No. ______

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC AND SEARS HOLDINGS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Arbaugh* v. *Y & H Corp.*, this Court clarified that limitations on judicial relief should not be treated as jurisdictional absent a clear statement by Congress. At least six circuits have held that 11 U.S.C. 363(m) does not limit the appellate courts' jurisdiction to review unstayed bankruptcy court sale orders, but rather limits only the remedies available in such an appeal. By its plain terms, Section 363(m) presupposes a "reversal or modification on appeal" of a sale order, and specifies only that such reversal or modification "does not affect the validity of [the] sale" to a good faith purchaser, leaving the courts free to fashion other remedies without that effect.

In the present case, the Second Circuit held, to the contrary, that Section 363(m) deprived the appellate courts of jurisdiction over an appeal from a lease assignment order deemed "integral" to an already completed sale order, notwithstanding that: the sale order was not contingent on the assignment; the sale price was fixed without regard to whether the lease could be assigned; and respondent had expressly waived (in successfully opposing a stay) any argument that Section 363(m) would bar appellate review. A month later, the Fifth Circuit re-confirmed that it also treats Section 363(m) as jurisdiction-stripping.

The question presented is:

Whether Bankruptcy Code Section 363(m) limits the appellate courts' jurisdiction over any sale order or order deemed "integral" to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner MOAC Mall Holdings LLC was an appellant in the court of appeals. MOAC Mall Holdings LLC is a wholly owned subsidiary of Mall of America Company LLC. No publicly held corporation owns 10% or more of the stock of either MOAC Mall Holdings LLC or Mall of America Company LLC.

Respondent Transform Holdco LLC was the appellee in the court of appeals.

Respondent Sears Holdings Corporation was named as an appellee in the court of appeals but did not participate in the proceedings.

RELATED CASES

- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC (In re Sears Holdings Corp.)*, No. 20-1846(L), U.S. Court of Appeals for the Second Circuit. Judgment entered December 17, 2021.
- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC (In re Sears Holdings Corp.)*, No. 19-CIV-09140 (CM), U.S. District Court for the Southern District of New York. Judgment entered May 11, 2020.
- *In re Sears Holdings Corp.*, No. 18-23538 (RDD), U.S. Bankruptcy Court for the Southern District of New York. Order entered September 5, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner MOAC Mall Holdings LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, 1a-11a) is not reported in the national reporter, but is available at 2021 WL 5986997. The opinion of the United States District Court for the Southern District of New York (App., *infra*, 12a-48a) is reported at 616 B.R. 615. The earlier, vacated opinion of the United States District Court for the Southern District of New York upholding petitioner's appeal (App., *infra*, 49a-100a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 17, 2021. App., *infra*, 1a. On January 24, 2022, the court of appeals entered a stay of its mandate to allow petitioner to file the present petition for a writ of certiorari. App., *infra*, 126a. This petition is filed within 90 days of the court of appeals' judgment.

The United States Bankruptcy Court for the Southern District of New York had jurisdiction to enter a final order under 28 U.S.C. 157(b)(2) and 1334. The United States District Court for the Southern District of New York had jurisdiction over the appeal of the bankruptcy court's order under 28 U.S.C. 158(a)(1). The United States Court of Appeals for the Second Circuit had jurisdiction to decide the appeal below under 28 U.S.C. 158(d). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 363 and 365 of Title 11 of the United States Code and Section 158 of Title 28 of the United States Code are reproduced in full in an appendix hereto. See App., *infra*, 128a-154a.

INTRODUCTION

This case grows out of one of the largest U.S. retail bankruptcies on record and involves an important and oft-recurring question of federal bankruptcy law that has divided the eight courts of appeals who have already ruled on the issue, including splitting the Second and Third Circuits (the two circuits in which the most large chapter 11 bankruptcies are filed). The question whether Section 363(m) of the Bankruptcy Code de-

prives the appellate courts of jurisdiction or instead merely limits the remedies available on appeal from a sale order has arisen in at least seventy appeals at the district and circuit court levels in the past five years. Here, the answer to that question was outcome determinative. The district court initially ruled in petitioner's favor on the merits of the appeal, and only upon respondent's motion for rehearing raising Section 363(m) for the first time—contrary to its repeated representations to the bankruptcy court that it would not argue on appeal that Section 363(m) applied—the district court dismissed the appeal for lack of jurisdiction. Petitioner's initially successful appeal turned into a loss solely because the Second Circuit (in conflict with all but one of the other courts of appeal to address the question) treats Section 363(m) as limiting the appellate courts' jurisdiction, and thus not subject to waiver or judicial estoppel.

As this Court recognizes, labeling a statutory limitation or prerequisite as "jurisdictional" is not merely semantic, but carries immense practical consequences. Jurisdictional issues are not subject to waiver or forfeiture, and can therefore be raised at any time. This can lead to gamesmanship by litigants playing a "wait-and-see" approach with respect to the merits of a proceeding, thus wasting judicial resources and unfairly prejudicing other parties. Worse yet, as happened here, parties can gain a procedural advantage by waiving an argument based on the statute, only to raise it later, when the litigation's outcome is unfavorable to them. Perhaps more importantly, outside of the waiver context, labeling Section 363(m) as jurisdictional prevents appellate courts from considering—as the plain language of Section 363(m) requires—whether there are

remedies available on appeal that do not affect the validity of the sale, which is the sole proscription that Congress included in the text of Section 363(m).

This Court has sought to reign in lower courts' loose characterization of limitations as "jurisdictional" by establishing a bright-line test requiring lower courts to find a statute jurisdictional *only if* Congress has "clearly state[d]" that it is jurisdictional. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006). Absent a clear Congressional statement, courts are instructed not to treat a statute as jurisdictional, but instead treat it as an element of the claim or a limitation on relief. *Ibid.*

The key statutory provision at issue in this case is Section 363(m) of the Bankruptcy Code, which applies to appeals from sale transactions in bankruptcy and provides as follows:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. 363(m). This section is intended to protect good faith purchasers of a bankrupt debtor's assets so that in the event an appellate court reverses or modifies an unstayed sale order on appeal, the sale itself (to the extent consummated) will remain valid.

In the case below, Sears obtained an order under Section 363(b) of the Bankruptcy Code authorizing a

sale of a substantial portion of Sears' assets to respondent Transform. The sale order provided that Transform had the right to designate up to approximately 600 leases for assignment to it, subject to all parties' rights to object to the assignment under the Bankruptcy Code. Importantly, nothing about the sale order was contingent on the successful assignment of any or all of the leases, and the purchase price in the sale would not change depending on whether the bankruptcy court approved the assignment of any (or all) of the leases. Months after the asset sale closed, Sears sought and obtained, over petitioner's objection, bankruptcy court approval to assign a shopping center lease within the Mall of America to Transform under Section 365 of the Bankruptcy Code. Petitioner appealed and sought a stay of that lease assignment order pending appeal, out of concern that Transform might argue on appeal that Section 363(m) precluded appellate review of the order. In opposing petitioner's stay request, Transform told the bankruptcy court that (i) Section 363(m) had no application to the order or appeal (because the lease assignment in question was not "an authorization under Subsection (b) or (c) of [Section 363] of a sale or lease of property") and (ii) Transform would not argue otherwise in district court.

Transform initially stayed true to its word—that is, until the district court ruled against it on the merits of petitioner's appeal and found that the bankruptcy court had erred in approving the lease assignment. Transform then pulled a remarkable about-face, arguing that 363(m) *did apply*, that it was a jurisdictional statute, not subject to waiver, and that it deprived the district court any ability to consider the appeal. Notwithstanding it was "appalled" by Transform's conduct, the dis-

trict court reluctantly agreed, based on Second Circuit precedent, that the court lacked jurisdiction. The court of appeals affirmed, similarly finding that it was bound by circuit precedent.

Applying this Court's *Arbaugh* analysis, Section 363(m) does not qualify as jurisdictional. Section 363(m) does not contain any indication, much less a "clear statement" by Congress, that it limits the appellate courts' jurisdiction. At least six other circuits have concluded that Section 363(m) limits only the available remedies, not the court's jurisdiction. Only the Fifth Circuit agrees with the Second that Section 363(m) is jurisdictional, a position the Fifth Circuit reaffirmed in a decision a month after the one here.

The ruling below is especially deserving of the Court's review. Respondent Transform repeatedly waived any argument that Section 363(m) precluded review, reversing course only *after* the district court ruled in petitioner's favor on the merits. The split among the courts of appeal divides two of the most important bankruptcy jurisdictions—the Second and the Third Circuits—and has been further entrenched since the decision in this case. Given the frequency with which the issue arises (but the difficulty that future litigants may face in obtaining this Court's review), this Court's intervention to resolve the conflict is sorely needed.

The writ of certiorari should be granted and the decision below should be reversed.

STATEMENT OF THE CASE

A. Legal Framework

Under the U.S. Constitution, Congress alone has the power to establish and fix the bounds of a federal court's jurisdiction. U.S. Const. Art. III § 1; *Hertz Corp.* v. *Friend*, 559 U.S. 77, 84 (2010) (the U.S. Constitution "authorizes Congress * * * to determine the scope of federal courts' jurisdiction within constitutional limits"); *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine" a federal court's jurisdiction.).

Federal courts, in turn, have a "virtually unflagging obligation * * * to exercise the jurisdiction given them [by Congress]." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (citations omitted). A court's obligation to exercise its jurisdiction is core to our judicial system, as federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 19 U.S. 264, 404 (1821).

Notwithstanding these fundamental principles, for many years, a recurring lack of precision in use of the term "jurisdiction" led courts frequently to mischaracterize statutes as jurisdictional. See *Reed Elsevier, Inc.* v. *Muchnik*, 559 U.S. 154, 161 (2010); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (cautioning that jurisdiction "is a word of many, too many, meanings" (citation omitted)). This tendency resulted in inconsistent rulings, and in many cases improperly left litigants with meritorious claims at the courts' doorsteps.

Noting the above, this Court has emphasized "a marked desire to curtail such drive-by jurisdictional

rulings, which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier*, 559 U.S. at 161 (citations and internal quotation marks omitted). Careful attention to the distinct nature of limitations is critical because misbranding a rule as jurisdictional "alters the normal operation of our adversarial system." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). Jurisdictional prerequisites cannot be waived or forfeited by parties, and can therefore be raised "at any time," including months or years into litigation. *Ibid.* Jurisdictional issues can be raised, as Transform did here, even after a party expressly disclaims reliance on an argument before a lower court and purports to affirmatively waive the argument in order to induce a favorable ruling. See *Puckett* v. *United States*, 556 U.S. 129, 134 (2009) (parties can even engage in "sandbagging," *i.e.*, "remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in [their] favor"); *Henderson*, 562 U.S. at 434-435 ("[A] party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction." (citation omitted)).

Such gamesmanship is unfair to litigants and can tax judicial resources by requiring courts to expend time and energy on the merits of a case, only to have to dismiss the case months or years later because of an eleventh-hour argument that the court lacked jurisdiction which could have been—but was not—raised earlier. See *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 502 (2006) (the consequences of a court's mischaracterization of a statute as jurisdictional can lead to "unfairness and waste of judicial resources"); see also *Henderson*,

562 U.S. at 434 (calling a requirement jurisdictional "is not merely semantic but [a question] of considerable practical importance for judges and litigants").

Given the severe consequences of deeming a statutory requirement jurisdictional, in 2006 this Court, in a unanimous decision in *Arbaugh*, devised a "readily administrable bright line" test for determining whether a particular statutory prerequisite or limitation is jurisdictional:

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Arbaugh, 546 U.S. at 515-516 (emphasis added); *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 420 (2015) (Congress can make a statute jurisdictional, but that "requires [a] plain statement"). By contrast, a provision is not jurisdictional if its language "provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." *Henderson*, 562 U.S. at 439. If Congress has not spoken clearly, courts must presume that a limitation is not "given the jurisdictional brand." *Id.* at 435.

B. Factual And Procedural History

1. The Parties

Sears Holdings Corporation was the parent entity for Sears, Roebuck and Co. (Sears), a one-time leading

American retailer of general merchandise, appliances, tools, consumer electronics, and other goods. Sears filed for chapter 11 bankruptcy on October 15, 2018.

MOAC d/b/a Mall of America is a 5.6 million square-foot shopping and entertainment center located in Bloomington, Minnesota. In 1991, MOAC entered into a lease agreement with Sears (the MOAC Lease) for Sears to serve as an anchor tenant and occupy a three-floor space within Mall of America. Given the strength of the Sears brand at the time, MOAC offered the MOAC Lease to Sears on favorable terms—a mere $10 per year in rent, with Sears separately responsible for taxes, utilities, insurance, and common area maintenance.

Transform Holdco LLC (Transform) is an entity formed by Eddie Lampert, Sears' former Chief Executive Officer and founder of hedge fund ESL Investments. Mr. Lampert formed Transform after Sears filed for bankruptcy with the goal of using that entity to acquire substantially all of Sears' assets through the bankruptcy proceedings. Transform has never operated as a retailer, and has no plans to occupy the MOAC premises itself for retail purposes.

2. The Asset Sale Under 11 U.S.C. 363

On February 8, 2019, the bankruptcy court entered an order (the Sale Order) approving a purchase agreement and sale of a substantial portion of Sears' assets to Transform under 11 U.S.C. 363(b), which is the Bankruptcy Code provision allowing debtors, after notice and a hearing and satisfaction of other statutory requirements, to sell property outside of the ordinary course of business. App., *infra*, 3a-4a. The MOAC Lease was not among the assets conveyed to Transform

on the sale closing date. Transform did, however, acquire a "designation right" with respect to the MOAC Lease and approximately 600 other leases. C.A. Supp. App. 59-60. This meant that, at a later date after the asset sale closed, Sears and Transform could select the MOAC Lease and seek to have it (i) assumed by Sears and (ii) assigned to Transform. Any such proposed lease assignment would be subject to the requirements of 11 U.S.C. 365—which, unlike the sale provision of Section 363, governs a debtor's ability to assume and assign leases in bankruptcy. This would require separate notice and hearing, an opportunity for other parties to object to the assignment, and, if the assignment was approved, a separate bankruptcy court order. 11 U.S.C. 365.

The asset sale under the purchase agreement was not contingent on the successful assignment to Transform of the MOAC Lease or any other designated lease. Sears and Transform agreed in the purchase agreement that "[f]or the avoidance of doubt, the sale, transfer, assignment and conveyance of the Designation Rights provided for herein on the Closing Date shall not effectuate a sale, transfer, assignment or conveyance of any Designatable Lease to Buyer or any other Assignee." C.A. Supp. App. 51. Nor was the purchase price paid as consideration under the Sale Order contingent in any way on the subsequent successful or unsuccessful assumption and assignment of any designated lease. The February 8 Sale Order was not appealed, and the asset sale to Transform closed on February 11, 2019.

3. The Lease Assignment Under 11 U.S.C. 365

More than two months after the sale closed, Sears and Transform filed a notice with the bankruptcy court

designating the MOAC Lease for assumption and proposed assignment. MOAC objected on the grounds that the requirements of 11 U.S.C. 365 were not satisfied. Specifically, MOAC argued that Transform, a non-retail entity that did not propose to occupy the lease and instead intended to sublease the space to future subtenants, was not an appropriate assignee. On September 5, 2019, following a hearing, the bankruptcy court overruled MOAC's objection and entered an order approving the lease assignment (the Assignment Order). See App., *infra*, 101a-125a.

MOAC appealed the Assignment Order to the district court and, out of an abundance of caution, also moved the bankruptcy court for a stay pending appeal. MOAC sought the stay because it was concerned that, in the absence of a stay, Transform might argue in district court that Section 363(m) mooted MOAC's appeal. At the hearing on MOAC's stay motion, Transform expressly confirmed on the record that it (i) agreed Section 363(m) was inapplicable and (ii) would not attempt to argue otherwise on appeal. C.A. App. 442-444.

The bankruptcy court denied the stay request, agreeing with Transform that Section 363(m) did not apply to the Assignment Order because it involved a lease assignment under Section 365, not a sale under Section 363(b) or (c). App., *infra*, 36a. In denying the stay, the bankruptcy court specifically noted that Transform is "not going to rely on 363(m), which [Transform's counsel] just reiterated for the second time." C.A. App. 443-444. The bankruptcy court also stated that Transform "would be judicially estopped" from arguing to the contrary on appeal. *Id.* at 444.

4. The District Court Appeal

On appeal, following briefing on the merits, the district court vacated the Assignment Order, ruling that the proposed assignment of the MOAC Lease to Transform violated Section 365 of the Bankruptcy Code. Specifically, the district court ruled that Transform, a newly formed entity that never intended to occupy or operate a retail establishment at the Mall of America premises, did not satisfy an essential prerequisite in Section 365(b)(3) of the Bankruptcy Code that its "financial condition and operating performance" be similar to the financial condition and operating performance of Sears as of the time Sears entered into the lease. App., *infra*, 89a-100a.

In reversing the *Assignment Order*, the district court did not vacate, reverse, or disturb the *Sale Order* or the asset sale, which had been fully consummated more than a year prior. Nor did the district court's order prejudice any party, because Transform had neither occupied the leased premises nor sub-leased it to any retail entity. Following the district court's order, Transform entered into a stipulation with petitioner, which was entered as an order by the district court, in which Transform agreed not to take any action that would prejudice petitioner's right to appellate review.[1]

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[1] Transform subsequently entered into a proposed, contingent sub-lease agreement, which contains a "litigation contingency" that is not satisfied as long as the litigation continues on appeal. C.A. Emergency Mot. 116 at 3. In a letter to petitioner's counsel, Transform's counsel represented that this litigation contingency ensured, as the stipulated stay had promised, that petitioner's right to appellate review would not be defeated by the sub-lease.

After losing on the merits in the district court appeal, Transform reversed course and backed out on its representations to the bankruptcy court. Transform filed a motion for rehearing with the district court, arguing for the first time that the court lacked jurisdiction over the appeal because Section 363(m) applied to the Assignment Order and deprived the court of jurisdiction. Transform's position was directly contrary to the position it took in bankruptcy court in successfully opposing the stay and contrary to the bankruptcy court's finding that Section 363(m) was inapplicable.

After briefing, the district court vacated its initial order and dismissed the appeal. The district court recognized that Transform's argument would typically be precluded under settled law of waiver because Transform disavowed any reliance on Section 363(m), and in fact "flatly stated to the bankruptcy judge that § 363(m) had no applicability to the assignment of the Mall of America Lease to [Transform], and that Transform did not intend to argue otherwise." App., *infra*, 14a. The district court also recognized that the bankruptcy court "plainly relied on Transform's representation that § 363(m) would not moot the appeal in the absence of a stay." *Id.* at 22a-23a.

While stating that it was "appalled by Transform's behavior," the district court ruled, "with deep regret," that, under Second Circuit precedent, Section 363(m) was jurisdictional and nonwaivable. App., *infra*, 28a, 48a. Specifically, the court determined that the lease assignment was subject to Section 363(m), notwithstanding that it was not entered under either of the provisions identified in Section 363(m)'s limitation, stating that the lease assignment constituted a sale because Transform was required to pay consideration for the

lease in the form of cure costs under Bankruptcy Code Section 365. *Id.* at 40a. Then, applying Second Circuit precedent, the district court ruled that Section 363(m) is a jurisdictional statute that deprived the district court of jurisdiction over the appeal. *Id.* at 27a-34a. Further, because it was jurisdictional, the Section 363(m) argument could not be waived by Transform and was not subject to judicial estoppel, despite the fact that "[a]ll the conditions for application of judicial estoppel would seem to be met here." *Id.* at 32a. Holding that it lacked jurisdiction, the district court dismissed petitioner's appeal. *Id.* at 48a.

5. The Second Circuit Appeal

MOAC appealed, and the court of appeals affirmed. Relying primarily on *Contrarian Funds LLC* v. *Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231 (2d Cir. 2010), the court of appeals held that "§ 363(m) deprived the District Court of appellate jurisdiction." App., *infra*, 8a. The court of appeals noted that binding precedent read the provision to "bar[] appellate review of any sale authorized by 11 U.S.C. § 363(b) . . . so long as the sale was made to a good-faith purchaser and was not stayed pending appeal." *Id.* at 5a (quoting *In re WestPoint Stevens*, 600 F.3d at 247).

The court of appeals first held that Section 363(m) applied to the Assignment Order. The court noted that it had previously held that Section 363(m)'s protections can extend to orders that are not made pursuant to Subsections (b) or (c) of Section 363, as referenced in Section 363(m), if the order is nonetheless "integral" to a Section 363 sale. App., *infra*, 5a-6a. Specifically, the court found that Section 363(m) "also limits appellate review of any transaction that is integral to a sale au-

thorized under § 363(b)—for example, where removing the transaction from the sale would prevent the sale from occurring or otherwise affect its validity." *Ibid.* The court held that the Assignment Order was "integral" based on stock language in the Sale Order that "[t]he assumption and assignment of the Assigned Agreements [defined to include 'Designatable Leases' like the MOAC Lease] are integral to the Asset Purchase Agreement" and nearly identical language in the Assignment Order. App., *infra*, 6a-7a.

In so ruling, the court did not independently examine the actual substance of the respective sale and lease assignment transactions to determine their level of interrelatedness. Nor did the court explain how a reversal of the lease assignment order could somehow prevent or otherwise affect the validity of an already-consummated sale, where (i) the Sale Order expressly contemplated that the bankruptcy court could reject a proposed assignment, and (ii) the sale price to the Sears debtors was not dependent on whether the court approved a subsequent request to assign a designated lease.

The court then addressed whether Section 363(m) was jurisdictional and thus not subject to waiver or judicial estoppel. Relying on the Second Circuit's prior published rulings in *In re WestPoint Stevens*, 600 F.3d at 247, and *Licensing by Paolo, Inc.* v. *Sinatra (In re Gucci)*, 105 F.3d 837, cert. denied, 105 F.3d 837 (1997), and a more recent unpublished decision in *In re Pursuit Holdings (NY), LLC*, 845 F. App'x 60, 62 (2021), the court held that appellate courts lack jurisdiction to review for any purpose an unstayed order within the scope of Section 363(m). App., *infra*, 8a-10a. The court of appeals observed that *In re WestPoint Stevens* was

decided post-*Arbaugh* and "held in no ambiguous terms that Section 363(m) is a limit on our jurisdiction." *Id.* at 8a. The court further held that, as a jurisdictional limit, Section 363(m) was not subject to waiver or judicial estoppel. *Id.* at 10a.

Noting the circuit conflict regarding whether Section 363(m) is jurisdictional, petitioner moved to stay the mandate so as to maintain the status quo for purposes of seeking review in this Court. Although Transform opposed the stay, the circuit court granted the stay on January 24, 2022, until the petition for certiorari is ruled upon and, if granted, until a ruling on the merits. App., *infra*, 126a.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Holding Is Part Of A Deepening Circuit Conflict Regarding Whether Section 363(m) Is Jurisdictional

The Court should grant a writ of certiorari because the Second Circuit's ruling that Section 363(m) is jurisdictional in nature is part of a persistent circuit split that requires this Court's resolution. In the past eleven years, this critical question regarding an appellate court's power to hear an appeal has reached no fewer than eight circuit courts, often on multiple occasions. Although some circuits have switched sides in the conflict over that time, the split persists, and has been reaffirmed recently by both circuits in the minority camp—the Second and Fifth.

1. Each of the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have rejected the argument that Section 363(m) is a jurisdictional bar to an appellate court even hearing an appeal. These courts have ruled instead that Section 363(m) merely sets limits on the

relief that an appellant might obtain. See *Reynolds* v. *Servisfirst Bank (In re Stanford)*, 17 F.4th 116, 122 (11th Cir. 2021) (Section 363(m) may provide a defense for a purchaser in an appeal, but "is not jurisdictional"); *In re Energy Future Holdings Corp.*, 949 F.3d 806, 820 (3d Cir. 2020) ("[W]e have construed § 363(m) as a constraint not on our jurisdiction, but on our capacity to fashion relief."); *Trinity 83 Dev., LLC* v. *ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) (finding that while Section 363(m) may provide a defense, "[a] defense, even an ironclad defense, does not defeat jurisdiction"); *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 896-897 n.4 (9th Cir. 2017) (rejecting "argument that the case is moot" because, "[b]y its terms, section 363(m) preserves *the validity* of a sale," whereas appellants "have not asked us to undo the sale"); *In re Brown*, 851 F.3d 619, 622-623 (6th Cir.), cert. denied, 138 S. Ct. 328 (2017) (rejecting argument that the "court lacks jurisdiction to hear Brown's appeal," and adopting instead "the approach of the Third and Tenth Circuits requiring parties alleging statutory mootness under § 363(m) to prove that the reviewing court is unable to grant effective relief without affecting the validity of the sale"); *C.O.P. Coal Dev. Co.* v. *C.W. Mining Co. (In re C.W. Mining Co.)*, 641 F.3d 1235, 1239 (10th Cir. 2011) (denying motion to dismiss appeal, holding instead that, while "§ 363(m) forecloses any remedy to COP that would affect the validity of the trustee's sale," it "does not preclude a remedy that would not affect the validity of the sale").[2] Consistent

[2] The Eighth Circuit has not expressly ruled on the jurisdictional nature of Section 363(m), but set forth a test requiring courts to consider whether the relief sought on appeal would affect

with this Court's instruction, including in *Arbaugh*, these rulings focus on the text of Section 363(m) and the fact that it lacks any clear indication that Congress intended to erect a jurisdictional limit.

The Third Circuit's analysis in *In re Energy Future Holdings* illustrates the proper focus on whether the statute reflects a clear statement by Congress stripping the courts of jurisdiction. That court correctly noted that "the provision by its terms forbids only those appeals that 'affect the validity of a sale,' not all those that call into question any aspect of such a sale." 949 F.3d at 820-821. Thus, the Third Circuit held that it was able to entertain on appeal a due process challenge to certain claim procedures for asbestos claimants incorporated in the chapter 11 plan confirmation order. The term in question provided that persons that did not file claims by a court-ordered bar date, including persons exposed to asbestos but who had not yet developed symptoms of disease ("latent" or "unmanifested" claims) and thus would not have known they had a claim, could only assert claims after the bar date by meeting a "for cause" standard. Even though the confirmation order was "inextricably intertwined" with an earlier sale order, *id.* at 819, 822, the Third Circuit held that appellate review of whether the confirmation order "can provide fair process could not conceivably 'af-

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the sale's validity. See *Official Comm. of Unsecured Creditors* v. *Trism, Inc. (In re Trism, Inc.)*, 328 F.3d 1003, 1006 (2003). As discussed below, that approach conflicts with the Second Circuit, which bars any appeal from an unstayed sale order and does not consider whether there is relief available that would not affect the validity of the sale.

fect the validity of the sale'" and was thus not barred by Section 363(m). *Id.* at 822 (citation omitted).

The Seventh Circuit in *Trinity 83* likewise focused on the critical distinction between remedies available on appeal and jurisdictional defenses, and held that "[t]he text [of Section 363(m)] is straight-forward" in that regard. 917 F.3d at 602. As the court observed, "Section 363(m) does not say one word about the disposition of the proceeds of a sale," and thus does not preclude such relief, *id.* at 602-603. Citing the distinction this Court drew in *Bell* v. *Hood*, 327 U.S. 678 (1946), between a court's ability to grant relief and its jurisdiction to rule, the Seventh Circuit recognized that even where Section 363(m) applies, it would at most "entitle[] the defendant to prevail;" it would "not defeat jurisdiction." 917 F.3d at 602. Thus, the court criticized those cases, including prior panel decisions within the Seventh Circuit, that mistakenly characterized Section 363(m) as involving "mootness," because "mootness is a jurisdictional doctrine," whereas Section 363(m) is not. *Ibid.*

The Sixth Circuit's decision in *In re Brown* follows the same approach, and also illustrates the potentially outcome-determinative significance of recognizing the non-jurisdictional nature of Section 363(m). Focusing on "the plain language of § 363(m)," the court observed that the statute "prohibits reviewing courts from modifying or setting aside a sale of property purchased in good faith," but that it "does not prevent a reviewing court from" granting other relief, such as "redistributing the proceeds from such a sale." *In re Brown*, 851 F.3d at 623. Although using the language of "statutory mootness" to describe Section 363(m), the Sixth Circuit emphasized that this "extends beyond" mootness in the

Article III jurisdictional sense. *Id.* at 622. Because Section 363(m) is *not* jurisdictional, the Sixth Circuit "adopt[ed] the approach of the Third and Tenth Circuits [of] requiring parties alleging statutory mootness under § 363(m) to prove that the reviewing court is unable to grant effective relief without affecting the validity of the sale." *Id.* at 623. If the limitation were jurisdictional, by contrast, the court would need to raise the issue *sua sponte*, even if the appellee did not. See *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2021). In a separate part of the opinion, the court declined to address the appellee's "argument in favor of applying the prudential doctrine of equitable mootness," another non-jurisdictional mootness doctrine, because it was raised too late and thus forfeited. *In re Brown*, 851 F.3d at 623.

2. In contrast with the majority of circuits, the Second and Fifth Circuits have repeatedly held that Section 363(m) is a jurisdictional bar to appellate review, regardless of whether the relief sought on appeal would affect the validity of a sale, which is the only proscription stated in Section 363(m).[3] The Second Circuit

[3] The First and D.C. Circuits have not expressly ruled on whether Section 363(m) is jurisdictional, but have applied section 363(m) to moot appeals of unstayed sale orders that would adversely affect the sale's validity. See *Anheuser-Busch, Inc.* v. *Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845, 849 (1st Cir. 1990) (applying Section 363(m) to moot an appeal relating to "one of the most valuable elements of the sale" when "removing [the transferred asset] from the sale would have adversely affected the terms of the sale"); *Hicks* v. *Pearlstein (In re Magwood)*, 785 F.2d 1077, 1080 (D.C. Cir. 1986) (concluding that the court "has no authority to overturn the Trustee's January 11, 1985 sale of the property" because appellant "never sought to stay the sale, and

has confirmed that view twice in the past calendar year. See App., *infra*, 8a-10a; *In re Pursuit Holdings (NY), LLC*, 845 F. App'x 60, 62 (2021) (finding that Section 363(m) "bars appellate review of any sale authorized by 11 U.S.C. 363(b) or (c)").

In *Contrarian Funds LLC* v. *Aretex LLC (In re WestPoint Stevens, Inc.)*, which was decided post-*Arbaugh*, the Second Circuit reaffirmed its pre-*Arbaugh* cases that "equated section 363(m) to an imposed jurisdictional limit on our authority to review the Bankruptcy Court's sale order." 600 F.3d 231, 247 (citing *In re Gucci*, 105 F.3d 837, 838 (2d Cir. 1997)). Like *In re Gucci*, the *In re WestPoint Stevens* decision specifically considered and rejected the argument that the appellate court might "order some form of relief *other than invalidation of the sale*," reasoning that "under section 363(m), we lack jurisdiction to review the entire Sale Order—not just the actual sale transaction." *Id.* at 248 (quoting *In re Gucci*, 105 F.3d at 840 n.1).

Under the Second Circuit's approach, the appellate court must consider as a threshold inquiry whether the order appealed is "integral" to the sale order; if so, and the appealed order was not stayed, the appellate court has no further jurisdiction other than to determine whether the purchaser purchased in good faith. *In re WestPoint Stevens*, 600 F.3d at 254. That flips on its

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the sale of the property was clearly one to a good faith purchaser"). The Sixth Circuit has characterized these First Circuit and D.C. Circuit rulings as siding with the Second Circuit in "creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue." *Parker* v. *Goodman (In re Parker)*, 499 F.3d 616, 621 (2007).

head the inquiry in other courts, which view the "integral" inquiry not as a categorical bar to appellate review, but as part of analyzing what relief the courts could grant. See, *e.g.*, *In re ICL Holding Co.*, 802 F.3d 547, 554 (3d Cir. 2015) ("[S]o long as we can grant effective relief, § 363(m) doesn't bar appellate review.").

The Fifth Circuit shares the Second Circuit's view. See *In re Gilchrist*, 891 F.2d 559, 560 (5th Cir. 1990) ("We have interpreted [Section 363(m)] to moot an appeal in the absence of a stay."). Like the Second Circuit, the Fifth Circuit has very recently reiterated this established circuit precedent and the jurisdictional nature of Section 363(m). In *In re C Whale Corp.*, the Fifth Circuit held that it "lack[ed] jurisdiction over this appeal" of a sale order, even where the appeal concerned the question whether the bankruptcy court had jurisdiction to approve the sale in the first instance. *Morimoto* v. *C Whale Corp (In re C Whale Corp.)*, No. 21-20147, 2022 WL 135125, at *4 (Jan. 13, 2022) (holding that where "an appeal is dismissed pursuant to section 363(m)," the court cannot address "the merits of [appellant's] arguments that the bankruptcy court lacked jurisdiction to enter the Sale Order free and clear of his alleged patent rights") (citing *In re Gilchrist*, 891 F.2d at 561).

3. The courts of appeal have acknowledged this split among the circuits, and, while there has been some movement by individual circuits, the split persists. For example, in 2007, in *In re Parker*, the Sixth Circuit noted a conflict between those circuits, including the Second and Fifth, that "construe § 363(m) as creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue," and an "alternative two part approach," adopted by the Third Circuit, that re-

quires the court of appeals to further assess whether it could "grant effective relief without impacting the validity of the sale." 499 F.3d at 621. At that time, the Sixth Circuit viewed the First, Seventh, Eleventh, and D.C. Circuits as also adopting the Second Circuit's approach. *Ibid.*

Subsequently, in *In re Brown*, the Sixth Circuit adopted what it characterized as the "minority" view that Section 363(m) is *not* jurisdictional, specifically rejecting the Second and Fifth Circuits' view of Section 363(m) as "creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue." 851 F.3d at 621. By that time, the Sixth Circuit recognized the Tenth Circuit as siding with the Third Circuit's side of the split. See *ibid.*

Since the Sixth Circuit first cataloged the circuit split in *In re Parker*, the Seventh and Eleventh Circuits have also joined the Third Circuit in rejecting a jurisdictional view of Section 363(m). In 2019, in *Trinity 83*, the Seventh Circuit expressly reversed positions and adopted the now majority view. 917 F.3d at 603. The court declared that "*River West* is overruled [and] * * * [a]ny other decision in this circuit that treats § 363(m) as making a controversy moot, rather than giving the purchaser or lessee a defense to a request to upset the sale or lease, is disapproved." *Ibid.* Subsequently, in *In re Stanford*, the Eleventh Circuit expressly agreed with the Seventh that "[s]tatutory mootness under 363(m) * * * is not jurisdictional," 17 F.4th at 122, and thus proceeded to ask the second question, under the Third Circuit's approach, whether Section 363(m) "preclude[s] the kind of relief that [appellants] are seeking," *id.* at 125.

Notwithstanding the willingness of other courts of appeal to revisit the issue, the split identified by the Sixth Circuit persists. The Second Circuit in the decision below specifically acknowledged MOAC's argument, based on *Arbaugh*, that *In re WestPoint Stevens*' reference to jurisdiction should not be read in a strict sense "because viewing the statute as imposing a jurisdictional limitation conflates threshold requirements bearing on a statute's applicability, such as elements of a claim, with jurisdictional requirements." App., *infra*, 9a-10a. This is precisely the error that other courts, like the Seventh Circuit in *Trinity 83*, have recognized in the process of disavowing a truly "jurisdictional" treatment of Section 363(m). 917 F.3d at 603. In its briefs below, MOAC alerted the Second Circuit to these other circuits' interpretation of Section 363(m). See MOAC C.A. Br. 55 at 46-49. Nonetheless, the Second Circuit doubled down on *In re WestPoint Stevens*' holding that "§ 363(m) divests appellate courts of jurisdiction to grant relief," and, on that basis rejected "MOAC's argument that statutory mootness under § 363(m) is subject to waiver or judicial estoppel." App., *infra*, 9a-10a.

There is a clear, direct, and persistent circuit conflict on this fundamental issue of appellate jurisdiction. It is thus necessary and appropriate for this Court to resolve the conflict by deciding whether Section 363(m) is a jurisdictional statute, or whether Section 363(m) simply limits the available remedies on appeal and, as such, is subject to waiver and estoppel.

B. The Second Circuit Holding That Bankruptcy Code Section 363(m) Is Jurisdictional Conflicts With This Court's Precedent

The Second Circuit's rule is not only the minority position, it is also wrong. Treating Section 363(m) as jurisdictional contravenes this Court's precedent and violates the courts' "virtually unflagging obligation * * * to exercise the jurisdiction given them [by Congress]." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976).

As discussed above, in *Arbaugh*, this Court established a bright-line test for all lower courts to use in evaluating whether a particular statute is jurisdictional. In so doing, the Court cautioned lower courts against overuse of the term "jurisdictional" given the potential pitfalls to litigants and courts alike and the mandate for courts to exercise the jurisdiction vested in them by Congress. Accordingly, the Second Circuit's analysis should have started and ended with the language of the relevant statutes at issue. It did not.

There is little question that the district court and court of appeals had jurisdiction to review the Assignment Order under the broad terms of the generally applicable jurisdictional statute. Congress established the appellate jurisdiction of district courts by enacting 28 U.S.C. 158 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. In that statute, Congress granted district courts jurisdiction over all appeals "from final judgments, orders, and decrees * * * of bankruptcy judges entered in cases and proceedings" under the Bankruptcy Code. 28 U.S.C. 158(a).

There was no dispute below that the Assignment Order was a final order that the bankruptcy court had

jurisdiction to enter in Sears' bankruptcy case. There is also no dispute that 28 U.S.C. 158(a) contains no statutory exception to the district court's appellate jurisdiction for matters relating to lease assignments under Bankruptcy Code Section 365 or sales under Bankruptcy Code Section 363.

Under this Court's precedent in *Arbaugh*, the lower courts were thus required to identify in the plain text of Section 363(m) where Congress had "clearly stated" that it was establishing a jurisdictional limitation to district courts' appellate jurisdiction under 28 U.S.C. 158. Absent a clear Congressional statement to that effect, Section 363(m) cannot be considered jurisdictional.

The plain text of Section 363(m) confirms that it is not a jurisdictional statute. Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. 363(m).

Nothing in Section 363(m) indicates that Congress intended to attach jurisdictional consequences when a stay of a sale order is not obtained. Much less did it do so "clearly." Section 363(m) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines*,

Inc., 455 U.S. 385, 394 (1982). Instead, by referencing "[t]he reversal or modification on appeal" of a sale order, the language in Section 363(m) expressly recognizes the district courts' appellate jurisdiction over such orders and contemplates a district court exercising that jurisdiction to reverse or modify the order. The only textual limitation goes to the *effect* of that judgment—"reversal or modification on appeal of" a debtor's sale or lease of property under Section 363(b) or (c) "does not affect the validity of a sale or lease" if the purchaser bought or leased the property from the debtor in good faith. 11 U.S.C. 363(m).

If the statute is not jurisdictional, any rights and protections thereunder could be waived by Transform—which it did here by affirmatively repudiating any potential rights under Section 363(m) in order to induce a favorable bankruptcy court ruling. See *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.").

In addition, regardless of whether Section 363(m)'s protections were waived or subject to judicial estoppel, the district court would be free to award any relief not affecting the validity of the February 2019 asset sale. Here, it could have done so by simply reversing the Assignment Order. The lease assignment was not itself a sale or lease under Subsections (b) or (c) of Section 363, and the Second Circuit did not find otherwise. Indeed, the district court's initial merits ruling reversing the Assignment Order did not disturb any aspect of the Sale Order or the already-consummated Section 363 asset sale. Neither the Sale Order itself nor the sale

price was contingent on the assignment of any Designated Lease, and the Sale Order provided for a hearing before any particular lease could be assigned, which presupposed that the bankruptcy court could reject any particular assignment as improper. C.A. App. 68-69. The asset sale to Transform thus would remain valid even if the Assignment Order were reversed, just as it would have if the bankruptcy court had not approved assignment of the lease in the first instance.

The Second Circuit's jurisdictional approach to Section 363(m) prevented it from undertaking the analysis above, because its approach erroneously starts and stops with the question whether a subsequent order is "integral" to an earlier sale order. Here, the court of appeals found the Assignment Order to be "integral" to the sale order based on nothing more than the fact that the Sale Order said so. That effectively put the respondent and Sears, as drafters of the Sale Order, in a position of defining the appellate courts' jurisdiction. By its text, however, Section 363(m) makes the courts responsible to consider whether relief is available that would not affect the validity of the sale.

C. The Jurisdictional Nature Of Section 363(m) Is An Important Federal Question

The question presented is of "considerable practical importance" given the significant consequences to litigants and courts of deeming a requirement jurisdictional. *Henderson*, 562 U.S. at 434.

As this case and others in the circuit split discussed above demonstrate, the difference between a limitation on appellate remedies and a jurisdictional bar is anything but academic. For example, in *In re Energy Future Holdings*, the Third Circuit was able to consider

the due process rights of individuals with unmanifested asbestos claims and their ability to obtain compensation, notwithstanding a related sale transaction. In *In re Brown* and *Trinity 83*, the Sixth and Seventh Circuits, respectively, were able to address how to allocate proceeds of a sale. And, in this case, the district court's original vacatur of an erroneous bankruptcy court ruling on the assignability of a lease, to the detriment of MOAC, would have stood both because Transform had repeatedly waived any Section 363(m) defense, and because relief would not have undermined the validity of the asset sale.

Appealable issues routinely arise in connection with sale or related transactions for which there are available remedies on appeal that will not invalidate the sale itself. For example, available remedies can include determinations on the allocation of sale proceeds as between creditors or the estates of different debtors, the validity of liens on sale proceeds, the propriety of third party releases that may be included in a sale order or related order, and (as here) the post-sale assignment of a contract or lease. In most other circuits, an appellate court would exercise its jurisdiction and consider these issues on the merits. Within the Second Circuit (as well as the Fifth and seemingly First and D.C. Circuits), however, these issues are beyond the reach of appellate review absent a stay.

Labeling Section 363(m) jurisdictional can also foster gamesmanship and unscrupulous litigation tactics, as occurred here with Transform to the obvious prejudice of MOAC. In addition, attaching jurisdictional consequences to a statute can result in waste of judicial resources, a concern that is anything but theoretical in this instance. As the district court lamented in its rul-

ing on rehearing, "[t]he parties filed lengthy briefs discussing the complicated issue raised by the appeal; they held an oral argument at which the court questioned them closely on contested points of law * * * [and] [i]t took several weeks of concentrated work to write the forty-three page decision disposing of the appeal." App., *infra*, 13a. Yet, "[a]t no point in this entire process" did Transform ever suggest that the district court lacked jurisdiction. *Ibid.* *Arbaugh* and its progeny sought to curtail such behavior and prevent unfair prejudice to litigants by creating a readily administrable test to ensure that jurisdictional labels are narrowly applied only when truly intended by Congress. The Second Circuit continues to disregard this test, however, as applied to sale-related issues in bankruptcy.

These issues arise with considerable frequency. Section 363 sales are a common feature of chapter 11 bankruptcies. In 2021, for example, approximately twenty-five percent (25%) of all large, public company bankruptcies involved a sale under Section 363 of all or substantially all of the company's assets.[4] And given the sheer number of creditors and parties in interest impacted by a bankruptcy sale—particularly those involving large companies such as Sears—appeals of sale orders and orders relating to sales are common. Indeed, a computer search reveals that issues involving the impact of Section 363(m) on an appeal have been addressed by district and circuit courts at least seventy times in the past five years alone. The outcome-

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[4] See UCLA-LoPucki Bankruptcy Research Database, https://lopucki.law.ucla.edu/tables_and_graphs/363_sale_percentage.pdf?q=1643343442.1491

determinative nature of the split is particularly concerning where, as here, it divides the two circuits representing the majority of large bankruptcies, and between which most large debtors may choose—the Second and Third.[5] Prospective appellants with meritorious arguments for redress should not be barred from appellate courts based solely on the venue selected by the debtor.

The impact of a ruling by this Court on Section 363(m) also will extend beyond sale transactions in bankruptcy. Section 363(m) is one of three Bankruptcy Code provisions addressing appellate remedies in chapter 7 or 11 cases. The others—contained in Sections 364(e) and 557(g)—contain nearly identical language to Section 363(m) for orders authorizing a debtor to obtain postpetition financing and orders authorizing certain debtors to dispose of grain, respectively.[6] Indeed, the language of Section 364(e) was modeled off of Section 363(m). See *Burchinal* v. *Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1489 (9th Cir. 1987). Courts thus utilize case law under Section 363(m) as a guide when interpreting the requirements and implications of Section 364(e). See *Boullioun Aircraft Holding Co.* v. *Smith Mgmt. (In re Western Pac. Airlines,*

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[5] 28 U.S.C. 1408 permits a debtor to commence a case in any district in which (i) the debtor is domiciled or resides, (ii) the debtor has a principal place of business, (iii) the debtor has its principal assets, or (iv) there is a pending bankruptcy case concerning the debtor's affiliate, general partner, or partnership. 28 U.S.C. 1408.

[6] Sen. Rep. 95-989, 95th Cong., 2d Sess. 31 (1978) ("Subsection (e) [of Section 364] provides the same protection for credit extenders pending an appeal of an authorization to incur debt as is provided under section 363[(m)] for purchasers.").

Inc.), 181 F.3d 1191, 1195 & n.3 (10th Cir. 1999); *Whorl, LLC* v. *Solidus Networks, Inc. (In re Solidus Networks, Inc.)*, No. BAP CC-08-1046, 2008 WL 8462968, at *4 (B.A.P. 9th Cir. Dec. 24, 2008). Therefore, a decision by this Court would bring much needed clarity and uniformity to appellate jurisdictional issues in bankruptcy in these other areas as well.

D. This Case Presents An Ideal Vehicle To Resolve The Circuit Split

This case also presents an ideal vehicle for the Court to resolve the circuit split over the jurisdictional nature of Section 363(m). The issue is clearly presented and was fully briefed and decided by the Second Circuit, and there are no factual or procedural obstacles that would detract from the Court's ability to focus on this critical issue of law.

In addition, resolution of this jurisdictional issue would be outcome determinative in the case below. Under the majority rule, petitioner would have prevailed with respect to the Section 363(m) argument on two grounds, either of which would be sufficient: (1) Transform had waived the defense; and (2) the relief petitioner sought would not effect the validity of the already-consummated asset sale to Transform. Granting review in this case would give the Court the opportunity to consider both grounds if it wished, or merely to reverse on the waiver ground if it preferred. Further, the district court had already considered the merits of MOAC's challenge to the Assignment Order and ruled in MOAC's favor.

The present case is also ideal for the Court's review because the status quo ante has been preserved notwithstanding the absence of a formal stay of the bank-

ruptcy court's Assignment Order. Because the parties stipulated after the district court's initial order to maintain the status quo in order to preserve appellate rights, Transform subsequently included a litigation contingency in its proposed sub-lease, and the court of appeals stayed its mandate in order to permit petitioner to seek Supreme Court review, there are no arguments of equitable mootness that could complicate the Court's consideration. In future cases, especially if the Court were to deny certiorari here, it would be less likely that an appellant would obtain a stay of the appellate mandate, and indeed it would be less likely that appellants would even seek review in the court of appeals, given the definitive and insurmountable standard the Second Circuit applies to even establishing appellate jurisdiction.

This case presents the Court with the perfect opportunity to consider and resolve this important and recurring question of appellate bankruptcy jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

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March 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by federal rule of appellate procedure 32.1 and this court's local rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the federal appendix or an electronic database (with the notation "summary order"). A party citing to a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of December, two thousand twenty-one.

PRESENT: Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Circuit Judges,
Ronnie Abrams,
District Judge.*

Nos. 20-1846-bk, 20-1953-bk

In Re: SEARS HOLDINGS CORPORATION, *Debtor*.

* Judge Ronnie Abrams, of the United States District Court for the Southern District of New York, sitting by designation.

MOAC MALL HOLDINGS LLC,
Appellant-Cross-Appellee,

v.

TRANSFORM HOLDCO LLC,
Appellee-Cross-Appellant,

SEARS HOLDINGS CORPORATION,
Debtor-Appellee.

For Appellant-Alexander J. Beeby

CROSS-APPELLEE: (Thomas J. Flynn, *on the brief*), Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, MN; David W. Dykhouse, Daniel A. Lowenthal, Patterson Belknap Webb & Tyler LLP, New York, NY

For Appellee-Richard A. Chesley

CROSS- APPELLANT: (Rachel Ehrlich Albanese, *on the brief*), DLA Piper LLP, New York, NY; Craig Martin, DLA Piper LLP, Wilmington, DE

Appeal from a judgment of the United States District Court for the Southern District of New York (Colleen McMahon, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Appellant-Cross-Appellee MOAC Mall Holdings LLC ("MOAC") appeals from a judgment of the United States District Court for the Southern District of New York (McMahon, J.), which (1) dismissed as moot under 11 U.S.C. § 363(m) MOAC's appeal from a September 5, 2019 assignment order (the "Assignment Order") issued by the United States Bankruptcy Court for the Southern District of New York (Drain, B.J.), and (2) denied

MOAC's motion for rehearing. Appellee-Cross-Appellant Transform Holdco LLC ("Transform") conditionally appeals the District Court's initial order of February 27, 2020, which reversed the Bankruptcy Court's judgment entered in Transform's favor. We assume the parties' familiarity with the underlying facts and procedural history, to which we refer only as necessary to explain our decision to affirm. Because we conclude that MOAC's appeal was properly dismissed as moot, we do not address the merits of Transform's conditional cross-appeal.

"A district court's order in a bankruptcy case is subject to plenary review, meaning that this Court undertakes an independent examination of the factual findings and legal conclusions of the bankruptcy court." D.A.N. Joint Venture v. Cacioli (In re Cacioli), 463 F.3d 229, 234 (2d Cir. 2006) (quotation marks omitted). A bankruptcy court's conclusions of law are reviewed de novo and its findings of fact for clear error. Id. We review de novo questions about whether an appeal relating to a bankruptcy court decision is moot. See Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.), 600 F.3d 231, 247 (2d Cir. 2010).

Two provisions of the Bankruptcy Code, 11 U.S.C. § 363(b)(1) and 11 U.S.C. § 363(m), are principally at issue in this case, which arises from a Chapter 11 bankruptcy proceeding involving Sears Holding Corporation ("Sears"). Sears formerly occupied space in the Mall of America in Minneapolis under a lease with MOAC.

By order dated February 8, 2019 (the "Sale Order"), the Bankruptcy Court authorized a sale under 11 U.S.C § 363(b), which, with exceptions not pertinent here, permits a trustee, after notice and a hearing, to use, sell, or lease property of the estate outside of the ordinary

course of business. 11 U.S.C. § 363(b)(1).[1] Through the Sale Order, Transform, among other things, purchased from Sears the right to designate which assignee would assume Sears's lease. The parties do not dispute that the Sale Order was authorized under § 363(b). After the sale closed, the Bankruptcy Court entered the Assignment Order, which authorized Transform to assign the lease to its wholly-owned subsidiary, Transform Leaseco LLC ("Leaseco"), and permitted Leaseco to assume the lease. MOAC moved to stay Transform's assignment of the lease, but the Bankruptcy Court entered an order denying the motion. MOAC then appealed the Assignment Order to the District Court, but it is undisputed that it did so without first obtaining from the District Court a stay of the assignment pending resolution of the appeal.

Relying on § 363(m), Transform — at the latest possible stage in the District Court proceedings — challenged the District Court's review on appeal of the

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[1] Section 363(b)(1) provides:

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

11 U.S.C. § 363(b)(1).

Bankruptcy Court's Assignment Order. Section 363(m) "creates a rule of statutory mootness . . . which bars appellate review of any sale authorized by 11 U.S.C. § 363(b) . . . so long as the sale was made to a good-faith purchaser and was not stayed pending appeal." In re WestPoint Stevens, Inc., 600 F.3d at 247 (quotation marks omitted). The text of § 363(m) provides as follows:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Thus, as the text makes clear, in the absence of a stay, § 363 limits appellate review of a final sale to "challenges to the 'good faith' aspect of the sale" without regard to the merits of the appeal. In re WestPoint Stevens, Inc., 600 F.3d at 247; see also Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 105 F.3d 837, 838 (2d Cir. 1997). The provision reflects Congress's "uniquely important interest in assuring the finality of a sale that is completed pursuant to 11 U.S.C. § 363(b)" and protecting good faith purchasers. In re WestPoint Stevens, Inc., 600 F.3d at 248.

We have held that § 363(m) also limits appellate review of any transaction that is integral to a sale authorized under § 363(b) — for example, where removing the transaction from the sale would prevent the sale from occurring or otherwise affect its validity. See id. at 250 (citing In re Stadium Mgmt. Corp., 895 F.2d 845, 849 (1st

Cir. 1990)); see also Cinicola v. Scharffenberger, 248 F.3d 110, 125 (3d Cir. 2001). The Bankruptcy Court concluded that § 363(m) does not apply to the assignment in this case. But we note that the parties before it did not raise the legal question that is before us — namely, whether the assignment is integral to the Sale Order such that § 363(m) applies to the assignment. The parties elected instead to focus the Bankruptcy Court's attention on whether MOAC would suffer irreparable harm in the absence of the stay.

The District Court, however, was squarely presented with the issue of whether the assignment in this case was integral to the Sale Order and determined that it was. We agree that the assignment of the lease to Leaseco was integral to the sale of Sears's assets to Transform, especially since both the Sale Order and the Assignment Order expressly state that the latter is integral to the former. Specifically, the Sale Order states that "[t]he assumption and assignment of the Assigned Agreements are integral to the Asset Purchase Agreement" pursuant to which the sale was accomplished. Joint App'x 28. "Assigned Agreements" is defined in the Asset Purchase Agreement to include "Designatable Leases" like the Mall of America lease. Supp. App'x 11. The Assignment Order contains language nearly identical to the Sale Order. It provides that "[t]he assumption and assignment of the Designated [Mall of America] Lease is integral to the Asset Purchase Agreement." Special App'x 72.[2] Taken together, this language supports the conclusion that the successful assignment of

[2] "Integral" is not defined in the contracts or the orders, so the word is defined by its ordinary meaning and means "essential to completeness." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020).

the leases, including the Mall of America lease at issue here, was integral to the Sale Order. The District Court thus correctly found that § 363(m)'s threshold requirement was satisfied.

Urging a contrary conclusion, MOAC argues that the term "integral" is ambiguous and that the assignment of the lease here is not integral to the § 363(b) sale because the Sale Order does not guarantee that Transform's designated assignee would be approved. According to MOAC, the Sale Order provides that the parties must adhere to the designation-of-rights procedure contained in the Sale Order and Asset Purchase Agreement, and that while failure to abide by the procedure might scuttle the sale, an unsuccessful assignment could not.

We are not persuaded. Under the designation-of-rights procedure, Transform's designated assignee must be approved if (1) the assignee satisfied certain contractual and statutory conditions, and (2) either no one objected to the assignment or the Bankruptcy Court resolved any objections in Transform's favor. *See* Joint App'x 71–72; see also Special App'x 42. Here, the Bankruptcy Court resolved MOAC's challenge to the assignment in Transform's favor and approved the Assignment Order after finding that Leaseco had complied with all necessary contractual and statutory requirements. In the absence of a stay of the assignment, reversing or modifying the Bankruptcy Court's approval of the assignment after the court has made such a finding would negate the parties' agreement. Reversing or modifying the Bankruptcy Court's approval would also run contrary to § 363(m)'s rule limiting appellate jurisdiction over an unstayed sale order to the narrower issue of whether the sale was entered in good faith. See In re Gucci, 105 F.3d at 840 (recognizing "that a rule limiting

appellate jurisdiction over unstayed sale orders to the issue of good faith furthers the policy of finality in bankruptcy sales").

MOAC next argues that Transform has waived its ability to rely on § 363(m), or is estopped from doing so, because it raised its jurisdictional argument only after the District Court ruled against it on the merits and because it insisted before the Bankruptcy Court that § 363(m) was not applicable under the circumstances of this case. At most, MOAC acknowledges, the statute's limitations on available appellate relief can render an affected appeal moot, but MOAC contends that these limitations are not "truly jurisdictional" and are therefore subject to waiver and judicial estoppel.

But that argument is foreclosed by our binding precedent in In re WestPoint Stevens, Inc., under which § 363(m) deprived the District Court of appellate jurisdiction, and which followed the Supreme Court's warning in Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2005), that we not conflate jurisdictional and nonjurisdictional statutory limitations. "We have held in no ambiguous terms that section 363(m) is a limit on our jurisdiction and that, absent an entry of a stay of the Sale Order, we only retain authority to review challenges to the 'good faith' aspect of the sale." In re WestPoint Stevens, Inc., 600 F.3d at 248; see also In re Gucci, 105 F.3d at 838 (holding that, pursuant to § 363(m), appellate courts "have no jurisdiction to review an unstayed sale order once the sale occurs, except on the limited issue of whether the sale was made to a good faith purchaser"). Thus, absent the entry of a stay (and excepting challenges to a purchaser's good faith), the District Court had no authority to reverse or modify a sale order in a way that affects the validity of a

§ 363 sale, regardless of the merit of the petitioner's appeal. See In re WestPoint Stevens, Inc., 600 F.3d at 247; In re Gucci, 105 F.3d at 840; cf. Bowles v. Russell, 551 U.S. 205, 213–14 (2007).

Relying primarily on Arbaugh, MOAC also argues that § 363(m) cannot be jurisdictional because it is not phrased in clearly jurisdictional terms and because viewing the statute as imposing a jurisdictional limitation conflates threshold requirements bearing on a statute's applicability, such as elements of a claim, with jurisdictional requirements. In advancing this argument, MOAC suggests that we did not mean to hold in In re WestPoint Stevens, Inc. that, under circumstances that also exist in this case, § 363(m) divests appellate courts of jurisdiction to grant relief. In urging a contrary conclusion, moreover, MOAC mistakenly relies in part on cases that relate to a district court's original subject-matter jurisdiction rather than, as here, appellate jurisdiction. MOAC's argument ignores that, in the absence of a stay, the District Court, on appeal, was unable to grant effective relief without impacting the validity of the sale at issue, thus rendering the case moot by operation of a clear limit on its appellate review that is imposed by Congress, not by rule. Moreover, in a summary order issued earlier this year, a panel of this Court reaffirmed that § 363(m) is jurisdictional because it "creates a rule of statutory mootness." In re Pursuit Holdings (NY), LLC, 845 F. App'x 60, 62 (2d Cir. 2021) (quoting In re WestPoint Stevens, Inc., 600 F.3d at 247). For these reasons, we are unpersuaded by MOAC's argument that statutory mootness under § 363(m) is subject to waiver or judicial estoppel, or that the statute conferred jurisdiction upon the District Court under the circumstances of this case.

Finally, the District Court did not abuse its discretion when it dismissed MOAC's alternative good-faith purchaser argument — raised for the first time in MOAC's own motion for a rehearing — as untimely. As previously noted, under the circumstances here, the reviewing courts "only retain authority to review challenges to the 'good faith' aspect of the sale." In re West-Point Stevens, Inc., 600 F.3d at 248 (emphasis added). In other words, appellate review is available only when the parties challenge the good-faith aspect of a sale. Here, neither party raised the good-faith issue on Transform's motion for a rehearing, and the District Court did not err in declining to address the issue sua sponte, as a court is not required to review the issue sua sponte before dismissing an appeal as moot under § 363(m). The District Court therefore neither overlooked nor misapprehended a point of law or fact previously raised, as is required to grant a motion for a rehearing under Bankruptcy Rule 8022.

In sum, because MOAC failed to obtain a stay of the Assignment Order, we agree with the District Court that it lacked jurisdiction to review that order.

We have considered MOAC's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.[3]

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[3] The District Court's May 11, 2020 order granting Transform's motion for rehearing and vacating the court's original decision in favor of MOAC, and its June 8, 2020 order denying MOAC's motion for rehearing and directing the district clerk of court in effect to close the case, together constitute a final decision that "end[ed] the litigation on the merits and [left] nothing for the court to do but execute the judgment." Hall v. Hall, 138 S. Ct. 1118, 1123–24 (2018); see 28 U.S.C. § 1291 (providing appellate jurisdiction over "appeals

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

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from all final decisions of the district courts"). We appreciate that, on March 11, 2020, the District Court entered a stay of what it described as its initial judgment in favor of MOAC. The District Court may well have thought that the stay remained in place after it later granted Transform's motion for rehearing. We note, however, that no judgment of the District Court was ever actually set forth in a separate document at any point. Of course, in the absence of a separate document, judgment is deemed entered 150 days after the order from which the appeal lies is entered. Fed. R. Civ. P. 58(c)(2)(B). But we will repeat our strong suggestion that "where the District Court makes a decision intended to be 'final,' the better procedure is to set forth the decision in a separate document called a judgment." Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 449 (2d Cir. 1978), abrogated on other grounds by Espinoza ex rel. JPMorgan Chase & Co. v. Dimon, 797 F.3d 229 (2d Cir. 2015).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 19 Civ. 09140 (CM)

In re: SEARS HOLDINGS CORPORATION, et al.,
Debtors.

MOAC MALL HOLDINGS LLC,
Appellant,

-against-

TRANSFORM HOLDCO LLC AND SEARS HOLDINGS CORPORATION, et al., A*ppellees*.

ORDER GRANTING TRANSFORM HOLDCO LLC'S MOTION FOR REHEARING, AND ON REHEARING VACATING THE COURT'S ORIGINAL DECISION ON APPEAL

McMahon, C.J.:

Appellant MOAC Mall Holdings LLC ("MOAC") took an appeal to this court from an order of the United States Bankruptcy Court for the Southern District of New York (Drain, B.J.), which approved the assignment and assumption of the certain lease (the "Lease") of the Sears store at the Mall of America in Minneapolis, Minnesota to an entity known as Transform Leaseco LLC.[1]

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[1] Transform Leaseco LLC ("Leaseco") is wholly owned by Transform Holdco LLC ("Holdco"). They are represented by the same counsel who have filed only one set of briefs and motions throughout the appeal. These two entities were referred to as "Transform" throughout the appellate opinion. However, as a technical matter relevant to this opinion on rehearing, it was Leaseco who was the designated assignee of the Sears lease, and Holdco who made the

The parties filed lengthy briefs discussing the complicated issue raised by the appeal; they held an oral argument at which the court questioned them closely on contested points of law.

At no point in this entire process – through briefing and oral argument – did either side suggest that the court might lack jurisdiction over the appeal. MOAC did not seek a stay pending appeal in this court, and Transform did not move to dismiss MOAC's appeal for want of jurisdiction. Everyone behaved as though that were a foregone conclusion.

It took several weeks of concentrated work to write the forty-three-page decision disposing of the appeal. In the end, the court vacated the order of the Bankruptcy Court, concluding that the assignment of the Mall of America Lease to Leaseco violated § 365(b)(3)(A) of the Bankruptcy Code.

Transform has not appealed that decision to the United States Court of Appeals for the Second Circuit. Instead, Transform filed the instant motion, in which is asserts for the first time – albeit on the basis of facts known to it throughout the pendency of the appeal, but never revealed to this court – that this court lacked jurisdiction over the appeal all along, because the order appealed from was not stayed pending appeal.

Ordinarily, the failure to raise a known argument while a case is under adjudication precludes the granting of a motion for rehearing/reargument. *In re Soundview*

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designation, and it turns out to be necessary to refer to them as separate entities, rather than collectively as "Transform," in critical portions of this opinion. Therefore, in this opinion references to "Transform" reflect arguments made in the one set of papers filed on behalf of both Leaseco and Holdco.

Elite Ltd., No. 14- cv-7666, 2015 WL 1642986, at *1 (S.D.N.Y. Apr. 13, 2015), *aff'd*, 646 F. App'x 1 (2d Cir. 2016). As Transform did not raise the appellate implications of Judge Drain's denial of MOAC's motion for a stay pending appeal under § 363(m) of the Bankruptcy Code, under the traditional rules applicable to such motions, its motion for rehearing would be summarily denied.

Transform insists, however, that the court must entertain the motion, because the issue it raises is both "jurisdictional" – that is, it goes to the court's power to hear the appeal in the first instance – and nonwaivable. Transform also argues that it cannot be estopped to raise the issue of the court's jurisdiction belatedly, even though – as I now know – its counsel flatly stated to the bankruptcy judge that § 363(m) had no applicability to the assignment of the Mall of America Lease to Leaseco, *and that Transform did not intend to argue otherwise*, in order to induce him to deny MOAC's motion for a stay.

Transform's motion for rehearing is granted. The court has examined its appellate jurisdiction for the first time. Having done so, I conclude, with great regret, that this court lacked the power to hear and decide MOAC's appeal.

The decision on appeal is vacated, and MOAC's appeal is dismissed as statutorily moot.

BACKGROUND

The Original Sale Order and the Asset Purchase Agreement

Though I have no wish to rehash details discussed in the opinion I am now vacating, Transform's latest gambit needs to be contextualized.

Sears, Roebuck and Co. ("Sears"), Sears Holdings Corporation and its affiliated debtors (collectively, the "Debtors") filed for bankruptcy in October 2018. Former Sears executives formed Transform – a group of entities including, for our purposes, a parent company known as Holdco and an affiliate called Leaseco – to try to recapture and market Sears' assets. Transform, through the vehicle Holdco, submitted the best bid to purchase substantially all of Sears' assets.

The Debtors and Holdco entered into an Asset Purchase Agreement (the "APA") to memorialize Holdco's purchase. Pursuant to the APA, Holdco paid Sears over $1.4 billion to purchase all of Sears' assets, properties and rights related to its business,[2] which included all of the following:

- Assigned Agreements and the Designation Rights
- Lease Rights
- Owned real property
- Inventory, receivables, equipment and improvements
- Intellectual Property
- Goodwill
- Data
- Books and records
- Marketing materials (including Sears iconic catalogs, its original marketing innovation)
- Claims

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[2] Property excluded from the asset sale is not relevant to this appeal and rehearing motion.

- Actions
- Contracts related to the business
- Store cash

In February 2019, the Bankruptcy Court approved the APA in a § 363(b) sale order (the "Sale Order"). (Bankr. Dkt. No. 2507, APX87.)[3] In the Sale Order, the Bankruptcy Court held that Holdco had purchased Sears' assets for "fair consideration." (*Id.* at 7, ¶ J.)

Among the bundle of assets purchased by Transform pursuant to the APA were (1) certain specifically Assigned Agreements, and (2) Designation Rights for contracts identified as "Designatable Leases." (*Id.* at 3.) "Designation Rights" are the right to designate to whom a lease between Sears (or an affiliate, such as Kmart) and some landlord should be assigned. Because Holdco had purchased Designation Rights, once it identified an assignee, Sears was required, per the terms of the APA, to assign the lease to Holdco's chosen assignee, as long as Holdco satisfied certain conditions that were specified in the APA. ("APA," Ex. B. to the Sale Order, APX184, as amended by Ex. F to Bankr. Dkt. No. 2599, APX3593, at § 2.6).

All told, there were hundreds of "Designatable Leases," one of which was Sears' lease at the Mall of America in Minneapolis. As this court noted in the decision on appeal, Transform intended to continue to operate about 425 of those properties as Sears or Kmart stores. It planned to use its Designation Rights to bring about the assignment of the rest of the Designatable

[3] "Bankr. Dkt." refers to the proceedings before Judge Drain in *In re Sears Holdings Corp., et al.*, No. 18-23538 (RDD) (Bankr. S.D.N.Y) and "APX" refers to the record on appeal to this court.

Leases to itself (through an affiliate, such as Transform Leaseco), and then to sublease the spaces covered by those leases to new tenants at what it hoped would be a handsome profit.

Pursuant to § 2.6 of the APA, Transform Holdco purchased the Designation Rights for all Designatable Leases on the closing date. (*Id.*) Its right to designate assignees under the leases vested at the closing of the APA. (*Id.* at §§ 2.6, 5.2(a).) But the APA made clear, "For the avoidance of doubt, the sale . . . of the Designation Rights provided for herein on the Closing Date *shall not effectuate a sale, transfer, assignment or conveyance of any Designatable Lease to Buyer [Holdco] or any other Assignee* . . . ." (*Id.* at § 2.6 (emphasis added).) Any such "sale, transfer, assignment or conveyance" would only occur on something called the "Designation Assignment Date" – defined in the APA as the date of the "sale, transfer, assignment, conveyance and delivery" of the designated lease by Sears to Holdco's designee. (*See id.* at §§ 2.6, 5.2(d).) The APA also set out precisely when and how Sears' interest in any individual Sears would pass to Holdco's designee:

> On each Assumption Effective Date,[4] pursuant to section 365 of the Bankruptcy Code and the Approval Order, Sellers shall assume and assign to the applicable Assignee any Designatable Lease so designated by Buyer for assumption

[4] With respect to designatable leases to which objections to designation were lodged – such as the lease before this court – this date is defined as "the fifth (5th) Business Day following the date of resolution of any objection to assumption and assignment of such Lease." (*Id.* § 1.1.) In the case of the Mall of America Lease, the Designation Assignment Date and the Assumption Effective Date were the same day.

> and assignment in accordance with the terms of this Agreement, and Buyer shall pay all or be responsible for Cure Costs with respect to such Designatable Leases.

(*Id.* § 2.7(c).)

Certain leases were assigned to Holdco as designee simultaneously with the closing of the APA and Holdco's acquisition of Designation Rights. (*See id.* § 2.7(b).) Those leases are listed in Exhibit A to the Sale Order. (APX170.) The Mall of America-Sears Lease that was the subject of the appeal to this court is not one of those leases.

The Subsequent Designation of the Mall of America Lease, The Objection, and The Appeal

On April 2, 2019, Judge Drain entered an order establishing a procedure for Holdco to designate additional contracts for assumption and assignment to its desired assignees. (Bankr. Dkt. No. 3008, APX1290.) Once Holdco identified an additional lease to be designated for assumption and assignment, the Debtors were to file a notice with the court. Any party objecting to such an assignment had to serve and file a written objection with the Bankruptcy Court eight days after the filing of (i) the notice, or (ii) evidence of adequate assurance of future performance pursuant to 11 U.S.C. § 365(b)(3) – whichever was later. (*Id.*)

Two weeks later, on April 19, 2019, Holdco filed a notice of "additional designatable leases" for assignment to itself or an affiliated entity (the "Notice"). (Bankr. Dkt. No. 3298, APX1331.) Among the additional desig-

nated leases was the Mall of America Lease. Holdco designated its affiliate, Leaseco, as the assignee of that particular lease.

MOAC objected to the Notice on the ground, among others, that the Debtors had not demonstrated that Leaseco met the qualifications for assignment of a shopping center lease as set forth in § 365(b)(3). (Bankr. Dkt. No. 3501, APX1344.) Over the course of the next few months, MOAC filed supplemental objections to the designation. Many other parties also filed objections to other lease assignments proposed in the April 19 Notice; all such objections except MOAC's were resolved.

As one might surmise from the name of Holdco's designee, the Mall of America Lease was intended to be marketed to a new tenant or tenants not yet identified. The parties stipulated that Holdco had no intention of operating a Sears store at the Mall of America, but rather intended to sublease the premises to a third-party tenant at a profit to Transform. (Bankr. Dkt. No. 4865 ¶¶ 11- 14, APX1783.) In fact, this was MOAC's major motivation for fighting the assignment – it did not want to see Sears' anchor tenant space divided or occupied by whoever would pay Transform the highest price. MOAC wanted another big box retailer to take over the space – even if it (like Sears) paid little or no rent – both to "preserve the character" of Mall of America (a concept discussed at length in this court's opinion disposing of the appeal) and to ward off the possibility that MOAC might find itself in default on co-tenancy provisions in the leases of other Mall tenants.

Judge Drain conducted an evidentiary hearing on MOAC's objections on August 23, 2019. At that hearing, Leaseco – the proposed assignee – presented evidence

that it met the requirements of § 365(b)(3)(A)-(D), as required by law and by the APA. It also offered two additional "concessions" that were intended to assuage MOAC's objections. It agreed (i) to put $1.1 million (effectively one year's rent, which the assignee would have had to pay in any event) into escrow; and (ii) to guarantee that it would sublet at least portion of the premises within two years. Leaseco also expressly agreed to operate in full compliance with the Lease (including the "Uses" section of the Lease and the REA), and to honor MOAC's buy-back rights under Article 6.3 of the Lease.

At the conclusion of the hearing, the Bankruptcy Court overruled MOAC's objections in an oral opinion read into the record. On September 5, Judge Drain signed a final order (the "Assignment Order") authorizing the assumption and assignment of the Mall of America Lease to Leaseco. (Bankr. Dkt. No. 5074, APX1947.) In that order, the Bankruptcy Court found that Leaseco met all the requirements for assignment of a shopping center lease, as set forth in 11 U.S.C. § 365. The Assignment Order imposed on Leaseco, as a condition of the assignment, the obligation to undertake the concessions it had offered during the hearing, and specifically ordered Leaseco to comply with the "Uses" section and to honor MOAC's buy-back rights.

The Assignment Order is the official bankruptcy court order by which the objections to the assignment were resolved. It is the order from which an appeal was taken to this court – the appeal that was disposed of by this court's decision dated February 27, 2020. (Dkt. No. 26.)

The Stay Proceedings

MOAC moved to stay the Assignment Order pending appeal on September 6, the day after it was filed. (Bankr. Dkt. No. 5083, Ex. A. to "Reh'g Resp.," Dkt. No. 33; Bankr. Dkt. No. 5110.) On September 18, Judge Drain held a hearing on MOAC's stay motion. (*See* "Stay Tr.," Bankr. Dkt. No. 5413; Ex. A to "Mot. for Reh'g," Dkt. No. 29-1.)

MOAC argued that, in light of 11 U.S.C. § 363(m), it needed a stay in order to protect its right to appellate review of the Bankruptcy Court's September 5 Assignment Order. That section of the Code provided as follows:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

The Bankruptcy Court was skeptical that any stay was necessary. While noting that the assignment was being made in accordance with the original § 363 Sale Order, Judge Drain said, "I can't imagine 363(m) as far as the sale is concerned applying here." (Stay Tr. at 8:4-5.) He reasoned that MOAC was appealing the Assignment Order only insofar as it related to only one of the roughly 600 Sears leases Holdco had the right to designate throughout the bankruptcy proceeding, while the authorization for the transfer of property that was the subject of the Sale Order – the sale of the Designation Rights – applied to all the leases. (*Id.*)

While it was in the happy position of having prevailed in the Bankruptcy Court, Transform agreed that no stay was necessary. At the stay hearing, counsel for Transform represented to the Bankruptcy Court that § 363(m) did not apply to MOAC's challenge to the Assignment Order. He stated, "in effect, because we do not have a transaction, I think we couldn't rely on 363(m) for the purposes of arguing mootness *because we have not closed on a transaction to assume and assign this to a sub-debtor* [sic]." (*Id.* at 8:14-18 (emphasis added).)[5] In other words, Transform argued to the Bankruptcy Court that an assignment to an intermediary entity such as Leaseco, without a subsequence transfer to some as-yet unidentified third party or parties that would occupy the Sears space, was not a § 363(b) or (c) "sale or lease" for the purposes of § 363(m).

The Bankruptcy Court ultimately concluded that no stay was necessary to preserve MOAC's right to appeal, finding, "This is not -- this is a 365 order. It's an outgrowth of the sale. It's not a 363(m), *and they're not going to rely on 363(m)*, which [Transform's counsel]'s just reiterated for the second time." (*Id.* at 9:23-25, 10:1 (emphasis added).) Judge Drain believed that the only "sale or lease of property" that was authorized pursuant to § 363(b) or (c) – which is a prerequisite for the applicability of § 363(m) – was the sale of Sears' assets (including the specific leases assigned directly to Holdco and the right to designate assignees for additional but as-yet-unidentified "designatable" leases), as memorialized in the original Sale Order. He also plainly relied on Transform's representation that § 363(m) would not moot the appeal

[5] As the parties were discussing the subleasing of the Sears premises at Mall of America, Transform's counsel must have said "sublettor," which was mistranscribed as "subdebtor."

in the absence of a stay when he rejected MOAC's principal argument for irreparable harm and concluded that it had not made a substantial showing of the need for a stay on the merits. In response to MOAC's concern that the district court might independently deem the appeal moot, Judge Drain stated that Transform would be estopped from so arguing. (*Id*. at 10:2-16.)

On September 27, Judge Drain entered an order denying MOAC's stay motion. (Bankr. Dkt. No. 5246.) The order clearly stated that the Assignment Order was "immediately enforceable and effective as of its entry on September 5, 2019." (*Id*.) Per the terms of the APA and the Assignment Order, the transaction closed five business days later, and the Mall of America Lease was assumed by Sears and then assigned to Leaseco.

Proceedings in the District Court

On October 2, MOAC filed the instant appeal, challenging the Assignment Order under § 365. (Dkt. No. 1.) At the September 18 hearing before the Bankruptcy Court, MOAC had reserved its right to seek leave for a stay in the event "equitable mootness" became an issue (Stay Tr. at 10:20-25, 11:1-7),[6] but it neither appealed from Judge Drain's order denying a stay pending appeal nor sought a stay pending appeal from this court. I have little doubt this was because Transform had represented

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[6] Equitable mootness is a prudential doctrine whereby district courts may dismiss a bankruptcy appeal as moot when effective relief would be inequitable. This doctrine applies to avoid unraveling underlying plans that have been substantially consummated. Here, Transform has not argued for equitable mootness; it only argues for statutory mootness. Moreover, to the extent the doctrine may apply to Transform's consummation of its plan to sublease the Mall of America Lease to an actual tenant, based on a stipulation entered in this court – *see infra*., at page 11 – it can do no such thing.

to Judge Drain that the appeal would not be moot under § 363(m).

As a result, this court – which does not pretend to expertise in bankruptcy law – was unaware of the possibility that the appeal might be moot because of Judge Drain's refusal to enter a stay pending appeal. I read the briefs and the record; I heard oral argument; and I worked for over a month on what turned out to be a very complicated appeal, relying on the arguments raised by the parties.

Ultimately, this court concluded that the Bankruptcy Court had erred in finding that Transform satisfied § 365(b)(3)(A) – a section of the Code that requires, in connection with the assignment of a lease for premises in a shopping center, that the proposed assignee's financial condition and operating performance be similar to the financial condition and operating performance of the debtor at the time the debtor became the lessee under the lease. The bankruptcy judge had expressly found that Leaseco's financial condition and operating performance were not similar to that of Sears when its Mall of America lease commenced back in 1991. In light of that finding (which was amply supported by the record), this court did not believe that any judicially-created performance guarantees, such as those sanctioned by the Bankruptcy Court[7] could be substituted for the standard expressly written into law by Congress.

[7] The Bankruptcy Court concluded that Transform/Leaseco did not have to abide by the literal terms of § 365(b)(3)(A) because (i) it seemed (by virtue of its fundraising capabilities) to have a net worth of at least $50 million (the justification for that number is explained in the opinion on the appeal), and (ii) it had agreed to abide by all terms of the Lease. This court concluded that things could not be

As a result, this court vacated the Assignment Order to the extent it had authorized the assumption and assignment of the Sears Lease to Leaseco – i.e., it modified the Assignment Order – and remanded the case to the Bankruptcy Court. (Dkt. No. 26); *In re Sears Holdings Corp.*, 613 B.R. 51 (S.D.N.Y. 2020).

Subsequently, this Court so-ordered a stipulation between the parties that allowed both parties to market the Lease pending further appeal, but forbade either party from entering into any sublease or similar agreement for the Sears space. (Dkt. No. 28.)

The following day, Transform filed the instant motion for rehearing, arguing for the first time that this Court lacked appellate jurisdiction over MOAC's appeal under 11 U.S.C. § 363(m), because MOAC had not obtained a stay of the Assignment Order. (Dkt. No. 29.)

ANALYSIS

Transform moves for rehearing pursuant to Bankruptcy Rule 8022. "The standard for granting such a motion, derived from Rule 40 of the Federal Rules of Appellate Procedure, requires the movant to state with particularity each point of law or fact that the movant believes the district court or BAP has "overlooked or misapprehended." *Soundview Elite*, 2015 WL 1642986, at *1 (internal quotations and citations omitted). This strict standard does not allow the movant to reargue its case, but rather is intended to "direct the court's attention to a material matter of law or fact which it has overlooked in deciding the case, and which, had it been given

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substituted for the very different requirements set forth in the statute.

consideration, would probably have brought about a different result." *Id.*

This court has admitted complete unawareness of the possibility that the appeal it so laboriously considered and decided might well be moot. I cannot say that I "overlooked" the issue, because both sides were aware that 11 U.S.C. § 363(m) had been raised in the Bankruptcy Court, but neither side called it to my attention during the pendency of the appeal. I would certainly not have "overlooked" this issue if it had been raised, since lack of appellate jurisdiction would have foreclosed me from deciding the appeal as argued (not to mention, saved me a great deal of work). I would instead have been limited me to whether Leaseco's assumption of the lease in the absence of a stay was done "in good faith" – an issue not briefed or argued to this court. That certainly would have "brought about a different result" on the appeal.

Having lost on the appeal, Transform has apparently thought better of the position it took before Judge Drain. It now argues that § 363(m) renders MOAC's appeal of the unstayed Assignment Order moot, thus precluding appellate review by this court.

MOAC responds that Transform has waived any rights it might have had under § 363(m) and is judicially estopped from relying on any protection the statute might otherwise have afforded it. MOAC also argues that Transform was correct when it represented to

Judge Drain that § 363(m) did not apply to the Assignment Order.[8]

After deliberation, I must reject MOAC's arguments. Because the Second Circuit takes the position that § 363(m) is "jurisdictional," neither waiver nor judicial estoppel can be relied on to overcome it. And, regrettably, § 363(m) does protect the assignment of the Mall of America Lease from appellate review in the absence of a stay, because the assignment of that lease was a "sale" within the meaning of that section.

Accordingly, MOAC's appeal is, and always was, statutorily moot.

I. Because Section 363(m) is "Jurisdictional," Waiver and Estoppel Cannot Be Relied On to Create Appellate Jurisdiction Where None Exists.

District courts have jurisdiction to hear bankruptcy appeals pursuant to 28 U.S.C. § 158. However, § 363(m) imposes a limitation on the exercise of that jurisdiction:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

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[8] I am not insensible to the fact that MOAC took exactly the opposite position when it moved before Judge Drain for a stay pending appeal.

11 U.S.C. § 363.

The Second Circuit has "held in no ambiguous terms that section 363(m) *is a limit on our jurisdiction* and that, absent an entry of a stay of the Sale Order, we only retain authority to review challenges to the 'good faith' aspect of the sale. Specifically, we held in *Gucci I* that we *lack jurisdiction* to review the 'unstayed *sale order*,' of a sale subject to the protections of section 363(m) and concluded that 'we may neither reverse *nor modify* the judicially-authorized sale.'" *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 248 (2d Cir. 2010) (emphasis added) (quoting *In re Gucci*, 105 F.3d 837, 838–840 (2d Cir. 1997)). Moreover, the statute makes it plain that knowledge of the pendency of an appeal does not in and of itself constitute "bad faith." Whether Transform's behavior before the Bankruptcy Court would qualify as bad faith is not a question that anyone has suggested I answer; it was certainly not raised on the appeal.

The Court of Appeals in *WestPoint* left open the possibility for, "A narrow exception . . . for challenges to the Sale Order that are so divorced from the overall transaction that the challenged provision would have affected none of the considerations on which the purchaser relied." *Id*. at 249. No one has pointed this court to any case in which such an exception has been found.

MOAC nonetheless insists that Transform's representations to the bankruptcy judge render the appeal not moot under the doctrines of waiver and judicial estoppel. While this court is appalled by Transform's behavior, I must disagree that either doctrine confers jurisdiction over an appeal where Congress has expressly removed it.

Waiver

MOAC contends that § 363(m) should be treated like any other statute, such that a party can knowingly waive its protection. Transform's counsel's representation to the Bankruptcy Court that the statute was inapplicable, and that Transform could not and would not rely on § 363, was, MOAC contends, a waiver of Transform's right to rely on the statute.

While waiver and forfeiture are applicable to many procedural conditions – for example, the "final decision" requirement for appeals, Title VII's exhaustion requirement, and the forum defendant rule in diversity cases, *see Williams v. KFC Nat. Mgmt. Co.*, 391 F.3d 411, 416 n.1 (2d Cir. 2004) (collecting cases)[9] – they cannot be relied on to create appellate jurisdiction where there is none. Given the Second Circuit's recognition of a clear distinction between limits on jurisdiction and waivable procedural conditions, I find it difficult to believe that the Court of Appeals would deem a statutory requirement to be "jurisdictional" – that is, one conferring or denying jurisdiction – and yet conclude that jurisdiction could attach via waiver, which is tantamount to by consent of the parties. If § 363(m) is a jurisdiction-depriving statute, then its requirements cannot be waived; "Parties cannot waive a defect in the Court's appellate jurisdiction." *In re Bucurescu*, 282 B.R. 124, 130 n.19 (S.D.N.Y. 2002) (citing *Kamerling v. Massanari*, 295

[9] Recently, the Second Circuit determined in *In re Indu Craft, Inc.*, 749 F.3d 107, 113, 116 (2d Cir. 2014) that Rule 6(b)(1) of the Federal Rules of Appellate Procedure (Appeal in a Bankruptcy Case) "is a nonjurisdictional rule" subject to waiver and forfeiture, emphasizing the difference between court-promulgated rules and jurisdictional limits enacted by Congress.

F.3d 206, 212–13 (2d Cir. 2002); *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 323 (2d Cir. 2001)).

Of course, the language of the statute does not exactly suggest that an appellate court lacks the power to reverse or modify an unstayed bankruptcy court order (it does, after all, presume that a district or appellate court has entered just such an order). But it does say that any such order will, in the absence of bad faith, be ineffective to undo a sale or lease already consummated in the absence of a stay. This, of course, means that an appellate court cannot fashion effective relief in the absence of a stay, which is what renders the appeal moot. Such "statutory" or "bankruptcy" mootness "furthers the policy of finality in bankruptcy sales and assists the bankruptcy court to secure the best price for the debtor's assets." *Gucci*, 105 F.3d at 840 (citing *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991)). As explained by the Sixth Circuit, § 363(m):

> reflects the more general constitutional consideration that an appeal must be dismissed as moot when, by virtue of intervening events, the court of appeals cannot fashion effective relief. Though reflective of the general prohibition against advisory opinions undergirding the constitutional mootness doctrine, bankruptcy mootness under § 363(m) is broader. Even if the appeal is not moot as a constitutional matter because a court could provide a remedy, the policy favoring finality in bankruptcy sales reflected in § 363(m) requires that certain appeals nonetheless be treated as moot absent a stay.

Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F.3d 737, 742 (6th Cir. 2005) (internal citations omitted).

The Second Circuit has quite clearly interpreted § 363(m) as a jurisdiction-depriving statute – that is, a statute that removes the appellate court's power to decide any issue except the issue of bad faith. I sit as a district court in the Second Circuit, so I am constrained by the words used by my Court of Appeals to describe my power. And if I lack all power to grant effective relief by congressional command, the parties are not free to agree otherwise, whether by consent or by waiver.

Significantly, MOAC calls the court's attention to no case in which an appellate court's order overturning an unstayed and fully consummated Bankruptcy Court order authorizing a § 363 sale was deemed effective by virtue of waiver. In the only case it cites, *In re Paige*, 443 B.R. 878, 908 (D. Utah 2011), *aff'd in part, rev'd in part*, 685 F.3d 1160 (10th Cir. 2012), the district court considered the possibility that § 363(m) could be waived, but ultimately rejected the proposition that any waiver occurred. *See id.*

Estoppel

With respect to estoppel, MOAC argues that, at the stay hearing, Judge Drain relied on Transform's representations that § 363(m) would not moot MOAC's appeal, which led him to conclude that MOAC would not suffer irreparable harm if he denied the stay. Now Transform seeks to benefit from a complete reversal of that representation.

Judicial estoppel is an equitable doctrine to be exercised in the sound discretion of the Court. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). It is "designed to prevent a party who plays fast and loose with the courts from gaining unfair advantage through the deliberate adoption of inconsistent positions." *Wight v.*

BankAmerica Corp., 219 F.3d 79, 89 (2d Cir. 2000). Judicial estoppel typically applies when "1) a party's later position is 'clearly inconsistent' with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *In re Adelphia Recovery Tr.*, 634 F.3d 678, 695–96 (2d Cir. 2011). The Second Circuit has "further limit[ed] judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain." *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012) (internal citations omitted).

All the conditions for application of judicial estoppel would seem to be met here. Transform has taken different positions that are clearly inconsistent. Judge Drain plainly relied on Transform's representations – both that § 363(m) did not apply to this situation and that Transform had no intention of arguing otherwise – when he concluded that MOAC had failed to demonstrate that it would suffer irreparable injury in the absence of a stay. In response to Judge Drain's question, "So you're not relying on -- you wouldn't -- you're not going to go to the district and say 363(m) applies here. This is over," Transform's counsel replied:

> MR CHESLEY: "Well, we -- in effect, because we do not have a transaction, I think we couldn't rely on 363(m) for the purposes of arguing mootness because we have not closed on a transaction to assume and assign this to a sub debtor [sic].
>
> THE COURT: The specific assign.
>
> MR. CHESLEY: Correct, Your Honor."

(Stay Tr. at 8:11-20.) Judge Drain then reiterated his understanding of Transform's comments: "It's not a 363(m), and they're not going to rely on 363(m), which Mr. Chesley's just reiterated for the second time." (*Id.* at 9:24-25, 10:1.)

Finally, Transform has derived an unfair advantage from its switch in position, because MOAC appears to have been lulled into not seeking a stay before this court.

The question is whether that gets MOAC past § 363(m).

Although the Second Circuit has "never held . . . that judicial estoppel can never apply to matters affecting subject matter jurisdiction," it has cautioned that "'special care' should be taken in considering whether judicial estoppel should apply 'to matters affecting federal subject matter jurisdiction.'" *Intellivision*, 484 F. App'x at 621 (quoting *Wight*, 219 F.3d at 89). This special care is warranted because, "It is axiomatic that a *lack of subject matter jurisdiction may be raised at any time* even by a party who originally asserted jurisdiction." *Wight*, 219 F.3d at 90 (emphasis added) (internal quotation and citations omitted). Although Transform represented that it could not and would not rely on § 363(m), when it comes to "jurisdictional" considerations, "The bottom line is that irrespective of how the parties conduct their case, the courts have an independent obligation to ensure that federal jurisdiction is not extended beyond its proper limits." *Id.*

Moreover, as a bankruptcy judge in this district recently pointed out, "Judicial estoppel applies to inconsistent factual positions, not alternative legal theories of the case." *In re DeFlora Lake Dev. Assocs., Inc.*, 571

B.R. 587, 599 (Bankr. S.D.N.Y. 2017). Transform's representation to Judge Drain that § 363(m) did not apply to the instant appeal, because there had not yet been a "sale" of Sears' Mall of America Lease as that term is used in § 363(m) is at best a mixed question of law and fact, if not a pure question of law. The assertion that a particular statute does not apply to undisputed facts is not, it seems to me, an "inconsistent factual position" – it is an inconsistent legal position.

Therefore, as much as I hate to say it, judicial estoppel appears to me inapplicable. And I do hate to say it, for if ever there were an appropriate situation for the application of judicial estoppel, this would be it.

II. *Weingarten* is not Outcome Determinative.

Transform argues that the Sixth Circuit's opinion in *Weingarten Nostat, Inc. v. Service Merchandise Co.*, 396 F.3d 737 (6th Cir. 2005) compels the conclusion that MOAC's appeal is mooted by the absence of a stay of the Assignment Order. (*See* Mot. for Reh'g at 5.)

Weingarten is the only case known to this court in which the assignment of a lease pursuant to designation rights was deemed a protected transaction under § 363(m). Its facts are so nearly identical to those in this case as to render it deceptively appealing as a precedent. But I do not believe that it controls the outcome of this motion – and not simply because it was decided in a different circuit.

In *Weingarten*, the debtor, Service Merchandise, sold the designation rights to most of its real property and retail leases to KLA (the equivalent of Holdco) for $116.4 million. *See* 396 F.3d at 739. KLA's parent corporation, Kimco, then partnered with Schottenstein Stores

Corporation to form an entity known as JLPK (the Leaseco equivalent), which was designated by KLA as the assignee of the Service Merchandise lease in a mall known as Argyle Village Square Shopping Center. *See id*. at 739, n. 1. JLPK, like Leaseco, had no intention of operating a business on the site; it intended to sublease the space. The difference between that case and ours is that, in *Weingarten*, the sublessees had already been identified and the premises were to be subleased at roughly the same time as the assignment. *See id*. at 739–40.

Weingarten, the landlord at Argyle Village, objected to both prongs of the transaction. It objected to the assignment to JLPK, because JLPK did not meet the "similarity" requirements required by § 365(b)(3)(A). And it objected to the sublease of a portion of the premises to Michaels, an arts and crafts store, because having Michaels in the mall would both (i) place Weingarten in breach of its lease with Jo-Ann's, a competing crafts store, in violation of § 365(b)(3)(C), and (ii) disrupt the tenant mix or balance of Argyle Village under § 365(b)(3)(D). *See id*. at 740.

After first siding with the landlord – ironically, on the very ground on which MOAC prevailed in this court on the appeal (namely, that JLPK, the intermediate assignee did not meet the similarity in "financial condition and operating performance" criteria of § 365(b)(3)(A)) – the Bankruptcy Court reversed field and approved the transaction, pursuant to both §§ 363 and 365. It did so after Kimco and Schottenstein's – neither of whom was ever the assignee of Service Merchandise's lease – agreed to guarantee a year's base rent on the leased premises.

Weingarten "vigorously" sought a stay pending appeal, from both the district court and the Sixth Circuit. However, its many applications were denied, and the transactions closed. Although the aggrieved landlord pursued its appeal in the absence of a stay, the Sixth Circuit dismissed Weingarten's appeal as moot under § 363(m). It reasoned that (1) lease assignments for consideration were "sales" within the meaning of that statute; and (2) the two-part transaction in question was actually a single transaction, pursuant to which Service Merchandise had "sold" its lease to the ultimate subtenant, Michaels. *See id*. at 742–43.

There are two important factual distinctions between this case and *Weingarten*.

First, as MOAC correctly points out, in *Weingarten* "the assignee paid *separate consideration* for the assignment." (Reh'g Resp. at 16 (emphasis added).) JLPK, the party in Leaseco's position in the *Weingarten* transaction, paid $300,000 in order to be designated as the assignee of the lease. *See* 396 F.3d at 743. Of course, JLPK paid that money to its affiliate, KLA – not to Service Merchandise's bankruptcy estate. But at least it paid something to someone in the transactional chain. There is no suggestion in the record before me that Leaseco paid anything to anyone who controlled the Lease – not to Sears, the assignor; not to Holdco, the designator; and not to ESL Investments, Inc., their mutual parent – in order to procure the assignment of the Mall of America Lease from Sears. But for reasons discussed below, I think this first factual distinction irrelevant.

It is the second reason that causes me to conclude that the Sixth Circuit's opinion, while interesting and informative, does not necessarily control the outcome of

Transform's motion. The *Weingarten* court ultimately blessed the transaction because the assignment to intermediate assignee JLPK (the party in Leaseco's shoes) was but the first half of a two-step but ultimately unitary transaction, whereby Service Merchandise (the debtor) assigned (sold) its lease to the ultimate subtenant, Michaels. To the Sixth Circuit, that was a critically important factor – one that caused it to "discount" the intermediate assignment to JLPK, and overlook Weingarten's argument that JLPK did not meet the requirements of § 365(b)(3)(A):

> Service Merchandise's assignment of the lease to JLPK pursuant to the designation-of-rights agreement with KLA constitutes a single transaction *if we consider the overall result of the transaction*. If the details of the transaction are discounted, it is clear that *Service Merchandise sold the Argyle Village lease to Michaels* pursuant to §§ 363(b) and 365. The relevant case law demonstrates that *a stay pending appeal is required when the sale and assignment are part of a single transaction*, and there is no reason that this protection should be lost merely because the transaction has been separated into two steps.

Id. (emphasis added).

In our case, we have no second step – none has occurred, and none is anticipated in the foreseeable future. No ultimate subtenant had been identified at the time the Assignment Order was approved and entered; none has been identified to date. That this made a difference to the outcome below could not be clearer; Transform's counsel represented to Judge Drain that the absence of a second-step transaction took the assignment of Sears'

Mall of America lease to Leaseco out of the purview of § 363(m). (See Stay Tr. at 8:14-18.) Put otherwise, Transform essentially argued to Judge Drain that *Weingarten* did not preclude MOAC's appeal.

Because the Sixth Circuit's "unitary transaction" analysis ultimately dictated the outcome in *Weingarten*, I cannot accept Transform's invitation to hold that *Weingarten* is outcome- determinative here, or to conclude that its reasoning would necessarily apply to the intermediate step in a two-step transaction in a case, like this one, where the assignee has not closed on the ultimate sublease.

If Transform is to prevail, it must be because the intermediate step, the assignment of the lease from Sears to Leaseco, was a "sale" within the meaning of § 363(m) – an issue never discussed by the Sixth Circuit in *Weingarten*. It is to that issue that I now turn.

III. The Assignment Order is Protected by § 363(m).

Section 363(m) applies to the "sale or lease of property."

A sale, per Black's Law Dictionary, is the transfer of property or title for a price. *Sale*, Black's Law Dictionary (11th ed. 2019). The Second Circuit has never opined on whether an assignment of an interest in property is tantamount to a "sale" for purposes of § 363(m). However, other courts that have faced this issue have concluded that such assignments are sales, because either (1) they were assignments for valuable consideration, or (2) the bankruptcy court authorized the § 365 assignment under § 363 as well.

Applying either criterion, the intermediate assignment of the Mall of America Lease to Leaseco qualifies as a § 363(m) sale.

The Sixth and Fourth Circuits, as well as one of my colleagues in this District, have expressly held that a lease assignment for valuable consideration is a § 363 sale. *See Weingarten*, 396 F.3d at 742 (The Sixth Circuit holds that "the assignment of a lease for a valuable consideration" is a sale for § 363(m) purposes); *In re Adamson Co. Inc.*, 159 F.3d 896, 898 (4th Cir. 1998) (same); *see also In re Cooper*, 592 B.R. 469, 480 (S.D.N.Y. 2018), *appeal dismissed* (Mar. 1, 2019) ("This Court sees no meaningful distinction between a sale, on the one hand, and a transfer of property in exchange for valid consideration, on the other."). The Third and Ninth circuits have similarly treated assignments for consideration as § 363(m) "sales." *See Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 493 (3d Cir. 1998) (buyer purchased franchise agreement for $230,000); *In re Exennium, Inc.*, 715 F.2d 1401, 1404 (9th Cir. 1983) (buyer purchased four of debtor's leases for over $78,000); *see also In re Am. Banknote Corp.*, No. 99 B 11577, 2000 WL 815910, at *2 (S.D.N.Y. June 22, 2000) (debtor received $380,000 for assuming lease); but *c.f. In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1085 (3d Cir. 1990) (appellee conceded that § 363(m) did not apply to mere lease assignments).

I can see no reason not to reach the same conclusion, and to hold that an assignment for consideration constitutes a "sale" as that word is used in the Code.

(i) The Assignment of the Lease Was a Sale Because It Was a Transfer of an Interest in Property for Consideration.

The Assignment Order authorized a transfer of Sears' interest in the Lease to Leaseco. And I must reject MOAC's contention that this particular assignment cannot be a "sale" within the meaning of these cases because it was not supported by independent consideration.

The Assignment Order directs Holdco to pay all cure costs due to MOAC under the Lease. (Assignment Order ¶ 11.) As noted above, this was the bargain struck in the APA; when a specific lease was designated for assignment, five business days after the resolution of any objections thereto (the Assumption Effective Date), Sears would assume the lease and assign the lease to Holdco's designee -- but only after Holdco paid cure costs for that lease. (APA § 2.7(c).)

Under the Bankruptcy Code, a debtor that assumes an unexpired ease is responsible for paying cure costs when the debtor assumes an unexpired lease. *See* 11 U.S.C. § 365(b)(1)(A). Sears did not become responsible for cure costs until is assumed the Mall of America Lease, which occurred on the Assumption Effective Date. Holdco's satisfaction of Sears' obligation to pay those cure costs constitutes valid consideration for the assignment of the Mall of America Lease itself. *See Thales Alenia Space France v. Thermo Funding Co., LLC*, 959 F. Supp. 2d 459, 467 (S.D.N.Y. 2013) (citing *Mencher v. Weiss*, 306 N.Y. 1, 8 (1953)). And because Sears had no obligation to pay cure costs until the Assumption Effective Date, the payment of those costs by Holdco constitutes new consideration – not simply the carrying out of a preexisting obligation to which Holdco agreed in the APA. Indeed, Sears would not have incurred the statutory obligation to pay cure costs if the Bankruptcy

Court's had not approved Sears' assumption of the MOAC Lease.

I thus have no difficulty concluding that the assignment to Leaseco was a "sale," because Sears transferred its interest in the Mall of America lease to Holdco's designee for consideration.

(ii) The Assignment Was a Sale Pursuant to Both §§ 363 and 365.

That said, not every assignment under § 365 is *per se* a "§ 363(m) sale." Only assignments/sales that fall within § 363(b) or (c) of the Code qualify as "sales" for the purposes of § 363(m). As the Third Circuit put it, "[A] party need only obtain a stay pending appeal when the debtor receives authorization to assign and sell executory contracts or leases under *both* § 363 and § 365." *Cinicola v. Scharffenberger*, 248 F.3d 110, 124 (3d Cir. 2001) (emphasis added).

So the question becomes whether this particular assignment was authorized under both statutes, or was merely an assignment under § 365. The answer is: both.

Cases in other Circuit Courts of Appeal have attached great importance to whether the bankruptcy court "purported to authorize a section 363 sale" to distinguish such sales from cases where the debtor "merely assigns a lease under section 365." In re Rickel Home Ctrs., Inc., 209 F.3d 291, 302 (3d Cir. 2000); see also Weingarten, 396 F.3d at 743; Krebs, 141 F.3d at 498. Numerous courts have applied § 363(m) to transactions where the bankruptcy court invoked § 363 as well as § 365 in order to authorize a transaction.

In *Krebs*, for example, the debtor moved to assume and assign three franchise agreements to the highest

bidder at auction. 141 F.3d at 493. The court distinguished its case from *Slocum* (in which the Third Circuit had concluded that a "mere assignment" pursuant to § 365 was not a § 363(m) "sale") because, in *Krebs*, "the bankruptcy judge in this case authorized both an assumption under section 365 and a subsequent sale under section 363." *Id*. at 498. Similarly, in *Rickel*, the debtor sold and assigned 41 leases to the buyer or its affiliate. 209 F.3d at 295. Once again, the court distinguished the case from *Slocum* because, "the District Court explicitly authorized a sale of the leases pursuant to section 363, despite [the appellant]'s contention that section 363 was inapplicable to this transaction." *Id*. at 302. I note also that the Sixth Circuit in *Weingarten* authorized the transaction under both § 363 and § 365. *Weingarten*, *supra*., 396 F.3d at 743.

And so we turn to the language of the Assignment Order in this case. Its text answers the question. The assignment of the Mall of America Lease is a sale for purposes of § 363(m) because the assignment of this particular designatable lease – which I have found to be a sale, a transfer of an interest in property for consideration) – repeatedly references §363 as well as § 365 as providing authority for the assignment. Despite Judge Drain's on-the-record statement that the Assignment Order would be "only" a "365," the text of the Assignment Order provides that, "*Pursuant to sections 105, 363, and 365* of the Bankruptcy Code, the Debtors . . . are authorized to take any and all actions as may be: (i) reasonably necessary or desirable to implement the assumption and assignment of the Designated Lease pursuant to and in accordance with the terms and conditions of the Asset Purchase Agreement, the Related Agreements, the Sale Order, and this Order . . ." (Assignment

Order ¶ 5 (emphasis added)); and "*Pursuant to sections 105(a), 363(b), 363(f), and 365* of the Bankruptcy Code, the Debtors are authorized to transfer the Designated Lease in accordance with the terms of the Asset Purchase Agreement and the Sale Order" (*id.* ¶ 6 (emphasis added)). These references alone are enough to bring the assignment of the Mall of America lease within the ambit of § 363(m).

Furthermore, the integrity of Assignment Order has to be protected by § 363(m), because the Assignment Order is "inextricably intertwined" with the Sale Order. *See Cinicola*, 248 F.3d at 126. As Judge Drain recognized at the hearing, the assignment to Leaseco was an "outgrowth" of the Sale Order. (Stay Tr. at 9:24.) Nothing could be more patent. The "sale" by assignment of leases to be designated in the future was originally authorized by the Sale Order, which was itself entered pursuant to § 363(b) of the Code. The Sale Order adopted the APA between Sears and Holdco – with all of its terms and conditions of sales of the designatable leases, as explained above – and incorporated the terms of that agreement into the Sale Order. The APA, as incorporated into the Sale Order, specifically provided that the "sale" of any designatable lease would take place only when an assignee is designated and the assignment is authorized

It is difficult to see how the Assignment Order effectuating a "sale" authorized pursuant to the Sale Order could be anything but "inextricably intertwined" with that Sale Order – an order that, while expressly stating that it did not bring about the "sale" of any particular lease, specifies when that sale would take place and sets out all the steps needed to effectuate the actual sale of any designated lease. The two orders could not operate more closely "in conjunction" with each other.

Cinicola is persuasive authority for this proposition. There, the debtor's trustee asked the bankruptcy court to approve a settlement agreement that involved the sale of assets and the assignment of executory contracts to a buyer for over $25 million. *Cinicola*, 248 F.3d at 116. The executory contracts included certain physicians' employment contracts, and the physicians objected to the assignment. See id. at 116–17. The bankruptcy court, invoking §§ 363 and 365, authorized the settlement agreement, but deferred action on the assignment of the physicians' contracts in order to address their objections. *See id.* at 117, 122. After a hearing on the physicians' objections, the bankruptcy court entered a second order authorizing the assignment of the contracts under § 365. *See id.* at 125. The trustee assigned the contracts and subsequently closed on the settlement agreement. *See id.* at 117.

Notwithstanding the fact that the second order invoked only § 365, the Third Circuit determined it was "clear the Bankruptcy Court intended its Second Order to operate in conjunction with its First Order," such that the assumption and assignment of the employment contracts were "inextricably intertwined" with the debtor's sale of assets to the buyer in the settlement agreement. *Id.* at 125–26. Its reasoning is reminiscent of the Sixth Circuit's determination, in *Weingarten*, that a transaction carried out in two steps should be viewed from the perspective of the ultimate result.

Here, even if the Assignment Order itself were only a § 365 order (as Judge Drain obviously believed it to be), it was certainly an "outgrowth of the sale" (as he also believed), such that the two orders are inextricably intertwined. The transaction could not have been carried out without reference to both orders.

MOAC's arguments to the contrary are unconvincing.

First, MOAC argues that, unlike the Sale Order, the Assignment Order does not explicitly reference § 363(m). But in none of the cases discussed above did the court expressly reference subsection (m), as opposed to § 363 generally. *See, e.g., Rickel*, 209 F.3d at 302; *Krebs*, 141 F.3d at 498.

MOAC also urges that, because it has a right to object as part of the designation process, its objection cannot be deemed "finally resolved" until its appeal is decided. Unfortunately, the language of § 363(m) is unforgiving: "Although an appellant's challenge to a sale authorization might raise meritorious arguments . . . denial of a requested stay has the effect of precluding this Court from reviewing those issues, other than the good faith of the purchaser, if the sale has closed in the interim." *Gucci*, 105 F.3d at 840. The assignment of the Lease to Leaseco has taken place; the unstayed transaction has closed. Section 363(m) would be meaningless if "final resolution" of an objection were deemed delayed until a decision is rendered on appeal even in the absence of a stay. Indeed, the entire § 363(m) jurisprudence that has (finally) been called to the attention of this court consists of cases in which the objection was not "finally resolved" on MOAC's reading, because the landlord took an appeal. Yet appeal after appeal from consummated transaction has been dismissed for statutory mootness because of a desire to give "finality" to the judgments of the Bankruptcy Court – judgments that would be interlocutory in nature if they did not "finally resolve" objections. When it comes to statutory mootness under § 363(m), there are "special consequences of denying a stay of a bankruptcy sale" such that I may not review

even the most meritorious arguments on appeal if the sale has closed in the interim. *See id.* at 840.

Next, MOAC argues that Transform provided no more or less consideration based on the approval or denial of the assignment of the Mall of America Lease. But as explained above (*see supra*, pp. 23–24), that is simply not so; Holdco made a separate and independent payment, in satisfaction of an obligation imposed by law on Sears, in order to bring about the assignment.

Finally, I have considered the possibility that this case presents the never-before-found and possibly mythical "exception" to the usual rule of statutory mootness that was mentioned in passing in *WestPoint*, 600 F.3d at 249. The *WestPoint* court speculated that there might be "challenges to the Sale Order that are so divorced from the overall transaction that the challenged provision would have affected none of the considerations on which the purchaser relied, thereby allowing a higher court to entertain an appeal from a consummated transaction in the absence of a stay. *Cf. Krebs Chrysler–Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir.1998) (stating that an appeal is not moot under § 363(m) unless the party failed to obtain a stay and reviewing courts can fashion a remedy "that will not affect the validity of the sale")." *Id.*

Unfortunately for MOAC, I cannot conclude that this case would fall within any such exception. Judge Drain did say (also in passing) that § 363(m) probably would not apply to the Assignment Order because MOAC was appealing from just one assignment among 600 that were authorized by the Sale Order. But nothing in the record supports a conclusion that losing the opportunity to sublease the Mall of America space "would

have affected none of the considerations on which [Transform/Holdco] relied" in making the deal enshrined in the APA. If, as MOAC insists, Mall of America is a very special mall in the pantheon of American malls, then the opportunity to sublease Sears' very valuable space at this very special mall might well have been integral to any deal Transform was willing to enter. Any "finding" that Transform would have agreed to the same deal, on the same terms memorialized in the Sale Order, without gaining the ability to sublease the Mall of America space would be pure conjecture on my part. There was no hearing at which evidence was adduced on that issue; and it is not a conclusion one can reach simply because the Mall of America lease is but one among 600.

So either the Assignment Order brought about a § 363(m) sale, or it is protected by virtue of its connection to the APA and the Sale Order. Either way, Transform wins.

I am not suggesting that MOAC needed to obtain a stay of the actual Sale Order at the time it was entered. It could not possibly have done so, since at that point no one knew to whom the Mall of America Lease might be designated, so there would have been no basis on which to object. But Sears' assignment of the Mall of America Lease to Leaseco in the Assignment Order is protected by § 363(m), because, per the terms of the APA, the Assignment Order effected a sale (a transfer for consideration) of that lease, as authorized by the Sale Order. If MOAC had obtained a stay of the Assignment Order from Judge Drain, we would not be here today. And if MOAC had asked this court to impose a stay prior to the

consummation of the assignment, we might not be here today.[10] But it did not.

It is, therefore, with deep regret that I grant the motion for rehearing and, on rehearing, dismiss MOAC's appeal as statutorily moot. That necessitates the vacatur of this court's decision on appeal.

CONCLUSION

For the reasons stated above, Transform's motion for rehearing is GRANTED. On rehearing, this Court concludes that it lacks appellate jurisdiction over MOAC's appeal because it is statutorily moot under § 363(m). Therefore, this court's decision on appeal at Dkt. No. 26 is VACATED and MOAC's appeal at Dkt. No. 1 is DISMISSED.

This constitutes a written opinion and order of the court. The Clerk of Court is directed to close the motion at Dkt. No. 29.

Dated: May 11, 2020

New York, New York

/s/Colleen McMahon
Chief Judge

BY ECF TO ALL PARTIES

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[10] Obviously, I cannot go back in time and say with certainty what ruling would have issued if MOAC had sought a stay pending appeal back in September of last year. Other landlords, such as the landlord in Weingarten, have tried and failed to obtain stays pending appeal in similar circumstances. For all I know, it was already too late by the time MOAC filed its notice of appeal. However, I certainly cannot say that I absolutely would have denied any such application.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 19 Civ. 09140 (CM)

In re: SEARS HOLDINGS CORPORATION, et al.,
Debtors.

MOAC MALL HOLDINGS LLC,
Appellant,

-against-

TRANSFORM HOLDCO LLC and SEARS HOLDINGS CORPORATION , et al.,
Appellees.

DECISION ON APPEAL

McMahon, C.J.:

Sears (f/k/a Sears, Roebuck and Co., collectively with Sears Holdings Corporation and its affiliated debtors, the "Debtors"), the iconic American retailer, is bankrupt.

The instant appeal is taken from an order issued by The Hon. Robert Drain, U.S.B.J., approving the assignment and assumption of Sears' lease at the equally iconic (if considerably newer) Minneapolis shopping mall cum amusement and entertainment venue known as the Mall of America.

The approved assignor is not a business establishment – not a retail store, not a restaurant, not a hotel, not an amusement venue, not a waterpark (reputed to be the latest addition to the Mall of America's ever-length-

ening list of very un-shopping-mall-like tenants). Rather, it is an entity known as Transform Leaseco LLC ("Transform Leaseco"), an affiliate and wholly owned subsidiary of Transform Holdco LLC (collectively, "Transform"). Transform was formed and is headed by Sears' final CEO, Eddie Lampert, and several other former Sears executives.

Transform's goal is to gain control of substantially all of Sears' assets, including Sears' many real estate holdings, through Sears' bankruptcy proceedings. In this it has been largely successful; Transform provisionally acquired 660 Sears leases in a sale order entered by the Bankruptcy Court, 659 of which the court has approved for assignment to Transform. Transform plans to continue to operate approximately 400 of these 660 leases (i.e., Transform will continue to operate Sears stores at those locations) and to market the remaining 260 in order to find new tenants to occupy those premises.

Mall of America is not interested in seeing Sears' three-story building leased out by Transform. Mall of America's owner, MOAC Mall Holdings LLC ("MOAC"), wants the lease to revert to it, the landlord, so that it can control who gets to occupy that very prestigious space. MOAC insists that, under certain provisions in the Bankruptcy Code that were passed to protect the owners and tenants of "shopping centers," the lease may not be assigned to Transform and must revert to the landlord.

The learned bankruptcy judge disagreed with MOAC's argument that 11 U.S.C. §§ 365(b)(3)(A) and/or (b)(3)(D) prohibited the assignment of the Mall of America lease (the "Lease") to Transform. He approved the

assignment and assumption as proposed by Sears. But Judge Drain admitted that, at least insofar as his ruling addressed § 365(b)(3)(A), his ruling was one of first impression.

MOAC has appealed from the Bankruptcy Court's order.

I agree with the bankruptcy judge that nothing in § 365(b)(3)(D) of the Code prohibits the transfer of the Lease to Transform.

However, I am constrained to disagree with his conclusion that § 365(b)(3)(A) does not bar the proposed assignment. In § 365(b)(3)(A), Congress provided a rigorous standard that an assignee of a bankrupt's shopping center lease must meet in order to give the landlord adequate assurance that the new tenant will not shortly end up in bankruptcy. In this case, the Bankruptcy Court found that the tenant did not meet that standard. The judge's decision that an alternative provision in Sears' Lease could be substituted for the statutory standard effectively read the congressionally-mandated standard out of the Bankruptcy Code. I do not believe that result can be justified.

The proposed assignment is, therefore, disallowed.

Statement of Relevant Facts

Although Judge Drain held a hearing at which evidence was presented and witnesses were cross-examined, the facts salient to this appeal do not appear to be in dispute.

Relevant Terms of the Lease

Sears was one of the original anchor tenants at Mall of America. Its Lease – which, with extensions, runs for

100 years, or until 2091[1] – contains many terms that are most unusual, especially in a shopping center lease. Equally unusual are many of the terms of the Amended and Restated Reciprocal Easement and Operating Agreement ("REA") between Sears, MOAC, and the other two original anchor retail tenants at the mall, Macy's and Nordstrom, which are incorporated into and made a part of the Lease. The terms are highly favorable to Sears; the reasons for that, I am advised, are that (1) Sears constructed the demised premises at its own expense, while (2) MOAC bent over backward to get Sears into the shopping center as an anchor tenant.

Under the Lease, Sears owes only $10 per year in rent, which it prepaid through 2021 at the time the Lease was signed. (APX2231).[2] However, with taxes, common area payments, and insurance, Sears' annual financial obligation to the mall amounted to approximately $1.1 million. (Transcript of August 23, 2019 Hearing ("Tr.") at 53:21-25, 54:1-5, APX2048-49).[3] Unlike most tenants at shopping centers and malls, Sears is not responsible for paying any "percentage rent," which is an extraordinarily tenant-favorable term in any commercial lease.

The REA, as incorporated into the Lease, required Sears to operate as a retail department store in its space for a term of 15 years, or until 2007. That 15-year term,

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[1] One wonders whether there will be big box retailing in 2091. Unimaginable things can happen when leases last for a century. Just ask the people of Hong Kong.

[2] References to the record on appeal, which can be found at Docket Entry #17, are designated with the prefix APX.

[3] The transcript for this hearing can also be found in the Bankruptcy Court docket, *In re Sears Holdings Corporation, et al.*, No. 18-23538 (RDD) (Bankr. S.D.N.Y.), at Docket Entry #5393.

the Major Operating Period of Sears ("Major Operating Period"), expired over a decade ago.

In another unusual provision, per the REA, once the Major Operating Period expired, Sears had the right – without needing the approval of MOAC or the other parties to the REA – to vacate all or any part of the building, or to lease or sublease all or any portion of the building, or to assign the REA. (APX2438). In most shopping center leases, the landlord retains veto power over the assignment of tenant leases. *See Retail Lease: Key Provisions*, Practical Law Practice Note 4-507-0793 (Westlaw 2020) ("Retail leases usually contain explicit restrictions on a tenant's ability to assign its lease or sublease its premises to third parties. These provisions typically provide that the landlord's consent is required before an assignment or sublease.")

The only constraint on Sears in this regard was found in Article XXII of the REA, the relevant portion of which – Article XXII(c)(1), which is applicable *only* to Sears and not to Macy's or Nordstrom – provides that any Sears sublessee or assignee, for the remainder of the term of the Lease, was forbidden to use the leased premises, "for any use or purpose other than retail purposes customarily found in an enclosed mall shopping center and non-retail activities customarily incidental thereto *or such other uses and purposes that are compatible and consistent with (and are not detrimental, injurious or inimical to) the operation of a first-class regional shopping center*." (APX2420-21) (emphasis added).

Thus, Sears and its successors and assigns were not limited to running a retail establishment in the demised premises from and after 2007. No one – not MOAC and not any of its other tenants, even co-anchor tenants

Macy's and Nordstrom – could possibly have entertained any justifiable expectation that the Sears space would be used for retail purposes beyond the Major Operating Period. Rather, Sears could use the space for retail activities, or for non-retail activities that one might find in a mall, or even for non-retail activities that were "compatible . . . with [] and . . . not detrimental . . . to" a first-class mall – which Mall of America considers itself to be.[4]

The very broad "use restriction" applicable to Sears in Article XXII of the REA is, of course, virtually meaningless at Mall of America, since the phrase "compatible with and not detrimental to" a mall at that location includes practically any legal and non-industrial operation that might bring people into Mall of America, for any purpose. The "mall" currently houses hotels, a miniature golf course, an amusement park, a comedy club, an aquarium, a 2,500-square-foot Amazing Mirror Maze, and something called the "Crayola Experience," which occupies an area larger than an NFL football field and boasts 25 hands-on attractions. Most recently, the Bloomington City Council approved the development of a waterpark that will be fully integrated into Mall of America. (*See* Ghermezian Decl. ¶ 3, APX1837).

None of these establishments would have been thought "compatible" with a "shopping mall" when enclosed malls containing multiple retail shops and restaurants or fast food establishments were first invented. But all of them are by definition "compatible with and

[4] The REA does prohibit public or private nuisances, warehouses, or establishments that are noisy (a standard that does not seem to mean what most of us think it means, since I have never been to a quiet amusement park) or hazardous. (REA, Art. IX(D), APX2350-52).

not detrimental to" *this particular* mall in Minneapolis, and to its tenants. Indeed, aside from a house of prostitution or other criminal enterprise, this court has had great difficulty imaging any non-industrial use that would not be "compatible with and not detrimental to" the multi-faceted operations at Mall of America.

This includes use for commercial offices. Contrary to an assertion in MOAC's brief on appeal (Appellant's Br. at 7, Dkt. No. 16), use of a portion of the Sears Building for "office and service establishments" is not only not forbidden, it is expressly permitted. The only restriction is that, as long as any of the anchor tenants is operating a department store at Mall of America, "office use" in Mall of America may not include "a Building used *primarily* for general office purposes." (APX2350) (emphasis added). Use of the word "primarily" would appear to permit as much as 49% of the Sears Building to be rented out for general office purposes; and the employees who worked in those offices would undoubtedly provide considerable custom to the stores and restaurants in the mall.

Neither the Sears Lease nor the REA contains any sort of "tenant mix" restriction with respect to the Sears space following the expiration of the Major Operating Period.[5] According to the testimony of Raphael Ghermezian, the CEO of MOAC and a Senior Executive Vice-President of MOAC's parent company, certain ten-

[5] The REA includes an exclusive use provision – the quintessential tenant mix restriction – such that Sears must operate "a retail Department Store in the Sears Building"; but this provision only applies during the Major Operating Period, which has long since expired. (APX2418-19).

ants in the mall have in their leases "co-tenancy" or "anchor" provisions that allow them to break their leases if there are fewer than three "department stores" in Mall of America. (*See* Ghermezian Decl. ¶ 9, APX1840; Tr. at 77:18-25, 80:1-3, APX2072, 2075). However, none of those leases has been made part of the record. Moreover, had Sears not gone bankrupt, it could have "gone dark" or leased out its premises for a variety of non-retail uses – thereby depriving Mall of America of one of its "department stores" – and MOAC could not have stopped it from doing so, regardless of what was in some other tenant's lease.

But while Sears was able to obtain a virtually unfettered right to use the premises for myriad purposes after 2007 – or not to use it at all, but to keep it dark – a few provisions were added to the Lease to protect MOAC's interests.

Per Article 6.3(a) of the Lease, from and after the end of the Major Operating Period in 2007 and until the expiration of the Lease, if Sears decided to cease operating a store in the building, or to transfer its interest in the leased premises, it was required to give MOAC the right to match any bona fide offer for the space – or, if there were no such offer, to give MOAC the right the buy out the leasehold estate at fair market value. (APX2218).

Also, per Article 4.4 of the Lease, after 2007 if Sears ceased to operate at least 20,000 square feet on the third floor, an MOAC affiliate, Minntertainment Company, had the exclusive and irrevocable first right and option to lease the third floor, subject to the terms of an option agreement. (APX2214).

Finally, per Article XXV(D)(4)(a) of the REA, if, after 2007, Sears ceased operating, subleased its premises, or assigned the REA, Sears would nonetheless remain liable under the REA "unless its assignee has a net worth or shareholder equity, determined in accordance with generally accepted accounting principles, of at least $50,000,000.00 and executes a written undertaking in recordable form, stating at least that it is made for the benefit of Developer in which said assignee expressly assumes and covenants . . . to perform and be bound by . . . this REA . . . (including the provisions of this Article XXII . . .), which Sears shall deliver to Developer." (APX2438).

The Proposed Assignment

The Debtors filed for chapter 11 bankruptcy in October of 2018. Transform purchased substantially all of the Debtors' assets through a § 363 sale, including the right to designate certain leases for assignment if approved for assumption and assignment by the Bankruptcy Court. The sale order approved Transform's purchase of approximately 660 leases the Debtors would assume and then assign to Transform or its designee. Of the 660 leases assigned to Transform or its designee, the Mall of America Lease is the only lease still embroiled in litigation.

Sears wishes to assign the Lease, and have the Lease assumed by, a newly-formed entity, Transform Leaseco. As might be inferred from its name, Transform Leaseco plans to market the Sears space to as yet unidentified subtenants who are willing to pay the highest price in order to maximize the value of the real estate.

The Bankruptcy Code, specifically 11 U.S.C. § 365(f)(2)(B), permits such assignment "only if . . . adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease." Were Mall of America not a "shopping center,"[6] the proposed assignment would be in every way favorable under § 365(f)(2)(B), which deals with the assignment of leases in bankruptcy. As the Bankruptcy Court found (and no one disputes), the proposed assignment to Transform meets that statutory standard: (1) Transform has agreed to put one year's rent and consideration due under the Lease ($1.1 million) into escrow; (2) its senior management has extensive experience in marketing and selling Sears' vacated retail property; (3) Transform has obtained substantial financing with respect to its operating portfolio and real estate portfolio, and "likely" has the equity of at least $50 million required by Article XXV(D)(4)(a) of the REA (more on that later); (4) Transform committed to lease portions of the property within two years (provided MOAC does not interfere with its marketing efforts); and (5) most important, Transform agreed to be bound by all relevant provisions of the Lease and the

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[6] The parties stipulated that Mall of America is a "shopping center" under the Code – an assertion that is at the very least questionable, given the makeup of its tenants. (APX1782). The Code does not define the term; it is supposed to be "strictly construed," *In re Ames*, 121 B.R. 160, 164 (Bankr. S.D.N.Y. 1990); and while the mall shares some of the commonly understood characteristics of a shopping center, see *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1087–88 (3d Cir. 1990), Mall of America does not look much like most "shopping centers." I take the case as I find it, however, so for our purposes Mall of America is a "shopping center" for purposes of 11 U.S.C. § 365(b)(3).

REA – including specifically the modest "use restriction" in Article XXII and the "right of first refusal/buyout" provisions of Article 6.3(a) – which means that MOAC retains the right to buy out the lease or match any "unsuitable" tenant's offer for the space.

However, the Bankruptcy Code imposes additional restrictions on the assignment of a "shopping center" lease in bankruptcy. In particular, § 365(b)(3) adds gloss to § 365(f)(2)(B) by explaining exactly what is needed in order to give a shopping center landlord "adequate assurance of future performance by the assignee of such contract or lease." That term, in the shopping center context, is deemed to include four elements, two of which are relevant for purposes of this appeal:

(A) The financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease (which is our case is 1991); and

(D) That assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

This court reads the word "include" to mean, at a minimum,[7] that these provisions (as well as the other two subsections of § 365(b)(3), which are not at issue in this case) must be satisfied in order for a shopping center landlord to have "adequate assurance of future performance" of the terms of a lease.

[7] This reading is not inconsistent with Transform's definition of "includes" as "not limiting." (*See* Appellee's Br. at 15, Dkt. No. 20).

MOAC argues that the assignment to Transform would contravene both of these statutory provisions.[8]

The Bankruptcy Judge's Opinion

The Bankruptcy Court (Drain, B.J.) conducted a hearing on MOAC's objections on August 23, 2019. The parties agreed to a set of stipulated facts and to the admission of a number of exhibits into evidence. Each side also provided declarations in support of its position, which constituted the declarant's direct testimony; the declarants were available for cross-examination at the hearing.

In an oral opinion delivered at the conclusion of the hearing on August 23, 2019, Judge Drain determined that MOAC's objections should be denied, and approved Sears' assumption of the Lease and its assignment to Transform. (Tr. at 134:12-20, APX 2129).

The Bankruptcy Court first found that Transform had provided adequate assurance of future performance of the Lease as required by § 365(f)(2)(B). (Tr. at 115:15-18, APX2110). But of course, where a shopping center is concerned, that section is simply a starting point. As Congress made clear in the legislative history of the of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), "section 365(f) does not override any part of section 365(b)." H.R. Rep. 109-31(I), 87, 2005 U.S.C.C.A.N. 88, 153. The requirements set out in § 365(b)(3) give specific meaning to, and are more onerous than, what is meant by "adequate assurance" under § 365(f)(2)(B).

[8] MOAC originally argued that the proposed assignment would also contravene 11 U.S.C. § 365(b)(3)(C), but that issue is no longer in the case.

So the Bankruptcy Court turned to the requirements of § 365(b)(3). Insofar as is relevant to this appeal, Judge Drain found that Transform had satisfied the requirements of subsections (A) and (D) of that provision of the Code.

With regard to § 365(b)(3)(D): Judge Drain concluded that, because the Lease (including the REA incorporated therein) included no "tenant mix" requirement – and, indeed, neither required Sears to operate a retail store in its building nor substantially limited the type of entity to which Sears could sublease following the expiration of the Major Operating Period in 2007 – the assignment to Transform would not violate § 365(b)(3)(D)'s requirement that the "tenant mix" of the shopping center be preserved. (Tr. at 130:5-18, APX2125).

Judge Drain reasoned that § 365(b)(3)(D) had to be read in conformity with the Lease – the contract whose performance was being "adequately assured" – so as not to confer on MOAC more rights than it enjoyed under the Lease. Because the Lease neither contains any restriction on the tenant mix of the shopping mall nor guarantees that the Sears space will be operated as a retail department store – and, indeed, barely restricts the use of the Sears Building in any way (aside from proscribing nuisances, too much noise, industrial uses, or "primarily" as an office building) – Judge Drain found that the tenant mix would not be disrupted as long as Transform agreed to abide by the restrictions in Article XXII(c) of the REA – which it did.

Judge Drain rested this decision on the decision of Bankruptcy Judge Buschman in *In re Ames Department*

Stores, Inc., 127 B.R. 744 (Bankr. S.D.N.Y. 1991) [hereinafter, "*Thatcher Woods*"]. The *In re Ames* (*Thatcher Woods*) opinion draws heavily from a prior opinion – also by Bankruptcy Judge Buschman and also involving the Ames bankruptcy – *In re Ames Department Stores, Inc.*, 121 B.R. 160, 162 (Bankr. S.D.N.Y. 1990) [hereinafter, "*Westmont*"]. *Thatcher Woods* has been cited with approval a number of times subsequently.[9]

With regard to § 365(b)(3)(A): Transform contended that its current financial condition and operating performance could be "derived from inspection of a confidential letter, dated April 26, 2019 (the "Transform Financials")

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[9] *In re Ames's* logic was followed in *In re Great Atlantic & Pacific Tea Company, Inc.*, 472 B.R. 666, 678 (S.D.N.Y. 2012), a case in which Judge Seibel affirmed Judge Drain's finding that § 365(b)(3)(D) did not apply where the debtor was permitted under the lease to go dark – and did in fact go dark – prior to bankruptcy; and *In re Toys "R" Us Property Company I, LLC*, No. 18-31429, 2019 WL 548643, at *6 (Bankr. E.D. Va. Feb. 11, 2019), which expressly noted, "In order to invoke the protection of § 365(b)(3)(D), a lessor must establish that there was an intended tenant mix and that the mix was part of the bargained-for-exchange of the debtor's and other tenants' leases." *See* also *In re Toys "R" Us Prop. Co. I, LLC*, 598 B.R. 233, 241–42 (Bankr. E.D. Va. 2019) (citing *Westmont*); *In re Toys "R" Us, Inc.*, 587 B.R. 304, 310 (Bankr. E.D. Va. 2018) (citing *Westmont*); *In re Ames Dep't Stores, Inc.*, No. 01-42217, 2005 WL 1000263, at *5 n.46 (Bankr. S.D.N.Y. Apr. 29, 2005) (citing *Thatcher Woods*); *In re Serv. Merch. Co., Inc.*, 297 B.R. 675, 689–690 (Bankr. M.D. Tenn. 2002), *aff'd sub nom. Ramco-Gershenson Props., L.P. v. Serv. Merch. Co.*, 293 B.R. 169 (M.D. Tenn. 2003) (citing *Thatcher Woods*); *In re Trak Auto Corp.*, 277 B.R. 655, 672 (Bankr. E.D. Va. 2002) (citing *Thatcher Woods*), *aff'd sub nom. LaSalle Nat'l Tr., N.A. v. Trak Auto Corp.*, 288 B.R. 114, 125–26 (E.D. Va. 2003) (citing *Westmont*), *rev'd on other grounds sub nom. In re Trak Auto Corp.*, 367 F.3d 237 (4th Cir. 2004) (citing *Westmont*); *In re J. Peterman Co.*, 232 B.R. 366, 369–70 (Bankr. E.D. Ky. 1999) (citing *Thatcher Woods*).

(12-MOAC), and from the Buyer's reply (the "Buyer's Reply") (16-MOAC)." (APX1783). It argued that the Transform Financials revealed that the proposed assignee had $250 million in equity.

But MOAC's counsel cast doubt on the Transform Financials in at least two ways. (*See generally* Tr. at 17-35 (cross-examination of Michael Jerbich), APX2012-30). First, the balance sheet on which Transform relied was marked as a "draft" and indicated that it was subject to adjustment. (Tr. at 26:9-25, APX2021; 12-MOAC at 10, APX4245). Second, an "Adequate Insurance Information" table in the same document expressly notes that the document "is not intended to provide the basis for any decision on any transaction." (Tr. at 31:10-16, APX2026; 12-MOAC at 7, APX4242).

As a result, the bankruptcy judge found himself unable to conclude that Appellee had in excess of $250 million in of equity, as Transform contended. Specifically he refused to accept the dollar amounts in the declaration of Roger Puerto, one of Transform's witnesses and the Head of Real Estate Transactions at Transform, "as the value of the portfolio, but simply as evidence that Transform believes that it has a valuable portfolio and that it's seeking to realize it." (Tr. at 45:7-11, APX2040). Judge Drain concluded that Transform *hoped* that its portfolio would turn out to be worth $250 million – a proposition that had yet to be tested in the marketplace. (Tr. at 117:24-25, 118:1-3, APX2112-13).

That said, the Bankruptcy Court found that "it's highly likely that that [Transform's] equity exceeds $50 million." (Tr. at 118:4-5, APX2113). He focused on that number because, if Sears were to have assigned the Lease outside of bankruptcy to an entity with at least

$50 million in net worth or shareholder equity, it would be relieved of liability under the Lease. (*See* REA, Article XXV(D)(4)(a)).[10] The bankruptcy judge reached his factual finding, not on the basis of Transform's financial statements, but because, "I cannot believe that third-party lenders would provide the level of financing that they have to Transform without at least that level of solvency." (Tr. at 118:5-8, APX2113). No testimony from the third party lenders appears in the record.

Having found it "highly likely" that Transform satisfied the $50 million standard, the bankruptcy judge then decided that assignment to an entity that had at least $50 million in equity/net worth was sufficient under § 365(b)(3)(A) – even though that provision as drafted requires that the assignee of a shopping center lease have "financial condition and operating performance" that was "similar" to that of Sears back when the Lease was signed.

The bankruptcy judge concluded that § 365(b)(3)(A), like § 365(b)(3)(D), had to be read in conformity with anything in the lease to be assigned that guaranteed future performance under the lease. Noting that there were not many cases interpreting § 365(b)(3)(A) (he found only three), he observed that each of those three case "makes it clear that [§ 365(b)(3)(A)] is to be construed not in a mechanical way, but rather consistent with the underlying charge as set forth in the preface to it, the general language in Section 365(b)(3), which again refers to ade-

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[10] Article XXV of the REA relieved Sears of any future obligations under the Lease as long as it subleased or assigned its space to an "assignee [that] has a net worth or shareholder equity . . . of at least $50,000,000.00." (APX2438).

quate assurance of future performance of the lease itself." (Tr. at 121:12-17, APX2116). He determined that § 365(b)(3)(A), like § 365(b)(3)(D), ". . . requires reference back to the part[ies]' actual agreement, and that Congress did not create independent requirements that would not go to actual assurance of future performance, but rather wanted to focus the Court on, obviously still subject to Section 365(e), taking into account the landlord's rights under the lease, as implicated by these four subsections." (Tr. at 125:10-17, APX2120).

Judge Drain noted that Sears and MOAC had bargained for the level of financial security that it would take before MOAC would release Sears from its lease obligations in the event of an assignment (which was something that MOAC could not veto). MOAC agreed to relieve Sears from liability as long as it assigned the Lease to a tenant with at least $50 million in equity/net worth. It did not require Sears to replace itself with a tenant whose financial standing was comparable to that of Sears in 1991 in order to be relieved of liability for performance of the Lease. Applying the reasoning of *In re Ames* to § 365(b)(3)(A), Judge Drain concluded that Transform had provided MOAC with all the assurance required by that provision of the Bankruptcy Code. (*See* Tr. at 129:9-15, APX2124).

That said, the learned bankruptcy judge recognized that he was plowing new ground. He thus made a second pronouncement: "[I]f that legal determination is incorrect, and that the case law [I] cited and follow on the grounds of *stare decisis* is incorrect, then the *financial condition and operating performance of Transform is not similar to Sears in 1991*. Transform has not carried its burden to show, for example, that the ratio as far as its financial health, is the same, notwithstanding that it

has shown that it's sufficiently financially healthy, when coupled with the favorable nature of the lease and deposit of an amount equal to the annual projected monetary payment under the lease, that it is sufficiently healthy." Tr. at 129:16-25, 130:1-2, APX2124-25) (emphasis added).[11]

In other words, the Bankruptcy Court concluded that, if Article XXV(D)(4)(a)'s $50-million-in-equity provision for relieving Sears of liability did not supersede the similar-to-Sears-in-1991 statutory standard in § 365(b)(3)(A), the assignment could not be approved, because Transform failed to carry its burden of demonstrating financial similarity.

The Order Appealed From

After delivering his oral opinion, Judge Drain entered a final order authorizing, *inter alia*[12] the assumption and assignment of the Lease to Transform, from which MOAC appeals. ("A&A Order," APX1947). This order provides that MOAC's rights under Article 6.3 of the Lease shall remain fully enforceable against Transform and any assignee, Transform will operate in compliance with the Lease, including the "Uses" section of the Lease and the REA, and Transform must initially sublet a portion of the premises within two years, "on the condition that the counterparty to the [Lease] does

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[11] The reference to the "ratio" between Transform's and Sears' financial health referred to a standard announced in *In re Casual Male Corporation*, 120 B.R. 256, 265 (Bankr. D. Mass. 1990) – a case in which, as here, the proposed assignor was a newly-formed entity that did not have an operating history. That case is discussed *infra* at pp. 35–37.

[12] The order appealed from grants additional relief.

not improperly interfere with the Buyer's attempt to sublet the premises . . . ." (*Id.* at ¶¶ 16–17, APX1962-64).

MOAC appealed.

Conclusions of Law

On appeal, MOAC argues that the Bankruptcy Court erred in holding that the Lease terms define the protections of §§ 365(b)(3)(A) and (D). Thus, MOAC asserts, the Bankruptcy Court's determinations that the assignment to Transform satisfied (A) – even though it does not have similar financial condition or operating performance as Sears in 1991 – and (D) – even though Transform did not propose a certain tenant or use – were erroneous.

This court reviews the Bankruptcy Court's findings of fact under the clearly erroneous standard and its conclusions of law *de novo*. *In re Republic Airways Holdings Inc.*, 582 B.R. 278, 281–82 (S.D.N.Y. 2018), (citing *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018); *In re Bayshore Wire Prods. Corp.*, 209 F.3d 100, 103 (2d Cir. 2000); *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 699 (S.D.N.Y. 2012)). "Mixed questions of law and fact are generally subject to *de novo* review," *id.*, though "the standard of review for a mixed question all depends[]on whether answering it entails primarily legal or factual work," *U.S. Bank*, 138 S. Ct. at 967.

Following the bankruptcy judge's lead, I will begin with a discussion § 365(b)(3)(D) and *In re Ames's* reliance on lease terms to provide substance to the Code's "undefined notions of tenant mix." *In re Ames* (*Thatcher Woods*), 127 B.R. at 753. I will then turn to Section §

365(b)(3)(A), which I find to be a very different provision.[13]

<u>365(b)(3)(D)</u>

I agree with Judge Drain's conclusion that § 365(b)(3)(D) – which requires that the assignment of a shopping center lease in bankruptcy "will not disrupt any tenant mix" of the shopping center – is not violated by Sears' assignment of the Lease to Transform. In fact, given the terms of the Lease and the REA, and in light of Transform's promise to abide by the few restrictions on subletting contained therein, I conclude that the proposed assignment does not alter the tenant mix that was in existence at Mall of America at the time Sears filed for bankruptcy protection.

Let me begin by recapping the relevant findings of fact:

First, there is no provision in the Lease or the REA limiting tenant mix, other than Article XXII(c)'s restriction of the Sears space to uses "compatible with and not detrimental to" a mall and the restrictions that prohibit nuisances and industrial uses.

Second, Sears has had the right under the Lease, since 2007, to "go dark" or to sublease to a user who was not obligated to run a department store; and MOAC had no right to veto such a sublease – on "tenant mix" or any

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[13] Because I conclude that the Bankruptcy Court's order must be overturned under subsection (A), some might think it inappropriate to begin with what is, essentially, dictum. However, because the bankruptcy judge's decision on subsection (A) depends on his conclusion that subsection (A) should be treated exactly as subsection (D) was treated in the case of *In re Ames*, I think it makes more sense to discuss subsection (D) first.

other ground – aside from the few proscriptions mentioned above.

Third, under Article 6.3 of the Lease, MOAC does have a "right of first refusal" that allows it to pay the assignor the amount to be paid under a proposed sublease if it does not wish to see any particular new subtenant take over all or part of the Sears space – and Judge Drain "so ordered" Transform's representation that it would abide by Article 6.3 of the Lease.

Fourth, Transform also agreed that it would sublet at least a portion of the leased premises within two years (on the condition that MOAC did not interfere with its marketing efforts) and would be bound by all other provisions of the Lease – including specifically Article XXII of the REA, which contains all that exists in the Sears Lease with respect to use restrictions and tenant mix.

Fifth, as the parties stipulated, Transform does not intend to operate any store, such as a Sears or a K-Mart, in the leased premises. Rather, Transform intends to sublease the premises to as-yet unidentified any potential tenant for any portion of the premises.

MOAC does not challenge any of those findings of fact as erroneous. As is clear from the description of the relevant lease provisions above, they are not erroneous.

So with these facts in mind, we turn to a discussion of the law.

MOAC argues that (1) the plain language of § 365(b)(3)(D) prohibits any assignment of the Sears Lease that would affect the "tenant mix" at Mall of America, (2) the Bankruptcy Court could not make a determination about whether the proposed assignment to

Transform would affect "tenant mix," because there is no proposed tenant.

Like Judge Drain, I conclude that MOAC's argument fails at the first step. I do not believe that the assignment, taken together with the restrictions imposed by the Bankruptcy Court and accepted by Transform, affects the "tenant mix" at the mall.

MOAC's argument relies for its force on a determination that *In re Ames* (*Thatcher Woods*) – the decision on which the bankruptcy judge relied – was decided wrongly, and that, under the literal language of § 365(b)(3)(D), any assignment that would result (or, in this case, that could result) in the Sears space's being used for any purpose other than a retail department store is prohibited – notwithstanding the language in the Lease that permits change-of-use assignment.

The courts that have considered this question, starting with the bankruptcy court of this district in the *In re Ames* cases, have repeatedly rejected this argument.

In the first two *Ames* cases, the debtor, Ames, sought to assign leases for premises located in Westmont, Illinois and at the Thatcher Woods Shopping Center in River Grove, Illinois. Both stores had been occupied by an Ames subsidiary, Zayre, which had been operating Ames Department Stores at these locations. Ames proposed to assign its leases to Schottenstein, which planned to operate a furniture store in part of each store and sublet the remainder of the space.

In the first case, *Westmont*, the landlord objected to the assignment on the ground that the proposed assignment would disrupt the "tenant mix" in what landlord deemed to be a "shopping center," in violation of §

365(b)(3)(D). In the second case, *Thatcher Woods*, Ames/Zayre was one of four anchor tenants in the shopping center, and Pioneer, the landlord, objected to the assignment, on *inter alia*, the same ground.[14] In each case, the landlord argued that the phrase "will not disrupt any tenant mix" as used in the statute meant the assignment had to preserve a particular array of stores, or at least types of stores, in the shopping center.

Bankruptcy Judge Buschman disagreed with the landlord in both of the Ames cases. He concluded that bankruptcy courts had to rely on lease terms to define the Code's otherwise "undefined notions of tenant mix" in order to ensure that they were enforcing legal constraints cognizable under non-bankruptcy laws, and preserving the benefit of the bargain between landlord and tenant. *In re Ames* (*Thatcher Woods*), 127 B.R. at 753; *In re Ames* (*Westmont*), 121 B.R. at 165. Put otherwise, the *Ames* cases stand for the proposition that "tenant mix" at a shopping center – a term that is neither defined nor placed in time in the Code – is a function of the terms of the shopping center's space leases, rather than a separate criterion set by the legislature.

In *Westmont*, this "holding" was pure dictum. The principal issue in *Westmont* was whether the Ames Department Store was in fact part of a "shopping center." Judge Buschman held that it was not. That being so, any discussion of the requirements of § 365(b)(3)(D) – which applies only to leases in "shopping centers" – was entirely unnecessary.

However, Judge Buschman did discuss § 365(b)(3)(D) in the *Westmont* decision, and his discussion

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[14] Pioneer objected on other grounds as well, but those are not relevant to the discussion of § 365(b)(3)(D).

formed the basis for his subsequent ruling in the *Thatcher Woods* decision, where the store was indeed part of a "shopping center." What the *Westmont* decision said about § 365(b)(3)(D) thus bears scrutiny.

Having observed that the "general notions of tenant mix" in § 365(b)(3)(D) were "undefined," Judge Buschman looked to Congress' stated purpose in passing § 365(b), which was to protect the landlord's contract rights. *In re Ames* (*Westmont*), 121 B.R. at 165. Specifically, he noted, with regard to § 365(b)(3), that the statute was passed "to assure a landlord of his bargained for exchange." *Id.* (quoting H.R. Rep. No. 95-595, at 348–39 (1997)). He noted that both §§ 363(f)(2)(B) and 365(b)(3), which supplemented it, were designed to give the landlord "adequate assurance" that an assignee in bankruptcy would continue to perform *the terms of the debtor's lease*. He observed that, if § 365(b)(3)(D) were read without the prefatory language in § 365(b)(3), it would not specifically refer to the terms of the lease. But he went on to say that subsection (D) should be read in light of the Code section's prefatory language, which does refer to the terms of the underlying lease. He held that the Code "defines such 'adequate assurance of future performance *of a lease of real property in a shopping center*' to include non-disruption of tenant mix. The statute itself thus directs tenant mix inquiry to contractual provisions [of the lease] rather than general notions of tenant mix[15] argued by the Landlord here." *Id.* (emphasis added).

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[15] The "general notion[] of tenant mix argued by the Landlord" in Westmont was that assignment would be to an entity that was not the same "type" or entity – a furniture store rather than a department store – that had previously occupied the space.

In *Westmont* (as in this case), the Zayre lease did not contain any restrictive use clause. Moreover, in *Westmont* (as in this case), Zayre had an absolute right to assign its lease or sublease the premises without the landlord's approval. *See id.* at 164–65. Thus, the lease whose performance had to be adequately assured gave the landlord neither the right to control how the debtor's space could be used, nor any comfort that it would be used in any particular way, including as a department store (which is how Ames was using the space). That being so, the court concluded that Zayre's assignment to Schottenstein – a furniture store, rather than a department store – was not barred by § 365(b)(3)(D). *Id.* at 165.

Judge Buschman's analysis of § 365(b)(3)(D) in the subsequent *In re Ames* (*Thatcher Woods*) case relied extensively on this discussion (dictum or not) in the *Westmont* case.

As was true in the *Westmont* case, Ames's lease at Thatcher Woods "does not expressly restrict use of the premises in any fashion; nor do any of the leases of existing tenants restrict in any fashion the use of the Zayre of Illinois premises."[16] *In re Ames* (*Thatcher Woods*), 127 B.R. at 746. Nonetheless, the landlord (Pioneer) argued that, for purposes of § 365(b)(3)(D), the court was required to look beyond the terms of the lease, and could only determine the "tenant mix" at the shopping center by looking at the actual types of stores that were resident in the shopping center at the time of the bankruptcy. *Id.* at 752. Since Ames/Zayre was trying to as-

[16] Unlike in this case, those leases were in the record; Judge Buschman described various provisions in those leases.

sign the lease to a furniture store, rather than a department store, Pioneer argued that the assignment would alter the tenant mix.

Judge Buschman once again refused to read § 365(b)(3)(D) outside of the context provided by the prefatory language in the statute. He observed that this subsection was concerned solely with providing "adequate assurance of future performance . . . of the contract or lease" that was being assigned. *Id.* (emphasis added). Where preservation of the "tenant mix" (which Pioneer, like the landlord in *Westmont*, defined as the same type or store that had previously occupied the space) was not something to which the landlord was entitled to under the "contract or lease" at issue, Pioneer's interpretation of the "tenant mix" requirement in § 365(b)(3)(D) would effectively rewrite the lease. Because in Thatcher Woods the landlord had not bargained for the right to preserve tenant mix outside of bankruptcy, "no reason exists why it should have such a right now that [the debtor-tenant] has filed for bankruptcy." *Id.* at 754.

It is important to note that the term "tenant mix" as used in § 365(b)(3)(D) is both undefined and unfixed in time. It is not at all clear whether the phrase "tenant mix" in § 365(b)(3)(D) refers to the precise stores that were tenants at the time the lease in question was signed; or to a snapshot of the stores that were open when the bankruptcy was filed; or to types of stores as opposed to precise tenants. There can be no question that a snapshot of the tenants at Mall of America has varied over time, and that tenants undreamed of at the time the Sears Lease was signed (Crayola Experience? Waterparks?) now or soon will occupy space in or as part of the mall. Judge Buschman's description of the term "tenant mix" as "undefined" was, in short, apt.

Unfortunately, the legislative history of the statute sheds little light on the meaning of "tenant mix." The Conference Report for the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act") – pursuant to which § 365(b)(3) passed into law – says nothing at all about § 365(b)(3).

But Senator Orrin G. Hatch discussed "the provisions improving bankruptcy procedures with regard to shopping centers" during debate on the bill. *See* H.R. Rep. 98-882 (1984) (Conf. Rep.) *as reprinted in* 1984 U.S.C.C.A.N. 576, 598. He noted that changes to § 365 sought to remedy several problems, including that "shopping center leases are assumed or assigned and then used in ways *which violate the use clause of the lease and disrupt the tenant mix*." *See id.* at 598–600 (emphasis added). Having linked the disruption of tenant mix to violation of a lease's "use clause," Senator Hatch made it quite clear that the amendments were designed to prevent courts from effectively rewriting essential terms out of leases in order to effectuate assignments in bankruptcy:

> It is especially important that any use clause in the lease be strictly adhered to and that the tenant mix not be disrupted. . . . This amendment is intended to stop courts from creating new leases by changing essential lease terms to facilitate assignments.

Id. at 600.

I have no quarrel (nor did Judge Drain) with MOAC's argument that the provisions of § 365(b)(3), including subsection (D), supplement and give special meaning to the "adequate assurance" rule of § 365(f)(2)(B) in the context of shopping centers. Section

365(f)(2)(B) is not specific about what "adequate assurance" would require; § 365(b)(3) fills in that blank when the debtor has a lease for space in a shopping center; and § 365(b)(3)(D) prohibits assignments that would disrupt the tenant mix.

But given the lack of any statutory definition for the words "tenant mix," and the several possibilities for what it might mean, it makes perfect sense to interpret the phrase "tenant mix" for purposes of § 365(b)(3)(D) in light of the lease whose performance is being assured – because the tenancy governed by that lease is part of the "tenant mix" at the shopping center.

As was true in both *In re Ames* cases and in the cases that have cited them subsequently, (*see* n.9, *supra*), the Sears Lease and the REA (a master agreement incorporated therein) contain virtually no restrictions on what kinds of tenants could occupy the Sears building once the Major Operating Period expired in 2007. There is certainly no "use clause" in the Lease or in the REA that will be violated by assigning the lease to someone who does not plan to operate a retail store on the premises. Those documents permit virtually unfettered assignment of the Lease for a host of uses. They do not restrict the use of the space to a retail department store, and Sears itself has not been required to operate a retail store in the premises since 2007.

It is, therefore, fair to say that the "tenant mix" at Mall of America since 2007, when the Major Operating Period expired, included a space that was free to cease operating as a department store and that could be subleased for a variety of uses other than a department store, *without the approval of the landlord, and without regard to objections by any of the mall's other tenants*.

No one had a right – not MOAC and not any of its tenants – to assume or expect that the Sears space would be occupied by a department store until 2091. Other than by matching a proposed assignee's offer or buying Sears out (discussed further below), neither MOAC nor any of its other tenants could stop Sears from changing the way in which its space was being used. That uncertainty was part of the "tenant mix" of the mall, from the mall's very beginning. It was embedded in the terms of Lease and woven into Mall of America's "master agreement," the REA. And it remained part of the "tenant mix" at Mall of America when Sears declared bankruptcy.

To rule that Sears cannot now assign the Lease to an entity that is not a department store because that would somehow alter the "tenant mix" at Mall of America is to ignore the reality of the "tenant mix" that was created by the (admittedly) most unusual lease between MOAC and Sears. Such a ruling would not protect the rights of the landlord, MOAC; it would radically expand them.

While recognizing that nothing in the Lease restricts assignment of the space to an entity other than a department store, MOAC argues that the loss of Sears as a retailer will leave Mall of America with only two "department stores," which will in turn allow several of its other tenants to break their leases. MOAC represents that these unidentified tenants have the right to leave the mall if the number of department stores at Mall of America falls below three. (Tr. 80:1-4, APX2075). It argues that, in *Thatcher Woods*, Judge Buschman considered it significant (though not dispositive) that no tenants at the Thatcher Woods Shopping Center could cancel their leases if the premises occupied by Zayre of Illinois were to be subleased to an entity other than a

department store. In this case, by contrast, MOAC insists that some of its tenants could so cancel.

However, there are two problems with MOAC's argument on this appeal.

First, as noted above, none of these purported leases is found in the record on appeal, nor is there any testimony in the record from tenants indicating that they will leave Mall of America if the proposed assignment is approved, as was the case in *Matter of Federated Department Stores*, 135 B.R. 941, 944 (Bankr. S.D. Ohio 1991) – an opinion whose strained judicial definition of "tenant mix and balance" this court finds less than persuasive. In fact, MOAC's witness Mr. Ghermezian testified to the contrary – although tenants in Mall of America may leave without a third department store, "today, they may not leave that fast." (Tr. at 74:7, APX2069).

Second, if, as Mr. Ghermezian testified, other leases "require that a department store be operated in the Sears space," then those leases were entered into in contravention of the REA as incorporated into the Lease, which expressly permits Sears not to use the space for a department store from and after 2007 – whether or not that would have placed MOAC in violation of some other tenant's lease. And if (as I suspect, but cannot prove is the case) other tenant leases require that department stores be operated in three of the four anchor-tenant locations in the mall, (*compare* Tr. at 77:18-25, APX2072 *with* Tr. at 79:20-25, 80:1-4, APX2074-75), then it was particularly important that *MOAC* make sure that all the anchor spaces other than the Sears space contained department stores – because once the Major Operating Period expired, MOAC had no contractual ability to

make sure that the Sears space was operated as a department store.

At some point, MOAC did hedge against Sears' absolute right to convert the Sears Building to something other than a department store. It leased a fourth "anchor" space in Mall of America to Bloomingdale's, a retail department store. That gave the mall four department stores (Sears, Bloomingdale's, Macy's and Nordstrom), and gave MOAC a cushion against Sears exercising its rights under its Lease.

But in 2012, MOAC permitted Bloomingdale's to vacate its space. After it remained dark for three years,[17] MOAC finally leased the premises, not to another department store, but to Binney & Smith, which installed a "Crayola Experience" children's entertainment center in part of what used to be a department store.

The fact that Sears was having financial difficulty was hardly a secret during the period 2012-2017, when MOAC allowed the Bloomingdale's space first to go dark and then be converted to a non-department store use.[18]

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[17] This long period of disuse, despite the obvious attractions of Mall of America as a place to do business, is less surprising than it might seem; retail stores like Bloomingdale's and Sears are not exactly a growth industry these days.

[18] *See*, e.g., Lauren Thomas, Sears is Shuttering 20 More Stores, CNBC, June 22, 2017, https://www.cnbc.com/2017/06/22/sears-is-shuttering-20-more-stores.html ("Sears . . . is headed down what many believe is a path toward filing for bankruptcy, as the retailer struggles to grow its sales."); Brian Sozzi, As Sears Goes From Bad to Worse, Bankruptcy Looms, Fitch Says, THE STREET, Dec. 8, 2016, https://www.thestreet.com/investing/stocks/retail-zombie-sears-is-running-out-of-money-13918802; Sears and Kmart struggle to survive in the era of Walmart and Amazon, THE GUARDIAN, Dec. 4, 2014, https://www.theguardian.com/business/2014/dec/04/sears-closes-more-stores-shoppers-walmart; David Gelles, For

If MOAC had obligations to other tenants concerning the number of department stores, then, knowing the terms of the Sears Lease and the REA, it could and should have protected itself when Bloomingdale's closed, by leasing that space to a department store tenant. By not doing so, MOAC, not Sears, created any problem it faces today.

MOAC next argues that the assignment should be disallowed because it is impossible to know whether Transform will lease the Sears space to a tenant or tenants that MOAC and its other tenants do not find objectionable. But what Sears proposes to do is not unprecedented. *See* e.g., *Ramco-Gershenson Props., L.P. v. Serv. Merch. Co.*, 293 B.R. 169, 172–73 (M.D. Tenn. 2003) (debtor sold designation rights to third party, third party proposed assignment to new entity that would in turn sublease to a tenant); *In re Sun TV & Appliances, Inc.*, 234 B.R. 356, 359 (Bankr. D. Del. 1999) (assignee intended to shop the lease). And Transform has agreed

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Once-Mighty Sears, Pictures of Decay, N.Y. TIMES DEALBOOK, Oct. 29, 2013, https://dealbook.nytimes.com/2013/10/29/sears-considers-split-of-lands-end-and-auto-centers/; Ronald Thomas, Are We Recession-Bound? Results From Wal-Mart and Low-End Retailers Suggest 'Maybe', 2013 WLNR 21398411 (Aug. 23, 2013) ("In that area it is widely known that JC Penney (NYSE:JCP) and Sears/Kmart . . . could well be in bankruptcy within one to two years . . . ."); Brigid Sweeney, WHERE AMERICA SHOPPED, 2012 WLNR 8830213 (Apr. 23, 2012) ("After the second-worst year in the companys [sic] history, and with its annual shareholders meeting two weeks away, there is open discussion of a once-unthinkable proposition: Will this 126-year-old company, which helped define modern America, continue to exist?"); Paul R. La Monica, Tears for Sears: American icon in trouble, CNN MONEY, Jan. 12, 2012, https://money.cnn.com/2012/01/12/markets/thebuzz/index.htm ("The future is looking increasingly bleak for the former king of retail, Sears Holdings.").

to be bound by the relatively minimal restrictions in the Lease and REA on how the space can be used, an agreement incorporated into Judge Drain's order.

Moreover, MOAC is not without recourse if Transform tries to bring a tenant into Mall of America that MOAC would rather not have in the mall. Article 6.3 of the Lease provides that Sears must offer MOAC the right to purchase the Lease at the same price and on the same terms offered to Sears by any prospective tenant. Additionally, Article 6.3 also provides that, if no unrelated arms-length offer were made for the space, Sears must offer MOAC the right to purchase the Lease for the fair market value of the leasehold estate. Transform had to agree to abide by that provision in the Lease as a condition of the assignment; and Judge Drain incorporated that promise into his order. jr. at 132:13-17; *see A&A Order* at ¶¶ 16-17, APX1962-63). MOAC is as protected against incursion by a tenant deemed "undesirable" as it was prior to Sears' bankruptcy – thereby preserving the "tenant mix" that was in place prior to the bankruptcy.

Thus, in terms of "tenant mix," the Bankruptcy Court's order leaves MOAC in exactly the position that it would have occupied had Sears assigned the Lease outside of a bankruptcy, as was its absolute right. Under Judge Drain's order, MOAC is getting the full benefit of what it bargained for back in 1991 insofar as "tenant mix" is concerned. The Bankruptcy Code cannot be read to place the Landlord in a better position than it would have occupied absent the bankruptcy. *See In re Great Atl. & Pac. Tea Co., Inc.*, 472 B.R. 666, 675 (S.D.N.Y. 2012) ("Section 365 . . . does not give a landlord the right to improve its position upon the bankruptcy of a tenant. The statute affords no relief to a landlord simply because

it might seek to escape the bargain it made.") (quoting *In re Rock 49th Rest. Corp.*, No. 09-14557, 2010 WL 1418863, at *7 (Bankr. S.D.N.Y. Apr. 7, 2010)).

In support of its argument that the words "will not disrupt any tenant mix" in § 365(b)(3)(D) must be read to guarantee the preservation of the very businesses, or at least the same type and number of businesses, that were resident in the mall just before Sears declared bankruptcy, MOAC relies principally on *Matter of Federated Department Stores, Inc.*, 135 B.R. 941 (Bankr. S.D. Ohio, 1991). But Federated is not particularly helpful to its cause.

For one thing, the facts of *Federated* were radically different from the facts of this case.

In *Federated*, the debtors sought to assign the lease for a three-story Jordan Marsh store to Mervyn's. The store was located in a shopping mall in Miami, Florida called Dadeland, which was owned and managed by the Equitable Life Assurance Society of the United States ("Equitable"). Whereas Jordan Marsh was a full-line, fashion-oriented retail department store that offered moderately priced to expensive merchandise – similar to Macy's or Nordstrom – Mervyn's sells casual wear for cost-conscious consumers. *See Federated*, 135 B.R. at 941.

As part of a first bankruptcy plan hammered out by the bankruptcy court, Federated assumed a modified lease for the Jordan Marsh store at Dadeland, in exchange for Equitable's payment of $700,000. That deal was designed to give Equitable "security to plan for the future." *Id.* at 941–42, 945.

The original plan did not come to fruition, for reasons not explained in the opinion. One year later, the debtor closed the Jordan Marsh store and proposed a new plan, pursuant to which Mervyn's would take over the Jordan Marsh space at Dadeland.

Equitable objected to the assignment of the Jordan Marsh space to Mervyn's, on the ground that placing the store next to Saks Fifth Avenue – a decidedly upscale store – would disrupt the "tenant mix or balance" at Dadeland (specifically the "balance," which the court defined as the placement of stores relative to one another).[19] *See id*. at 943. After a hearing at which a witness from Saks testified that it would vacate the premises rather than allow the store next door to become a Mervyn's – something Saks had done at two prior malls, and apparently something that Saks had a right to do under its lease – the bankruptcy court concluded that the proposed assignment would violate § 365(b)(3)(D), because it would alter the "tenant balance" at Dadeland.

In so holding, however, the bankruptcy court focused on the fact that the new bankruptcy plan "took [] away" the security that Equitable had purchased during the first round of negotiations in the bankruptcy court. *See* id. at 941–42, 945. The bankruptcy judge concluded that Equitable had a "bargained for" right to control how the former Jordan Marsh space was to be used once it paid the $700,000 under the original, abandoned plan of reorganization:

> Must we not ignore the reasonable expectations of security and control over the character of future development that Equitable once bargained

[19] Equitable was willing to lease space at Dadeland to Mervyn's – just not the three-story space next door to Saks Fifth Avenue.

> for with the Debtor under court supervision. The concept of the "benefit of a bargain" is not a static concept constrained by the four corners of a lease—especially in a case such as this involving continuous, fluid negotiations. This bankruptcy proceeding first provided Equitable with security to plan for the future, then took it away. Based on the reasonable expectations of the parties under all the circumstances, it is fair and just to give a measure of that lost security back to Equitable.

Id. at 945.

So contrary to MOAC's argument, the *Federated* court did not simply rely on some literal reading of the phrase "tenant mix" as used in § 365(b)(3)(D) in order to reach its result. In fact, and significantly, the *Federated* court cited In re Ames (*Thatcher Woods*) with approval for the proposition that a court "may not imply non-bargained for terms in leases." *Federated*, *supra*, 135 B.R. at 945. The *Federated* court reached its conclusion that the assignment would violate § 365(b)(3)(D) in order to give Equitable the benefit of its bargain (a bargain not contained in the original lease, but reached in the bankruptcy court).[20]

This court has found only one case has cited *Federated* in the 19-plus years since it was decided – *In re*

[20] There is no suggestion in *Federated* that Equitable had the right, under Jordan Marsh's original lease, to control who could occupy the Jordan Marsh space if Jordan Marsh vacated that space. There is mention of some unspecified modification of the lease in exchange for the $700,000 payment; it may be that this lease modification gave Equitable explicit control over the identity of any subsequent assignee – a right that MOAC conspicuously lacks here.

Montgomery Ward, LLC, 307 B.R. 782, 787 (D. Del. 2004).[21] *Montgomery Ward* cited to *Federated* – in an alternative holding – for the proposition that "consideration of whether an assignment disrupts the balance of the tenant mix necessarily requires the court to determine the balance of the rights between the parties." 307 B.R. at 787. In other words, the Delaware court, relying on *Federated*, held that the phrase "tenant mix" could not be parsed without looking to the parties' underlying agreement, which is, of course, where the "balance of the rights between the parties" is laid out.

And that is precisely what Judge Drain did when applying *In re Ames* to the tenant mix question. He balanced the rights between the parties, as set forth in the Lease and the REA. He applied those rights rigorously to decide whether the requirement of "tenant mix preservation" at Mall of America had been met. As MOAC had and has only the most limited right to control who occupies the Sears premises under the Lease – and as Transform is now bound by all of the relevant restrictions in Article XXII of the REA, as well as MOAC's right of first refusal Article 6.3 of the Lease – Judge Drain correctly concluded that the proposed assignment of the Lease to Transform does not violate § 365(b)(3)(D).

It is not really necessary to address step two of MOAC's argument, which is that Judge Drain was not capable of deciding whether the proposed assignment would alter the mall's tenant mix since he had no idea

[21] Given the unusual facts of *Federated*, this is hardly surprising.

who or what the actual new tenant(s) might be. However, MOAC fails to convince on this prong of its argument as well.

MOAC relies on *In re Sun TV & Appliances, Inc.*, 234 B.R. 356, 359 (Bankr. D. Del. 1999), where the court denied a motion for approval of the assumption and assignment of a lease in a shopping center. At the auction of two of the debtor's leases, the winning bid was contingent on a finding that one of the leases was not subject to § 365(b)(3), because the winning bidder sought unbridled designation rights. In other words, the debtor would assign its rights to assign the lease to the bidder, under which the bidder would shop the lease to third parties and then direct the debtor to assign to lease to the bidder's chosen assignee. *See* id.

The lease in that case, unlike Sears' Lease in this case, contained significant restrictive use conditions: the store had to be an electronics store for 15 years and thereafter it could not be a store that competed directly with certain other tenants in the mall (including Lowe's, which foreclosed the premises' use as a department store, bookstore, jewelry store, or music/multimedia store). *See id.* at 366, 370. The debtor urged the court to strike those conditions as an unlawful restraint on assignment.

This the court declined to do. While the court found that § 365(b)(3) permitted "insubstantial deviations"[22]

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[22] The *In re Sun* court relied on an outdated version § 365(b)(3) that required only "that assumption or assignment of such lease will not disrupt substantially any tenant mix or balance in such shopping center." Congress has since removed "substantially" from the statute and reiterated that use provisions must be "strictly adhered to."

from the lease provisions, it denied the debtor's motion, reasoning as follows:

> Even if we were inclined to permit an insubstantial deviation from the provision, we would not make that decision here. At this time, neither [the assignee] nor the Debtor are able to tell the Landlord or this Court what use will ultimately be made of the Demised Premises. By the mere nature of the Motion, it is clear that [the assignee] does not intend to use the Premises itself. Absent knowledge of the ultimate intended use, we cannot determine that such use (if it does vary from the use provision of the Lease) would have an insubstantial impact on the Landlord and its other tenants.

Id.

As should be obvious, *In re Sun* has very little precedential value here; its facts turn the facts of this case on their head. In *In re Sun*, the lease restricted the use of the demised premises; in our case, by contrast, Sears has a virtually unrestricted right to assign the Lease to any type of legal and non-nuisance user – miniature golf course, spa, travel agency, comedy club, children's playground, or pharmacy – or to go dark and simply leave the premises vacant. Additionally, the assignee in *In re Sun* sought to get out from under these use restrictions, whereas Transform has agreed to abide by the use terms in the Lease.

Moreover, *In re Sun* did not hold, as MOAC argues, that a bankruptcy court may not approve a lease assignment in bankruptcy under § 365(b)(3)(D) before a new tenant has been identified. The issue in *In re Sun* was whether the court could ascertain if a proposed tenancy qualified as an "insubstantial deviation" from the explicit

use restrictions in the debtor's lease before a proposed tenant had been identified. The issue of "insubstantial deviation" as a matter of statute is not before this court, because the statute has since been amended. Furthermore, in this case, the Sears Lease authorizes quite "substantial deviations" from the original "tenant mix" in the Sears space from and after 2007 – and authorizes them through 2091.

What *is* illuminating about *In re Sun* for our purposes is that the bankruptcy court in Delaware did not read the "literal" (as defined by MOAC) language of § 365(b)(3)(D) as precluding a use other than one of the uses that was specified as permissible in the lease. So *In re Sun* also does not stand for the proposition that § 365(b)(3)(D) embodies some literal meaning of "tenant mix" that is divorced from the provisions of the lease sought to be assigned.

MOAC also cites to yet another *In re Ames* case, *In re Ames Department Stores, Inc.*, 348 B.R. 91, 93-94 (Bankr. S.D.N.Y. 2006) [hereinafter, "*Parkway*"], in which Ames sought to assign its lease in the Ames/Parkway Building. The building housed only two tenants: an Ames department store and a medical facility. Bankruptcy Judge Gerber concluded that this two-tenant building did not qualify as a "shopping center," so § 365(b)(3)(D) was inapplicable to the assignment. Judge Gerber did note, in dicta, that he was "initially concerned because [the proposed assignee] had not definitively stated what kind of business would be taking over the Ames store, that the proposed assignment . . . would disrupt the tenant mix or balance in the Ames/Parkway Building." *Id*. at 98. However, his concern dissipated because the assignee did in fact identify the sublessee

prior to Judge Gerber's ruling, and the sublessee – a furniture store – would not disrupt any tenant mix or balance. But ultimately, this case is meaningless as precedent here because the "tenant mix" statute was inapplicable to a non-shopping center tenant. The fact that the assignee identified a proposed tenant was interesting, but irrelevant to the ultimate determination, which was that §365(b)(3)(D) did not apply in the circumstances of the case. *Id*. at 97.

In our case, Transform has promised that it would abide by the provisions of Articles IX and XXII of the REA, which forbid the use of the Sears Building for things like a warehouse, a veterinary hospital, or a mortuary. The Bankruptcy Court incorporated that restriction into the order appealed from, so Transform is indeed bound to the Lease. Under the Bankruptcy Court's order, no tenant can be introduced into the space by Transform if Sears would have been precluded from leasing to that tenant. Having imposed that requirement, Judge Drain was free to conclude that MOAC had "adequate assurance" that the allowable "tenant mix" at Mall of America would not be disturbed by the assignment of the Lease to Transform.

Put more generally, where there are few or no use restrictions on a demised premises, and the assignee agrees to be bound by whatever restrictions do exist, as Transform has, a court may deem the adequate assurances under § 365(b)(3)(D) to have been given – even if the no ultimate occupant for the space has been identified.

<u>365(b)(3)(A)</u>

The Bankruptcy Court also concluded that Transform had given MOAC "adequate assurance of future

performance of [the] lease" as required by § 365(b)(3)(A) of the Code. Subsection (A) provides that "adequate assurance of future performance" of a shopping center lease requires proof that "the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease." 11 U.S.C. § 365(b)(3)(A). Congress adopted this provision to "insure that the assignee itself will not soon go into bankruptcy." H.R. Rep. 98-882 (1984) (Conf. Rep.) as reprinted in 1984 U.S.C.C.A.N. 576, 600.

It would, of course, be impossible to locate a tenant of any sort that boasted the precise "financial condition and operating performance" of Sears Roebuck back in 1991. At that point, Sears had been in business for nearly 100 years. It virtually created "big box" retailing, and its massive catalogues were the progenitor of Amazon's internet omni-market. It has few equals in the history of American business.

But by using the word "similar" rather than "identical," Congress indicated that identity of financial condition and operating performance is not required. The few courts that have considered what the statutory phrase "similar to the financial condition and operating performance of the debtor" means have concluded that it requires at the very least that there be proportionally comparable financial health between the assignee and/or its guarantors and the debtor as of the lease's inception. Alternatively, if the assignee is a newly-formed entity, like Transform, courts have looked to whether the strength of business experience of the assignee's owner and operator is comparable to that of the debtor at the time the

lease was signed. *See*, e.g., *In re Ames Dep't Stores, Inc.*, 2003 WL 749172, at *2 (S.D.N.Y. Mar. 5, 2003) (comparing Form 10-Ks and per-store sales and profit); *Ramco-Gershenson Props., L.P. v. Serv. Merch. Co.*, 293 B.R. 169, 177-78 (M.D. Tenn. 2003) (considering cashflow analysis for store; guaranty from assignee's parent company; and financial statements for the debtors, the proposed subtenant, and assignee's parent companies where assignee was a new entity with no operating history or financial record); *In re Casual Male Corp.*, 120 B.R. 256, 265 (Bankr. D. Mass. 1990) (comparing ratios of current assets to current liabilities and noting owner and CEO's business experience where assignee was recently incorporated).

Unfortunately for the Debtors, Transform did not manage to demonstrate that its financial condition and operating performance were "similar" to those of Sears in 1991 – even under the rather creative "proportionality" standard used to measure similarity by the courts in *In re Ames*, 2003 WL 749172, at *2, and *In re Casual Male Corp.*, 120 B.R. at 265. On the contrary: After declining to credit Transform's "draft" balance sheet (which showed equity in excess of $250 million), the learned bankruptcy judge found that the financial condition and operating performance of Transform was *not similar* to the financial condition and operating performance of Sears in 1991, under any standard of similarity – including proportional ratios, which the bankruptcy judge expressly mentioned. (*See* Tr. 129:16-25, 130:1-2, APX2124-25).

As far as MOAC is concerned, that is the end of the story. The statutory language requires similarity of financial condition and operating performance; the Bankruptcy Court found no such similarity; game over.

However, the learned bankruptcy judge rejected MOAC's argument. He decided that Transform's failure to demonstrate financial and operating "similarity" to Sears was of no moment, because it was "highly likely" that Transform satisfied an entirely different standard – one based, not on financial similarity, but on Transform's putative net worth or shareholder equity.

As the reader will recall, the Lease/REA provides that Sears could relieve itself of its obligations under the Lease as long as it assigned its Lease to an entity with a net worth or shareholder equity of $50 million or more. The bankruptcy judge concluded that if this level of assurance about an assignee's financial stability was sufficient assurance for MOAC outside the bankruptcy context, then it provided "adequate assurance of future performance" under the Bankruptcy Code – even though it bore no resemblance to the standard set out in subsection (A). The Bankruptcy Court said that Congress had not imposed any "independent requirements" when passing the special shopping center protections under the Code (Tr. 125:10-17, APX2120), and ruled that § 365(b)(3)(A), like § 365(b)(3)(D), had to be interpreted in light of the terms of the lease. As MOAC had agreed to relieve Sears of liability under the Lease outside of bankruptcy as long as its proposed assignee was worth $50 million or more, Judge Drain held that § 365(b)(3)(A) entitled it to no greater level of assurance in the context of a bankruptcy.

As the Bankruptcy Court recognized, this was a holding of first impression. No court has ever applied *In re Ames* to the financial assurance requirements in § 365(b)(3)(A). As he himself noted, the cases on which Judge Drain relied as precedential support for *In re*

Ames's logic[23] are all cases discussing whether a proposed assignment satisfied the "tenant mix" requirement of § 365(b)(3)(D) in light of use clauses (or lack of use clauses) in the underlying lease. The few cases that have analyzed whether an assignment comports with § 365(b)(3)(A) – there are apparently just three of them – do not rely on *In re Ames*. Neither do they look to the terms of the lease to see whether the assignee has given "adequate assurance of future performance of [the] lease" under that subsection of § 365(b)(3). Instead, the courts in those cases analyzed balance sheets, Form 10-Ks and other financial records. *See In re Ames*, 2003 WL 749172, at *2 (Form 10-Ks); *Ramco-Gershenson*, 293 B.R. at 177–78 (cash flow analysis, Form 10-Ks, and annual reports); and *In re Casual Male Corp.*, 120 B.R. at 265 (balance sheets and Form 10-Qs). Where, as here, the proposed assignment is to a start-up with no operating history of its own, they consider whether it is appropriate to compare the financial record and operating performance of the people who are running the new enterprise with the financial condition and operating performance of the debtor. *See, e.g.*, *Ramco-Gershenson*, 293 B.R. at 177-78 (assessing the financial strength of the newly formed assignee's guarantors); *In re Casual Male Corp.*, 120 B.R. at 265 (assessing the business experience of the recently incorporated assignee's sole owner and CEO). All three of those cases in some manner compare

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[23] *In re Great Atl. & Pac. Tea Co., Inc.*, 472 B.R. 666, 678–79 (S.D.N.Y. 2012); *Ramco-Gershenson Props., L.P. v. Serv. Merch. Co.*, 293 B.R. 169 (M.D. Tenn. 2003); *In re Toys "R" Us Prop. Co. I, LLC*, No. 18-31429, 2019 WL 548643, at *6 (Bankr. E.D. Va. Feb. 11, 2019) (also discussing § 365(b)(3)(C) under Fourth Circuit precedent that relies on *In re Ames* (*Westmont*)); *In re Ames* (*Thatcher Woods*), 127 B.R. 744 (Bankr. S.D.N.Y. 1991); *In re TSW Stores of Nanuet, Inc.*, 34 B.R. 299, 308 (Bankr. S.D.N.Y. 1983).

the financial strength of the assignee or its guarantors with the financial strength of the debtor in the year the lease was signed.

Nonetheless, the learned bankruptcy judge concluded, without much discussion, that *In re Ames* (*Thatcher Woods*) was controlling precedent "for purposes of this section [(A)], as well as the other three subsections of 365(b)(3) that each requires reference back to the party's actual agreement, and that Congress did not create independent requirements that would not go to actual assurance of future performance . . . ." (Tr. at 125:10-14, APX2120).

I am not persuaded by the learned bankruptcy judge's reasoning. For one thing, I disagree with his premise. Congress did indeed create "independent requirements" for actual assurance of future performance when it passed § 365(b)(3) – four separate independent requirements, over and above those set out in § 365(f) – each of which needs to be met before a bankruptcy court can approve the assignment of a shopping center lease. *In re Ames* does not authorize a bankruptcy court to dispense with any congressionally-mandated "independent requirement" for adequate assurance of performance. Rather, it comes up with a logical way to interpret one of those requirements (subsection (D)'s non-disruption of tenant mix) because Congress left that term undefined. Courts do that all the time; it is our proper role.

That is precisely what the learned bankruptcy judge did in this case when discussing subsection (D). He did not discard the statutory "tenant mix" standard when he followed *In re Ames* in that context; he, like many courts before him, used the Lease to give meaning to that undefined phrase. And like many courts before him, he

concluded that assigning the Lease to an entity that agreed to abide by the few use restrictions imposed on Sears, while preserving the limited right MOAC had to control the use of the premises (by matching a proposed lessee's offer or buying Sears out of the Lease), would not disturb the "tenant mix or balance" at Mall of America. As Sears' ability to cease using the space for a department store, whether by assigning the Lease (which it could do without MOAC's consent) or by going dark, had been part of the "tenant mix" at Mall of America for over a decade, I see no reason to disturb that eminently logical conclusion.

But when it turned to subsection (A), the Bankruptcy Court did not simply come up with a way to interpret the phrase "similar . . . financial condition and operating performance" as between the Debtors and the assignee.[24] Instead, the court adopted an alternative standard for determining adequacy of assurance after concluding that the statutory standard was not met. Put otherwise, the Bankruptcy Court, stretching *In re Ames* past its breaking point, read § 365(b)(3)(A) out of the statute, effectively rewriting it and overriding the express wishes of the legislature. And as the Supreme Court reminded us only this week, legislating is not our proper role. *See Rodriguez v. FDIC*, 589 U.S. ___, No. 18-1269, slip op. at 4, 6 (Feb. 25, 2020).

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[24] In cases like *In re Ames*, 2003 WL 749172, at *2, and *In re Service Merchandise Co., Inc.*, 297 B.R. 675, 682–86 (Bankr. M.D. Tenn. 2002), aff'd sub nom. Ramco-Gershenson, 293 B.R. 169 (M.D. Tenn. 2003), that is exactly what the courts did: figured out a reason why the financial data with which they were presented demonstrated financial similarity between the assignee and the debtor at the time the lease was signed.

Subsection (A), unlike subsection (D), does not use a phrase that requires resort to the lease to give it definition and context. In adopting subsection (A), Congress wanted to assure the landlord that it would not have to endure a second bankruptcy any time soon. H.R. Rep. 98-882 (1984) (Conf. Rep.) *as reprinted in* 1984 U.S.C.C.A.N. 576, 600; *see also*, *Ramco-Gershenson*, 293 B.R. at 177 n.5 (quoting the goal). To accomplish that goal, Congress insisted on something more than the general and undefined "adequate assurance of future performance" ordinarily required when a lease is assigned in bankruptcy (i.e., the standard found in § 365(f)(2)(B)). Instead it devised a more specific standard. Congress concluded that if a shopping center landlord were dragged into bankruptcy court, it should not have a new tenant imposed on it unless the proposed assignee "looked," in terms of its financial condition and operating performance, like the party that was vacating the premises. Moreover, Congress selected a particular moment in time for making the comparison between the wherewithal of debtor and assignee: the assignee today versus the debtor as it was at the commencement of the lease, when its financial condition and operating performance were such as to make it an attractive tenant to the landlord.[25] Congress in its wisdom decided that only an as-

[25] The landlord certainly does not want to replace Sears with a tenant similar Sears as it has been in recent years According to MOAC, Sears had become a liability to the mall in the years immediately preceding its bankruptcy: "In the past several years, Sears has become a liability to the Mall, has ceased being able to drive traffic, has ceased being able to operate in a high manner, and has ceased in its ability to contribute to the Mall or add positively to its brand and tenant mix or image throughout the country and the world." (Ghermezian Decl. ¶ 10, APX 1840).

signee with a financial condition and operating performance that resembled the debtor's *ab initio* would provide a shopping center landlord with "adequate assurance" that the bargain originally struck would be performed by the lease's assignee. Congress may have been wrong to think so, but that was for Congress to decide.

In this case, we know that the congressionally-mandated requirement was not satisfied. The Bankruptcy Court held that Transform, the proposed assignee, failed to prove financial and operating similarity between Sears in 1991 and Transform today, under any standard – including the standard of proportionality that was developed in cases like *In re Ames*, 2003 WL 749172, at *2 and *Ramco-Gershenson*, 293 B.R. at 177–78. Transform's financial condition and operating performance were expressly found not to be "similar" to that of Sears in 1991.

Nonetheless, the Bankruptcy Court determined that the provision allowing Sears to escape liability under the Lease if it assigned to an entity with equity of $50 million gave MOAC protection that was effectively equivalent to what Congress had mandated. But that is simply not the case. Article XXV(D)(4)(a) of the REA, the provision that the Bankruptcy Court substituted for § 365(b)(3)(A), addresses only what it would take to absolve Sears of liability for an assignment outside of bankruptcy. In bankruptcy, which is where we are, Sears will be absolved of liability under the Lease whether the Lease is assigned to an entity with $50 million in net worth or not. Nothing in the Lease or the REA suggests that the provision cited by the bankruptcy judge would or should apply in the context of a bankruptcy proceeding.

There is good reason why this is so. As Judge Drain found, having $50 million in equity is not the same thing as having a financial condition and operating performance similar to that of Sears in 1991. It might be enough to give adequate assurance of future performance under the lesser standard of § 365(f)(2)(B) that applies outside the shopping center context; indeed, I would argue that that is precisely where the $50 million in equity provision of the REA would come into play were Sears located anywhere but a mall. But it does not satisfy the more stringent requirements of § 365(b)(3)(A). That differs substantially from how a "use clause" or restriction on assignment addresses the landlord's ability to control the look and feel of its property – or why the absence of such clauses (as is the case here) might preclude the landlord's ability to control the reletting of a debtor's premises in bankruptcy under the "tenant mix" standard articulated in *In re Ames*.[26]

In relying on *Ames* to hold that the $50 million in equity standard could be substituted for the "similar . . . financial condition and operating performance" standard of subsection (A) went far beyond what any court identified above as "controlling precedent" has ever done. With all respect to the learned bankruptcy judge, I do not see how his conclusion can possibly be correct. *In re Ames* does not offer a way around the congressionally-mandated standard for providing adequate financial assurance of future lease performance.

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[26] The other condition in the "get out from under" clause in the REA – that the assignee sign an undertaking agreeing to be bound by all the terms of the REA – was satisfied by Transform and meets yet another of the requirements of § 365(b)(3), this one found in subsection (C) of that statute. That section is not implicated by this appeal.

Like Judge Drain, I freely admit that I might be wrong. This is a difficult question, and making a decision has not been helped by knowing that Congress could not possibly have had an extraordinary lease like the Sears Lease in mind when it passed § 365(b)(3). I admit to having gone back and forth several times.

But if I am wrong, and the learned bankruptcy judge was right in concluding that the $50 million "get out from under" clause in the REA satisfies the mandate of § 365(b)(3)(A), then the order of the Bankruptcy Court would still need to be vacated, and the case must be remanded to the Bankruptcy Court for further findings.

Judge Drain found that it was "highly likely" that Transform had in excess of $50 million in equity. But "highly likely" doesn't cut it. Either Transform meets the standard in the Lease/REA or it does not. There has to be a finding, one way or the other, and that finding has to be supported by substantial evidence.

Unfortunately, the bankruptcy judge does not cite in his opinion to any evidence that supports his conclusion. His "finding" rests on his expressed belief that Transform would not have been able to obtain financing if it did not have at least $50 million in equity. The learned bankruptcy judge has seen far more of these situations than I have, and I do not question his expertise. But in an era when venture capitalists throw untold amounts of money at ideas that are not backed by anything like $50 million (or even $1 million) in equity, I perceive no justification for this wholly conclusory supposition. Had Judge Drain pointed to anything in Transform's financials that proved this point, it would be another matter entirely – but he did not.

Conclusion

For the reasons stated, the order of the Bankruptcy Court (*In re Sears Holdings Corporation, et al.*, No. 18-23538 (RDD) (Bankr. S.D.N.Y. Sept. 5, 2019), Dkt. No. 5074) is VACATED to the extent it approved the assumption and assignment of the Sears Lease (the "Designated Lease") to Transform and REMANDED to the Bankruptcy Court for fu1ther proceedings not inconsistent with this opinion.[27]

This constitutes the decision and order of the court. It is a written opinion. The Clerk of Court is respectfully directed to close this matter on the court's docket.

Dated: February: 27, 2020
New York, New York

/s/ Colleen McMahon
Chief Judge

BY ECF TO ALL PARTIES
Chief Judge

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[27] The order appealed from grants additional relief, not all of which appears to be related to the now-overturned assignment, but which may be - hence the remand.

APPENDIX D

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No. 18-23538 (RDD)

(Jointly Administered)

In re: SEARS HOLDINGS CORPORATION, et al., *Debtors.*[*]

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[*] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None);

ORDER (I) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF LEASE WITH MOAC MALL HOLDINGS LLC AND (II) GRANTING RELATED RELIEF

Upon the motion, dated November 1, 2018 (Docket No. 429) (the "Sale Motion"),[†] filed by the above-captioned debtors and debtors in possession (the "Debtors") seeking, among other things, entry of an order, pursuant to sections 105, 363, and 365 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*. (the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9007, and 9008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 6004-1, 6005-1, and 6006-1 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules"), authorizing and approving the sale of the Acquired Assets and the assumption and assignment of certain executory contracts and unexpired leases of the Debtors in connection therewith; and the Court having entered the prior order dated November 19, 2018 (Docket No. 816) including the schedule as revised by the *Global Bidding Procedures Process Letter* (together, the "Bidding Procedures Order") filed on November 21, 2018 (Docket No. 862), which approved competitive bidding procedures for the Acquired Assets and granted certain related relief; and Transform Holdco LLC (the "Buyer") having submitted the highest

BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

[†] Capitalized terms used but not defined herein have the meanings given to them in the Asset Purchase Agreement (as defined below) or, if not defined in the Asset Purchase Agreement, the meanings given to them in the Sale Order (as defined below).

or otherwise best bid for the Acquired Assets, as reflected in the Asset Purchase Agreement (as defined below); and the Court having conducted a hearing on the Sale Motion, which commenced on February 4, 2019, at which time all interested parties were offered an opportunity to be heard with respect to the Sale Motion; and the Court having entered the *Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith, and (IV) Granting Related Relief* (the "Sale Order") on February 8, 2019 (Docket No. 2507); and the Court having entered the *Order (I) Authorizing Assumption and Assignment of Certain Executory Contracts and Leases and (II) Granting Related Relief* (the "Assumption and Assignment Order") on April 2, 2019 (Docket No. 3008), pursuant to which the Debtors may assume and assign certain executory contracts or unexpired leases to the Buyer or Buyer's Assignee in accordance with the Asset Purchase Agreement, dated as of January 17, 2019, by and among the Buyer and the Sellers party thereto (including each Debtor and certain other subsidiaries of Sears Holdings Corporation, the "Sellers") (as may be amended, restated, amended and restated from time to time, including pursuant to that certain Amendment No. 1 to the Asset Purchase Agreement, dated as of January 17, 2019 by and among the Buyer and the Sellers, the "Asset Purchase Agreement"); and the Buyer having filed the *Notice of Assumption and Assignment of Additional Designatable Leases* (the "Designated Lease Notice") (Docket No. 3298), pursuant to which the Debtors seek

to assume and assign the lease for store number 1722 located at 2000 N E Court, Bloomington, Minnesota (the "Designated Lease") in accordance with the Assumption and Assignment Order; and the counterparty to the Designated Lease ("MOAC") having filed *MOAC Mall Holdings LLC's Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction* on January 30, 2019 (Docket No. 2199) and *MOAC Mall Holdings LLC's Second Supplemental and Amended: (A) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtor's Stated Cure Amount* on May 2, 2019 (Docket No. 3501); and the Buyer having filed *Transform Holdco LLC's Omnibus Reply in Support of Assumption and Assignment of Designated Leases* on May 6, 2019 (Docket No. 3654); and the counterparty to the Designated Lease having filed *MOAC Mall Holdings LLC's Third Supplemental and Amended Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases* on May 17, 2019 (Docket No. 3926) and *MOAC Mall Holdings LLC's Fourth Supplemental (I) Objections and Reply to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtor's Stated Cure Amount* on July 8, 2019 (Docket No. 4450); and the Buyer having filed *Transform Holdco LLC's Reply to MOAC Mall Holdings LLC's (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to*

Debtor's Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases on July 8, 2019 (Docket No. 4454) and *Transform Holdco LLC's Supplemental Reply and Cross-Motion to: (A) Strike MOAC Mall Holdings LLC's Fourth Supplemental (I) Objections and Reply to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtor's Stated Cure Amount; and (B) Permit Late Filed Responses to Requests for Admission* ("Motion to Strike") on August 16, 2019 (Docket No. 4867); and the counterparty to the Designated Lease having filed *MOAC Mall Holdings LLC's Pre-Evidentiary Hearing Brief Regarding the Proposed Assumption and Assignment of the MOAC Lease* on August 19, 2019 (Docket No. 4889); and the Buyer having filed *Transform Holdco LLC's Amended Supplemental Reply and Cross-Motion to Strike MOAC Mall Holdings LLC's Pre-Evidentiary Hearing Brief Regarding the Proposed Assumption and Assignment of the MOAC Lease* ("Amended Motion to Strike") on August 20, 2019 (Docket No. 4903); and the counterparty to the Designated Lease having filed *MOAC Mall Holdings LLC's Reply Objecting to Transform Holdco LLC's Motion to (A) Strike MOAC's July 8 Supplemental Objection and (B) Permit Late Responses to Requests for Admissions* on August 20, 2019 (Docket No. 4915); and the Court having entered the *Stipulation and Order by and Among Sellers, Buyer, and Landlord MOAC Mall Holding LLC (I) Extending Time Under 11 U.S.C. § 365(d)(4) for Lease of Nonresidential Real Property* and *(II) Setting Briefing Schedule* on May 13, 2019 (Docket No. 3823), *Stipulation and Order by and Among Sellers, Buyer, and MOAC Mall Holdings LLC (I) Extending*

Time Under 11 U.S.C. § 365(d)(4) for Lease of Nonresidential Real Property on June 25, 2019 (Docket No. 4354), and *Stipulation and Order by and Among Sellers, Buyer, and MOAC Mall Holdings LLC (I) Extending Time Under 11 U.S.C. § 365(d)(4) for Lease of Nonresidential Real Property* (the "Third Extension Stipulation") on August 1, 2019 (Docket No. 4687); and the Court having conducted an evidentiary hearing on the assumption and assignment of the Designated Lease on August 23, 2019 (the "Assumption and Assignment Hearing"), at which time all interested parties were offered an opportunity to be heard with respect to the Assumption and Assignment Notices and their objections, replies, and pleadings thereto; and due notice of the Sale Motion, Asset Purchase Agreement, Sale Order, Assumption and Assignment Order, Designated Lease Notice, and the Assumption and Assignment Hearing having been provided; and, except as otherwise provided for herein, all objections with respect to the Designated Lease hereto having been withdrawn, resolved, adjourned, or overruled for the reasons stated by the Court in its bench rulings on the record of the Assumption and Assignment Hearing; and upon the letter, and representations therein on behalf of MOAC, dated September 4, 2019 submitted to the Court by Thomas J. Flynn, Esq. and David W. Dykhouse, Esq, counsel to MOAC, commenting on the proposed form of this Order submitted by counsel for the Buyer and it appearing that the relief granted herein is in the best interests of the Debtors, their estates and creditors, and all parties in interest in these chapter 11 cases; and upon the record of the Assumption and Assignment Hearing and these chapter 11 cases; and after due deliberation; and good cause appearing therefor, it is hereby

FOUND AND DETERMINED THAT:

A. Bankruptcy Rule 7052. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such. The Court's findings shall also include any oral findings of fact and conclusions of law made by the Court during or at the conclusion of the Assumption and Assignment Hearing. This Order shall constitute the findings of fact and conclusions of law and shall take immediate effect upon execution hereof.

B. Jurisdiction and Venue. This Court has jurisdiction over the Sale Motion, the Sale Transaction, and the property of the Debtors' estates, including the Acquired Assets, pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b), and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of these chapter 11 cases and the Sale Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

C. Sound Business Purpose. The Debtors have demonstrated a good, sufficient, and sound business purpose and justification for the immediate assumption and assignment of the Designated Lease consistent with the Sale Order, the Assumption and Assignment Order and this Order. The Buyer shall not be subject to the stay provided by Bankruptcy Rules 6004(h) and 6006(d).

D. Vested Title. The Designated Lease constitutes property of the Debtors' estates, and title thereto

is vested in the Debtors' estates within the meaning of 541(a) of the Bankruptcy Code.

E. **Notice and Opportunity to Object**. Actual written notice of, and a fair and reasonable opportunity to object to and to be heard with respect to, the Designated Lease has been given, as required by the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Asset Purchase Agreement, and the Amended Case Management Order. Pursuant to the Sale Order, and Assumption and Assignment Order, the Designated Lease Notice was properly served and the counterparty thereto was afforded timely, good, appropriate and sufficient notice, and an opportunity to object in accordance with the Sale Order and no further notice need be given with respect to the assumption and assignment of the Designated Lease.

F. **Cure Notice**. The Debtors have served, prior to the Assumption and Assignment Hearing, the *Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection With Global Sale Transaction* (the "Cure Notice") filed on January 23, 2019 (Docket No. 1774) on the counterparty to the Designated Lease, which provided notice of the Debtors' intent to assume and assign such Designated Lease and notice of the related proposed Cure Costs upon the counterparty to such Designated Lease. The service of the Cure Notice was timely, good, sufficient, and appropriate under the circumstances, and no further notice need be given with respect to the Cure Costs for the assumption and assignment of the Designated Lease. *See Affidavit of Service* (Docket No. 2162). All counterparties to the Designated Lease have had a reasonable opportunity to object both to the Cure Costs listed on the Cure Notice

and the Designated Lease Notice and, to the assumption and assignment of the Designated Lease to the Buyer or an Assignee, if applicable, in accordance with the Bidding Procedures Order and the Assumption and Assignment Order.

G. **Assignment or Transfer Agreement**. Any applicable assignment agreement or any other agreement or instrument of assignment or transfer (an "Assignment or Transfer Agreement") with respect to the Designated Lease was negotiated and proposed in good faith, from arms'-length bargaining positions, and without collusion. Neither the Debtors nor the Buyer have engaged in any conduct that would cause or permit the assumption, assignment, or transfer to the Buyer, pursuant to the Assignment or Transfer Agreement and this Order, to be avoided under section 363(n) of the Bankruptcy Code.

H. **Assumption and Assignment of Designated Lease**. The assumption and assignment of the Designated Lease is integral to the Asset Purchase Agreement, is in the best interests of the Debtors and their estates, and represents the valid and reasonable exercise of the Debtors' sound business judgment.

I. **Waiver of Bankruptcy Rules 6004(h) and 6006(d)**. The assumption and assignment of the Designated Lease must be approved and consummated promptly in order to preserve the value of the Acquired Assets particularly given the August 31, 2019 deadline pursuant to the Third Extension Stipulation. The Debtors have demonstrated compelling circumstances and a good, sufficient, and sound business purpose and justification for the immediate approval of the assumption and assignment of the Designated Lease in connection with

the Sale Transaction as contemplated by the Asset Purchase Agreement and approved pursuant to the Sale Order. Accordingly, there is cause to waive the stay contemplated by Bankruptcy Rules 6004(h) and 6006(d) with regard to this Order; provided, however, that any appeal of this Order timely filed within 14 days after the entry of this Order shall not be rendered moot by such waiver.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. **Motion is Granted and Objections Overruled**. The Sale Motion and the relief requested therein to the extent not previously granted by this Court pursuant to the Bidding Procedures Order and/or the Assumption and Assignment Order is GRANTED and APPROVED to the extent set forth herein and all Objections to the Sale Motion are hereby OVERRULED.

2. **Motion to Strike and Amended Motion to Strike**. The Motion to Strike is hereby GRANTED in part, and DENIED in part. Specifically, the Motion to Strike is GRANTED with respect to the Buyer's request to retroactively extend the Buyer's time to respond to the counterparty's Requests for Admission related to the Designated Lease pursuant to Fed. R. Bankr. P. 7036. The remainder of the Amended Motion to Strike is hereby OVERRULED.

3. **Findings of Fact and Conclusions of Law**. The Court's findings of fact and conclusions of law in the Sale Order and Assumption and Assignment Order, and as stated in its bench rulings the record of the hearing with respect to the Sale Order and the Assumption and Assignment Hearing are incorporated herein by reference, solely with respect to the Designated Lease. The

Designated Lease constitutes an Acquired Asset. Accordingly, all findings of fact and conclusions of law in the Sale Order and the Assumption and Assignment Order with respect to the Acquired Assets, including any explicitly governing the Initial Assigned Agreements, shall apply to the Designated Lease with full force and effect, and as the Buyer or Assignee of such Designated Lease, Buyer and any Assignee are entitled to all of the protections set forth in the Sale Order and Assumption and Assignment Order with respect to Acquired Assets.

4. **Notice**. Notice of the proposed assumption and assignment of the Designated Lease was adequate, appropriate, fair, and equitable under the circumstances, and complied in all respects with section 102(1) of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, and 6006, and the Amended Case Management Order.

5. **Assumption and Assignment**. Pursuant to sections 105, 363, and 365 of the Bankruptcy Code, the Debtors, as well as their officers, employees, and agents, are authorized to take any and all actions as may be: (i) reasonably necessary or desirable to implement the assumption and assignment of the Designated Lease pursuant to and in accordance with the terms and conditions of the Asset Purchase Agreement, the Related Agreements, the Sale Order, and this Order; or (ii) reasonably requested by the Buyer for the purpose of assigning, transferring, granting, conveying, and conferring to the Buyer, or reducing to the Buyer's possession or the Buyer's Assignee's possession, if applicable, the Designated Lease.

6. **Transfer of the Designated Lease Free and Clear**. Pursuant to sections 105(a), 363(b), 363(f), and 365 of the Bankruptcy Code, the Debtors are authorized

to transfer the Designated Lease in accordance with the terms of the Asset Purchase Agreement and the Sale Order. The Designated Lease shall be transferred to the Buyer or the Buyer's Assignee, if applicable, in accordance with the terms of the Asset Purchase Agreement, the Sale Order, the Assumption and Assignment Order, and this Order and such transfer shall: (i) be valid, legal, binding, and effective; (ii) vest the Buyer or the Buyer's Assignee, if applicable, with all right, title, and interest of the Debtors in the Designated Lease; and (iii) be free and clear of all Claims against the Debtors (including Claims of any Governmental Authority) in accordance with section 363(f) of the Bankruptcy Code.

7. This Order: (i) shall be effective as a determination that, all Claims against the Debtors have been unconditionally released, discharged, and terminated as to the Designated Lease, and that the conveyances and transfers described herein have been effected, and (ii) is and shall be binding upon and govern the acts of all persons, including all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, county and local officials, and all other persons who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments that reflect that the Buyer or the Buyer's Assignee, as applicable, is the assignee and owner of such Designated Lease free and clear of all Claims, or who may be required to report or insure any title or state of title in or to any lease (all such entities being referred to as "Recording Officers"). All Recording Officers are authorized and specifically directed to strike recorded Claims

against the Designated Lease recorded prior to the date of this Order. A certified copy of this Order may be filed with the appropriate Recording Officers to evidence cancellation of any recorded Claims against the Designated Lease recorded prior to the date of this Order. All Recording Officers are hereby directed to accept for filing any and all of the documents and instruments necessary and appropriate to consummate the transactions contemplated by the Asset Purchase Agreement; *provided* however that nothing in this paragraph 8 or paragraph 10 shall authorize any Recording Officers to take any action with respect to Restrictive Covenants (as defined in the Assumption and Assignment Order).

8. No holder of any Claim against the Debtors or their estates shall interfere with the Buyer or Buyer's Assignee's, if applicable, title to or use and enjoyment of the Designated Lease or the premises governed by such Designated Lease based on or related to any such Claim or based on any actions the Debtors have taken or may take in these chapter 11 cases.

9. If any Person that has filed financing statements, mortgages, mechanic's liens, *lis pendens*, or other documents or agreements evidencing Claims against the Debtors or the Designated Lease shall not have delivered to the Debtors as of the time of entry of this Order, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, or, as appropriate, releases of all Claims the Person has with respect to the Debtors or such Designated Lease or otherwise, then with regard to such Designated Lease: (i) the Debtors are hereby authorized and directed to, and the Buyer is hereby authorized to, execute and file such statements, instruments, releases, and other documents on behalf of the person with respect to

such Designated Lease, (ii) the Buyer is hereby authorized to file, register or otherwise record a certified copy of this Order, which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the release of all Claims against such Designated Lease, and (iii) the Buyer may seek in this Court or any other court to compel appropriate persons to execute termination statements, instruments of satisfaction, and releases of all Claims with respect to such Designated Lease; *provided* that, notwithstanding anything in this Order, the Sale Order, or the Asset Purchase Agreement to the contrary, the provisions of this Order shall be self-executing, and neither the Sellers nor Buyer shall be required to execute or file releases, termination statements, assignments, consents, or other instruments in order to effectuate, consummate, and implement the provisions of this Order. This Order is deemed to be in recordable form sufficient to be placed in the filing or recording system of each and every federal, state, county, or local government agency, department, or office.

10. Subject to the terms of this Order, this Order shall be considered and constitute for any and all purposes a full and complete general assignment, conveyance, and transfer by the Debtors of the Designated Lease acquired under the Asset Purchase Agreement or a bill of sale or assignment transferring good and marketable, indefeasible title, and interest in all of the Debtors' right, title, and interest in and to such Designated Lease to the Buyer or Buyer's Assignee, if applicable.

11. <u>**Assumption and Assignment of Designated Lease**</u>. The Debtors are hereby authorized in accordance with sections 105(a) and 365 of the Bankruptcy Code to assume and assign the Designated Lease to the Buyer or the Buyer's Assignee, if applicable, free and

clear of all Claims to the extent set forth in the Sale Order, the Assumption and Assignment Order, and this Order, to execute and deliver to the Buyer or the Buyer's Assignee, if applicable, such documents or other instruments as may be necessary to assign and transfer such Designated Lease to the Buyer or the Buyer's Assignee, if applicable, as provided in the Asset Purchase Agreement, and to transfer all of the Debtors' rights, title, and interests in such Designated Lease to the Buyer or the Buyer's Assignee, if applicable. With respect to the Designated Lease, Cure Costs in the amount of $120,833.72 shall be paid by the Buyer within five days after entry of this Order. Any additional timely asserted and properly established accruing Cure Costs, if any, shall be paid promptly after (a) they are agreed by the Buyer or (b) determined by the Court, and the Buyer's right to object to any such asserted Cure Costs is fully reserved and preserved. Payment of Cure Costs as provided herein shall (i) be in full satisfaction and cure of any and all defaults under these Designated Lease, whether monetary or non-monetary; (ii) compensate the counterparty to the Designated Lease for any actual pecuniary loss resulting from such defaults; and (iii) be made solely by the Buyer, and the Debtors shall have no liability therefor.

12. With respect to the Designated Lease, the Buyer, in accordance with the provisions of the Asset Purchase Agreement and as set forth on the record at the Assumption and Assignment Hearing, has provided adequate assurance of future performance under the Designated Lease in satisfaction of sections 365(b) and 365(f) of the Bankruptcy Code to the extent that any such assurance is required and not waived by the counterparty to such Designated Lease. Within five days of

the entry of this Order and as a condition for the assumption and assignment of the Designated Lease, the Buyer's Assignee will put into an escrow account the full amount of the Designated Lease charges for one year, $1.1 million. The escrow will remain available during the term of the Designated Lease in the event that the Buyer's Assignee fails to pay a scheduled payment owing under the Designated Lease. In the event that the Designated Lease is subsequently assigned, the escrow for the respective Designated Lease will be released on a pro rata basis according to amount of space assigned to a subsequent assignee. In addition, within five days after the entry of this Order and as condition for the assumption and assignment of the Designated Lease, the Buyer shall execute and deliver guaranty agreements substantially in the form annexed to the Assumption and Assignment Order as Exhibit B thereto. Upon entry of this Order with respect to the Designated Lease, the Buyer or Buyer's Assignee, if applicable, shall be fully and irrevocably vested with all rights, title, and interest of the Debtors under such Designated Lease and, pursuant to section 365(k) of the Bankruptcy Code, the Debtors shall be relieved from any further liability with respect to breach of such Designated Lease occurring after such assumption and assignment. As between the Debtors and the Buyer, the Buyer shall be solely responsible for any liability arising and owed pursuant to the terms of the Designated Lease after the Closing. The Buyer or Buyer's Assignee, if applicable, acknowledges and agrees that from and after the entry of this Order, with respect to the Designated Lease, in accordance with this Order, it shall comply with the terms of the Designated Lease in its entirety, including any indemnification obligations expressly contained in such Designated Lease

(including with respect to events that occurred prior to the entry of this Order, for which cure costs were not known, liquidated or due and owing as such date), as to which the Buyer continues to reserve its rights against the Debtors for indemnification to the extent provided in the Asset Purchase Agreement and the Debtors reserve their respective rights and defenses with respect to any claims therefor. The assumption by the Debtors and assignment to the Buyer or Buyer's Assignee, if applicable, of the Designated Lease shall not be a default under such Designated Lease. Subject to the payment of the undisputed Cure Costs and resolution of any disputed Cure Costs as provided in paragraph 11, the counterparty party to the Designated Lease is forever barred, estopped, and permanently enjoined from asserting against the Debtors, the Buyer, their affiliates, successors, or assigns of the property of any of them, any default existing as of the date of entry of this Order or that any additional cure amounts are owed as a condition to assumption and assignment.

13. All of the requirements of sections 365(b) and 365(f), including without limitation, the demonstration of adequate assurance of future performance and payment of Cure Costs required under the Bankruptcy Code have been satisfied for the assumption by the Debtors, and the assignment by the Debtors to the Buyer or its designated Assignee with respect to the Designated Lease. Pursuant to the Sale Order, the Buyer has delivered to the Designated Lease counterparty (and delivered by e-mail or facsimile to counsel for the Designated Lease counterparty) evidence of adequate assurance of future performance within the meaning of section 365 of the Bankruptcy Code with respect to the Designated Lease

that is proposed to be assumed and assigned to such Assignee. As further described on the record at the Assumption and Assignment Hearing, and based upon the requirements described in paragraph 12 of this Order, the Buyer and its designated Assignee have satisfied their adequate assurance of future performance requirements with respect to the Designated Lease and in connection therewith have presented sufficient evidence regarding their business plan, the experience and expertise of their management, and demonstrated they are sufficiently capitalized to comply with the necessary obligations under such Designated Lease.

14. The assumption of any liabilities under the Designated Lease shall constitute a legal, valid and effective delegation of all liabilities thereunder to the applicable Assignee and, following payment of all amounts required to be paid by agreement of the parties or an order of the Court, and except as expressly set forth in the Asset Purchase Agreement, the Sale Order or this Order, shall divest the Debtors of all liability with respect to such Designated Lease for any breach of such Designated Lease occurring after the Closing in accordance with Section 2.9 of the Asset Purchase Agreement.

15. Pursuant to section 365(b)(1)(A) and (B) of the Bankruptcy Code, the Buyer shall, within five business days after entry of this Order, pay to the applicable Designated Lease counterparty all undisputed Cure Costs and other such undisputed amounts required with respect to such Designated Lease. Upon assumption and assignment of the Designated Lease, the Debtors and their estates shall be relieved of any liability for breach of such Designated Lease after the Closing pursuant to the Asset Purchase Agreement and section 365(k) of the Bankruptcy Code and the Buyer shall be responsible for

any costs or expenses (including, without limitation, for royalties, rents, utilities, taxes, insurance, fees, any common area or other maintenance charges, promotional funds and percentage rent) arising under the Designated Lease attributable to (x) the portion of such calendar year occurring prior to such Lease Assignment or (y) for any previous calendar year; provided that, the Buyer reserves all rights against the Debtors for indemnification for such expenses, to the extent provided in the Asset Purchase Agreement and Related Agreements and the Debtors reserve all their respective rights and defenses with respect to any claims therefor. For the avoidance of doubt, the Buyer will perform under and in accordance with the terms of the Designated Lease from and after entry of this Order.

16. Solely in connection with the Designated Lease and the proposed transfer pursuant to this Order, any provision in the Designated Lease that purports to declare a breach or default as a result of a change or transfer of control or any interest in respect of the Debtors is unenforceable and the Designated Lease shall remain in full force and effect notwithstanding assignment thereof. Solely in connection with the Designated Lease and the proposed transfer, no sections or provisions of the Designated Lease, that in any way purport to: (i) prohibit, restrict, or condition the Debtors' assignment of such Designated Lease (including, but not limited to, the conditioning of such assignment on the consent of any counterparty party to such Designated Lease); (ii) provide for the cancellation, or modification of the terms of the Designated Lease based on the filing of a bankruptcy case, the financial condition of the Debtors, or similar circumstances; (iii) provide for additional pay-

ments (e.g., so called "profit" sharing/splitting), penalties, fees, charges, or other financial accommodations in favor of the non-debtor counterparty to such Designated Lease upon assignment thereof; or (iv) provide for any rights of first refusal on a contract counterparty's part, rights of first offer or any other purchase option or any recapture or termination rights in favor of a contract counterparty, or any right of a Landlord to take an assignment or sublease from a tenant, shall have any force or effect with respect to the grant and honoring of the Designation Rights or the rights under Section 2.9 of the Asset Purchase Agreement in accordance with the Sale Order, this Order, and the Asset Purchase Agreement and assignments of Designated Leases by the Debtors in accordance therewith and herewith, because they constitute unenforceable anti-assignment provisions under section 365(f) of the Bankruptcy Code and/or are otherwise unenforceable under section 365(e) of the Bankruptcy Code except that the Rights of the Landlord under Article 6.3 of the Lease shall remain fully enforceable against Buyer and any assignee. Upon assumption and assignment of the Designated Lease pursuant hereto, the Buyer or Buyer's applicable Assignee shall enjoy all of the rights and benefits, under the Designated Lease as of the date of the entry of this Order and shall assume all obligations as of the Closing, together with liability for any Cure Costs.

17. Solely in connection with the Designated Lease and notwithstanding anything to the contrary in paragraph 13 or 16 hereof, upon the entry of this Order, the Buyer will operate in compliance with the Designated Lease, including, but not limited to the "Uses" section of the Designated Lease, and the Amended and Restated Reciprocal Easement and Operating Agreement,

Mall of America, Bloomington, Minnesota dated May 30, 1991 between Sears, Roebuck and Co., Mall of America Company, Nordstrom, Inc., and Macy's California, Inc. Notwithstanding the foregoing, the Buyer must initially sublet a portion of the premises for the Designated Lease within two years, on the condition that the counterparty to the Designated Lease does not improperly interfere with the Buyer's attempt to sublet the premises for the Designated Lease.

18. *Ipso Facto* Clauses Ineffective. Except as otherwise specifically provided for by order of this Court or in the Asset Purchase Agreement, the Designated Lease shall be transferred to, and remain in full force and effect for the benefit of, the Buyer or, if applicable, the Assignee in accordance with its terms, including all obligations of the Buyer or, if applicable, the Assignee, as the assignee of the Designated Lease, notwithstanding any provision in such Designated Lease (including, without limitation, those of the type described in sections 365(e)(1) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer. There shall be no, and the counterparty to the Designated Lease is forever barred and permanently enjoined from raising or asserting against the Debtors, the Buyer, or, if applicable, the Assignee, any defaults, breaches, claims, pecuniary losses, rent accelerations, escalations, assignment fees, increases, or any other fees charged to the Buyer, if applicable, the Assignee, or the Debtors, as a result of the assumption or assignment of the Designated Lease pursuant to this Order.

19. Except as otherwise specifically provided for by order of this Court, upon the Debtors' assignment of the Designated Lease to the Buyer or Buyer's Assignee, if applicable, under the provisions of this Order and full

payment of all Cure Costs as required under section 365(b) of the Bankruptcy Code, no default shall exist under the Designated Lease, and no counterparty to the Designated Lease shall be permitted to declare a default by any Debtor, the Buyer or, if applicable, the Assignee, or otherwise take action against the Buyer or, if applicable, the Assignee as a result of any Debtor's financial condition, bankruptcy, or failure to perform any of the Debtors' obligations under the Designated Lease. Any provision in the Designated Lease that prohibits or conditions the assignment of such Designated Lease or allows the counterparty thereto to terminate, recapture, impose any penalty, condition on renewal or extension, refuse to renew, or modify any term or condition upon such assignment, constitutes an unenforceable anti-assignment provision that is void and of no force and effect solely in connection with the transfer thereof pursuant to this Order. The failure of the Debtors, the Buyer or, if applicable, the Assignee, to enforce at any time one or more terms or conditions of any Designated Lease shall not be a waiver of such terms or conditions, or of the Debtors', the Buyer's, or, if applicable, the Assignee's, rights to enforce every term and condition of the Designated Lease.

20. **Waiver of Bankruptcy Rules 6004(h), 6006(d), and 7062**. Notwithstanding the provisions of Bankruptcy Rules 6004(h), 6006(d), or 7062 or any applicable provisions of the Local Rules, this Order shall not be stayed after the entry hereof, but shall be effective and enforceable immediately upon entry, and the 14 day stay provided in Bankruptcy Rules 6004(h) and 6006(d) is hereby expressly waived and shall not apply. Time is of the essence in assuming and assigning the Designated Lease in connection with the Court approved Sale

Transaction. Any party objecting to this Order must exercise due diligence in filing an appeal and pursuing a stay within the time prescribed by law, or risk its appeal will be foreclosed as moot; provided, however, that any appeal filed within 14 days after the entry of this Order shall not be rendered moot by the waiver contained in this paragraph. This Order constitutes a final order upon which the Debtors and the Buyer are entitled to rely.

21. Conflicts; Precedence. In the event that there is a direct conflict between the terms of this Order, the Assumption and Assignment Order, the Sale Order, or any documents executed in connection therewith, the provisions contained in this Order, the Assumption and Assignment Order, the Sale Order, and any documents executed in connection therewith shall govern, in that order. Nothing contained in any chapter 11 plan hereafter confirmed in these chapter 11 cases, any order confirming such plan, or in any other order of any type or kind entered in these chapter 11 cases (including, without limitation, any order entered after any conversion of any or all of these chapter 11 cases to cases under chapter 7 of the Bankruptcy Code) or in any related proceeding shall alter, conflict with or derogate from the provisions of the Asset Purchase Agreement, the Assumption and Assignment Order, the Sale Order or the terms of this Order.

22. Lease Deposits and Security. The Buyer shall not be required, pursuant to section 365(l) of the Bankruptcy Code or otherwise, to provide any additional deposit or security with respect to the Designated Lease to the extent not previously provided by the Debtors or to the extent that such deposit or security required under the Designated Lease has already been deposited by Debtors.

23. **Automatic Stay**. The automatic stay imposed by section 362 of the Bankruptcy Code is modified solely to the extent necessary to implement the provisions of this Order.

24. **Retention of Jurisdiction**. This Court shall retain exclusive jurisdiction to, among other things, interpret, enforce and implement the terms and provisions of this Order, the Sale Order and the Asset Purchase Agreement, all amendments thereto, any waivers and consents thereunder (and of each of the agreements executed in connection therewith), to adjudicate disputes related to the Sale Order, this Order, or the Asset Purchase Agreement (and such other related agreements, documents or other instruments) and to enforce the injunctions set forth herein.

25. **Insurance Obligations**. To the extent required by the express terms of any Designated Lease, within thirty days hereof, the Buyer shall provide the counterparty to such Designated Lease with any evidence or certificates of insurance that may be required. Nothing in this Order shall waive, withdraw, limit or impair any claims that the Designated Lease counterparty may have against the Debtors, the Buyer or the Buyers' Assignee with respect to claims for indemnification for third parties' claims arising from or related to the use and occupancy of the Designated Lease prior to the Closing solely to the extent of available occurrence-based insurance coverage that named the Designated Lease counterparty as an additional insured; provided, for the avoidance of doubt, that the Designated Lease counterparty may pursue such claims only against the insurer(s) that named the Designated Lease counterparty as an additional insured and solely to the extent of such coverage.

Dated: September 5, 2019
White Plains, New York

/s/ Robert D. Drain
THE HONORABLE ROBERT D. DRAIN UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of January, two thousand twenty-two,

Before: Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Circuit Judges,
Ronnie Abrams,
District Judge,*

Docket Nos. 20-1846(L), 20-1953(XAP)

In Re: SEARS HOLDINGS CORPORATION, *Debtor*,

MOAC MALL HOLDINGS LLC,
Appellant-Cross-Appellee,

v.

TRANSFORM HOLDCO LLC, *Appellee-Cross-Appellant*,

SEARS HOLDINGS CORPORATION, *Debtor - Appellee*.

ORDER

Appellant-Cross-Appellee MOAC Mall Holdings LLC moves for a stay of the issuance of the Court's mandate pending the filing and disposition of a petition for writ of certiorari.

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* Judge Ronnie Abrams, of the United States District Court for the Southern District of New York, sitting by designation.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX F

11 U.S.C. 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without

a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the coowners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such

holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against

any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

APPENDIX G

11 U.S.C. 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual

pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under

the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof.

This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or

appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest

purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of

the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary

to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

APPENDIX H

28 U.S.C. 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of

the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal in pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.