No. 21-1270

IN THE

Supreme Court of the United States

MOAC MALL HOLDINGS LLC,

Petitioner,

v.

TRANSFORM HOLDCO LLC, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 1991, Petitioner entered into a long-term lease with Sears, Roebuck and Co. After Sears' bankruptcy filing, the Bankruptcy Court authorized Sears to sell substantially all of its assets to Respondent, including its interest in the lease. Sales of assets in bankruptcy are governed by 11 U.S.C. § 363. If the assets sold include a lease, the provisions of 11 U.S.C. § 365 also apply. When an asset is sold to a good-faith purchaser, § 363(m) bars appellate relief affecting the validity of the sale in the absence of a stay.

After the Bankruptcy Court authorized the transfer of the lease to Respondent under both §§ 363 and 365, Pet. App. 111a-12a, Petitioner appealed, seeking to overturn the Bankruptcy Court's order. The Court of Appeals affirmed the District Court's dismissal of Petitioner's appeal for three reasons. First, the court determined that the transfer of the lease was "integral" to the sale of Sears' assets to Respondent, and thus the remedy Petitioner seeks—setting aside the order directing the transfer—could not be implemented without affecting the validity of the asset sale. Pet. App. 5a-7a. Second, the court held that, in the absence of a stay, relief affecting the validity of the sale, including setting aside the lease transfer, was foreclosed under § 363(m). Pet. App. 7a-8a. Third, the court determined that § 363(m) is not waivable because, by denying effective relief, it defeats the court's jurisdiction. Pet. App. 8a-9a. The questions presented are:

1. Did the Court of Appeals err in concluding that the transfer of the lease was integral to the sale of

Sears' assets such that an appellate court could not set aside the lease transfer without affecting the validity of the asset sale?

If such a remedy *could* be fashioned, § 363(m) does not apply. If such a remedy *could not* be fashioned, the second and third questions presented are:

2. When a lease transfer is integral to an asset sale under § 363 of the Bankruptcy Code, does § 363(m) bar setting aside the lease transfer to a good-faith purchaser in the absence of a stay?

3. May the provisions of § 363(m), which deny effective relief in appeals of this kind, be waived?

In its formulation of the question presented, Petitioner inverts the order of the issues decided by the Court of Appeals and reduces them to a three-part, compound question with an embedded factual assertion: (i) "[w]hether Bankruptcy Code Section 363(m) limits the appellate courts' jurisdiction over any sale order or order deemed 'integral' to a sale order," (ii) "such that it is not subject to waiver," (iii) "and even when a remedy *could* be fashioned that does not affect the validity of the sale." Pet. at I (emphasis added). Although the reason for the factual assertion in part (iii) is unclear, it is problematic. First, it is contrary to the fact-bound determinations of the courts below, which concluded that the only remedy Petitioner seeks—overturning the lease transfer—*could not* be fashioned without affecting the validity of the sale. Second, if accepted as true, the factual assertion moots consideration of the other two issues identified in the question presented, leaving

nothing else for the Court to address. That is because, as noted, § 363(m) does not apply if a remedy *could* be fashioned without affecting the validity of the sale.

PARTIES TO THE PROCEEDING

Sears Holdings Corporation is an additional party to the proceedings below but was not named as an appellee in the Court of Appeals.

RULE 29.6 STATEMENT

Respondent Transform Holdco LLC is a limited liability company organized and existing under the laws of Delaware. Transform Holdco LLC's parent corporation is Hoffman Topco LLC. No publicly held corporation owns any membership interest in Hoffman Topco LLC.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, but available at 2021 WL 5986997, and is reproduced in the appendix at Pet. App. 1a. The opinion of the District Court is reported at 616 B.R. 615, and is reproduced in the appendix at Pet. App. 12a. The original, vacated opinion of the District Court is unreported, but is reproduced in the appendix at Pet. App. 49a. The decision of the Bankruptcy Court is an oral decision issued at an August 23, 2019 hearing; the resulting order is reproduced in the appendix at Pet. App. 101a.

JURISDICTION

The Court of Appeals entered its judgment on December 17, 2021. Petitioner filed its petition on March 17, 2022. The Bankruptcy Court exercised jurisdiction under 28 U.S.C. §§ 157(b) and 1334. The District Court initially exercised jurisdiction under 28 U.S.C. § 158(a), but dismissed for lack of jurisdiction owing to its inability to grant relief. The Court of Appeals exercised jurisdiction under 28 U.S.C. § 158(d). Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions are relevant to this matter: 11 U.S.C. § 363, 11 U.S.C. § 365, 28 U.S.C. § 158.[1]

PRELIMINARY STATEMENT

This matter arises out of the Chapter 11 bankruptcy case of Sears, Roebuck and Co. ("Sears"). Petitioner is MOAC Mall Holdings LLC, d/b/a Mall of America ("MOAC"). Respondent is Transform Holdco LLC ("Transform").

In 1991, MOAC entered into a long-term lease with Sears (the "MOAC Lease"). The lease is notable in four respects: (i) it is for a term of 100 years; (ii) it required Sears to pay nominal rent of only $10 per year; (iii) Sears was permitted to assign the lease to another entity with virtually no restrictions; and (iv) Sears was required to pay all relevant taxes and other costs associated with the leased property. *See* Pet. at 10.

After Sears filed for bankruptcy, it sold the bulk of its assets to Transform, which, contrary to Petitioner's claim, *see* Pet. at 10, continued to operate much of Sears' retail business, *see* Pet. App. 16a. As part of the sale, Transform purchased the right to take assignment of hundreds of Sears' leases at various locations across the country. As authorized

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[1] The relevant portions of these provisions are reproduced in Petitioners' Appendix. *See* Pet. App. 128a-54a.

by the sales agreement, Transform elected to have the MOAC Lease transferred to it.

Under the Bankruptcy Code, sales of assets are governed by 11 U.S.C. § 363. If the assets sold include a lease, the provisions of 11 U.S.C. § 365 also apply. *See* Pet. App. 128a-54a (reproducing these provisions). This case involves the extent to which the transfer of a lease that is integrated into an asset sale is governed by § 363, including § 363(m), which prohibits appellate modification of a consummated bankruptcy sale to a good-faith purchaser. In relevant part, § 363(m) directs: "[t]he reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease [to a good-faith purchaser] unless such authorization and such sale or lease were stayed pending appeal." 11 U.S.C. § 363(m).

After Transform designated the MOAC Lease for transfer, MOAC objected under the provisions of § 365 governing the assignment of shopping center leases. After the Bankruptcy Court overruled MOAC's objection, MOAC sought a stay pending appeal, arguing that if § 363(m) were implicated, a stay was necessary to preserve its appellate rights. Pet. App. 21a. The Bankruptcy Court opined that a stay was not necessary because the matter was not governed by § 363, but rather by § 365. Pet. App. 21a ("I can't imagine 363(m) as far as the sale is concerned applying here."), 22a ("this is a 365 order"). In response to questions from the court, counsel for Transform acquieced in the court's view. Resp. App. 5a. The Bankruptcy Court also opined that MOAC's appeal was unlikely to succeed on the merits. Resp.

App. 8a-9a, 11a-12a. The court further expressed the view that, if it were to grant a stay, "the bond here would be enormous." Resp. App. 9a. The Bankruptcy Court thereafter entered an order denying MOAC's stay motion. Resp. App. 13a-15a.

Without taking any further steps to seek a stay, *see* Pet. App. 4a, MOAC appealed to the District Court. On appeal, the District Court initially reviewed the lease assignment for compliance with § 365, concluding that the transfer did not meet one of the requirements applicable to the assignment of shopping center leases. *See* Pet. App. 49a, 51a, 91a-99a. On rehearing, however, the District Court concluded that the lease transfer itself constituted a sale, Pet App. 42a (*i.e.*, "a transfer of an interest in property for consideration"), and was also "inextricably intertwined" with the larger sale of Sears' assets to Transform, Pet. App. 43a, thus implicating the provisions of § 363(m). Concluding that § 363(m) applied and could not be waived because it restricted the court's jurisdiction by denying all effective appellate relief, *see* Pet. App. 30a, the District Court dismissed MOAC's appeal, Pet. App. 48a. MOAC then appealed to the Court of Appeals, which affirmed on three grounds.

First, the Court of Appeals concluded that the lease transfer was "integral" to the asset sale such that setting aside the lease transfer *could not* be implemented without affecting the validity of the sale. Pet. App. 5a-7a. Second, it concluded that, because reversing the transfer order would "negate the parties' agreement," undoing the lease transfer was foreclosed under § 363(m). Pet. App. 7a-8a. Third, it

concluded that § 363(m) is not waivable because it "creates a rule of statutory mootness" by denying effective appellate relief. Pet. App. 8a-9a (quoting *In re Pursuit Holdings (NY), LLC*, 845 F. App'x 60, 62 (2d Cir. 2021)).

In its Petition, MOAC inverts the order of these issues and collapses them into a three-part, compound question with an embedded factual assertion: (i) "[w]hether Bankruptcy Code Section 363(m) limits the appellate courts' jurisdiction over any sale order or order deemed 'integral' to a sale order," (ii) "such that it is not subject to waiver," (iii) "and even when a remedy *could* be fashioned that does not affect the validity of the sale." Pet. at I (emphasis added). Although the reason for MOAC's inclusion of the factual assertion in part (iii) is unclear, it is problematic.

First, the assertion cannot simply be taken as true because it is contrary to the fact-bound determinations of the courts below. Second, accepting the factual statement as true would moot the other issues included in MOAC's question, leaving nothing for the Court to address. By its terms, § 363(m) does not apply if a remedy *could* be fashioned that does not affect the validity of a sale.[2] Third, the factual assertion presents precisely the kind of fact-bound question the Court does not ordinarily undertake to consider. *See* Sup. Ct. R. 10 ("[A] writ of certiorari is

[2] Nor does this case involve the possibility of more than one remedy, with one barred by § 363(m) and the other not. MOAC sought only one remedy below: overturning the lease transfer under § 365. It has identified no other, and, in all events, any other remedy has been waived.

rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, certiorari should be denied because, regardless of how the questions presented are framed, the issues decided below are not otherwise worthy of this Court's review. The Court of Appeals' resolution of this case does not implicate any actual conflict among the circuit courts. Nor does the decision below conflict with this Court's precedents.

More fundamentally, *even if* MOAC were able to bypass § 363(m), MOAC lacks an effective remedy. Again, the only remedy MOAC sought below was to set aside the lease transfer under § 365. If for some reason the lease transfer were set aside, that would not benefit MOAC. Setting aside the order would simply mean that the transfer of the lease—which occurred more than two years ago—was unauthorized because the order approving it has been reversed. Section 549 of the Bankruptcy Code provides for the recovery of unauthorized transfers in a bankruptcy case, but the relevant statute of limitations has long since expired, rendering the transfer unavoidable. 11 U.S.C. § 549(d). And even if the transfer of the lease could be undone, the leasehold interest would revert to Sears' bankruptcy estate, not to MOAC. Thus, wholly apart from the question of statutory mootness under § 363(m), the prospect of constitutional mootness looms large here, as does MOAC's

questionable standing to assert the potential interests of a party (Sears) not before the Court.

This case otherwise presents a poor vehicle for review of the issues decided below. The facts of this case are anomalous and unlikely to recur. Nor has MOAC been able to cite to any other case concerning whether a purchaser of assets may waive the protections of § 363(m). Moreover, MOAC's reliance on the fact that a consent stay has purportedly maintained the status quo is misplaced, for MOAC itself has violated the express terms of that stay. For these reasons, MOAC's petition should be denied.

BACKGROUND

By operation of law, when a debtor such as Sears files for bankruptcy relief, a bankruptcy estate is created consisting of all of the debtor's property wherever located. *See* 11 U.S.C. § 541(a). Before the debtor may sell estate property out of the ordinary course of its business, § 363(b)(1) requires the debtor to obtain bankruptcy court approval. 11 U.S.C. § 363(b)(1).[3] Following a hearing, the Bankruptcy Court here entered an order under § 363(b)(1) (the "Sale Order") approving the sale of substantially all of Sears' assets to Transform in accordance with the parties' asset purchase agreement (the "APA"), finding that Transform qualified as a good-faith

[3] In a Chapter 11 case, a trustee is not ordinarily appointed, and the debtor continues to operate its business as "debtor in possession" with the powers of a trustee. *See* 11 U.S.C. §§ 1101, 1107, 1108.

purchaser. *See* Pet. App. 3a-4a.[4] As a significant portion of Sears' assets were long-term leases of real property where its stores were located, Transform's right to take the assignment of these leases constituted a substantial portion of the value of what it purchased. *See* Pet. App. 15a-16a.

The sale was conducted as expeditiously as possible; had it not been, the stores would have been forced to close and thousands of employees dismissed. *See* Pet. App. 16a; Pet. App. 101a-25a. Because it was not possible for Transform to evaluate the economics of hundreds of store locations, nor for the Bankruptcy Court to conduct hearings on the proposed transfer of those leases, before the sale was consummated, the Sale Order and the APA gave Transform the right to designate leases for transfer after the sale closed. Pet. App. 17a. Transform designated the transfer of the MOAC Lease under this procedure. *See* Pet. App. 4a.

Once a sale of the debtor's property is consummated to a good faith purchaser, § 363(m) forecloses an appellate court's ability to grant relief that affects the validity of the sale in the absence of a stay. 11 U.S.C. § 363(m). The purpose of this provision is to encourage sales in bankruptcy cases under the rationale that a purchaser would be less willing to acquire property from a bankruptcy estate, or would substantially discount the price, if the purchaser were forced to take the risk of an appeal upsetting its expectations. *See, e.g.*, *Matter of Walker*

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[4] As the Court of Appeals observed, MOAC failed to timely challenge Transform's designation as a good-faith purchaser. *See* Pet. App. 10a.

Cnty. Hosp. Corp., 3 F.4th 229, 234 (5th Cir. 2021) ("The purpose of § 363 is to 'promote the finality of bankruptcy sales[,] thereby maximizing the purchase price of the estate assets.'" (alteration in original) (quoting 2 Norton Bankr. Law & Prac. § 44:37 (3d ed.)); *Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737, 741 (6th Cir. 2005) ("Section 363(m) encourages parties to deal with a debtor and promotes the finality of a sale under 11 U.S.C. § 363(b).").

Section 365 addresses the debtor's rights and obligations under its unexpired leases. The debtor may "reject" leases it does not need, effecting a breach; or "assume" them, requiring the debtor to reaffirm its obligations. In connection with assumption, the debtor may also seek to assign the lease to a third party. 11 U.S.C. § 365. The assignment of a lease of real property located in a shopping center must satisfy certain special requirements. *Id.* § 365(b)(3).

The MOAC Lease

On May 30, 1991, Sears entered into a Reciprocal Easement and Operating Agreement for Mall of America, Bloomington, Minnesota (the aforementioned "MOAC Lease" or "REA" in prior opinions) along with MOAC and others. Pet. App. 120a-21a. The MOAC Lease designated Sears as one of the original anchor tenants at the Mall. *See* Pet. App. 51a-52a.

As the District Court observed, the terms of the MOAC Lease were "unusual" and "highly favorable to Sears." Pet. App. 52a, 53a. Sears' rent was a mere

$10 a year for a term of 100 years. Pet. App. 52a. Sears was only required to operate its retail department store for the "first 15 years of the lease;" thereafter, "the tenant, its successors and assigns, is subject to certain very weak limitations, free itself to cease operating, and to assign its rights." D. Ct. App. APX2119 (August 23, 2019 evidentiary hearing and oral opinion of the Bankruptcy Court). Specifically, Sears could, without MOAC's approval, "vacate all or any part of the building," "lease or sublease all or any portion of the building," or "assign the REA." Pet. App. 53a. In other words, the lease was freely assignable. D. Ct. App. APX2125.

The Bankruptcy Filing, Asset Sale, and Lease Transfer Designation

Sears commenced its Chapter 11 bankruptcy case in October of 2018. In conjunction with the bankruptcy filing, Sears' largest shareholder formed Transform with the goal of purchasing most of Sears' assets from the bankruptcy estate. Pet. App. 15a, 50a.

Under the terms of the APA that the Sale Order approved, Transform acquired substantially all of Sears' assets. Pet. App. 15a-16a, 57a. As part of the sale, Transform acquired the right to designate any of Sears' approximately 600 leases, including the MOAC Lease, for transfer. Pet. App. 16a, 57a. In entering the Sale Order approving the APA, the Bankruptcy Court found that Transform was a good-faith purchaser and had bought Sears' assets for fair consideration. *See* Pet. Ap. 16a. In April of 2019, the Bankruptcy Court entered a further order establishing procedures for the designation of leases

that Transform identified for transfer, and shortly thereafter, Transform filed a notice designating certain leases for assumption and assignment, including the MOAC Lease. Pet. App. 18a-19a.

Proceedings in the Bankruptcy Court

MOAC objected to the proposed transfer, claiming that Transform did not meet the qualifications for assignment under § 365(b)(3). Pet. App. 19a. At the conclusion of an evidentiary hearing, the Bankruptcy Court overruled MOAC's objections. Pet. App. 20a. Thereafter, the Bankruptcy Court issued its order (the "Transfer Order") authorizing Sears' assumption of the MOAC Lease and directing the transfer of the lease to Transform. Pet. App. 20a, 111a-12a, 114a. The Transfer Order imposed significant obligations on Transform, requiring it to comply with certain concessions Transform made during the hearing, including a guaranty that it would sublease the property within two years (absent interference from MOAC), placing $1.1 million in escrow to cover one years' charges on the property, Pet. App. 20a, and paying amounts to cure Sears' defaults under the lease. The order also required Transform to assume Sears' liabilities under the lease, including royalties, rents, utilities, taxes, insurance, fees, common area or other maintenance charges, promotion funds, and percentage rent obligations, Pet. App. 118-19a, and it discharged Sears of all such liabilities, 11 U.S.C. § 365(k)—all additional consideration for the MOAC Lease that Transform paid.

MOAC moved for a stay pending appeal, arguing a stay was necessary to ensure that potential appellate

relief was not foreclosed under § 363(m). Pet. App. 21a; Resp. App. 5a-8a. At the stay hearing, the Bankruptcy Court engaged in extended colloquy with MOAC's counsel. In response to MOAC's argument that a stay was necessary to protect its appellate rights, the court stated: "I can't imagine 363(m) as far as the sale is concerned applying here." Resp. App. 5a. The court also stated that, before it would issue a stay, it would require MOAC to post "a bond equal to the sale consideration price." Resp. App. 5a, 9a ("the bond here would be enormous").

During the same colloquy, the Bankruptcy Court directed a number of questions to counsel for Transform, the first of which was: "Are you going to rely on 363(m)? I mean, if you were, I would think the sale would've closed already." Resp. App. 5a. Counsel responded: "Correct, your honor." Resp. App. 5a. The court inquired again: "So you're not relying on – you wouldn't – you're not going to go to the district [court] and say 363(m) applies here." Resp. App. 5a. To which counsel responded: "Well, we – in effect, because we do not have a transaction, I think we couldn't rely on 363(m) for the puposes of arguing mootness because we have not closed on a transaction to assume and assign this to a sub-[lessee]." Resp. App. 5a.

The court then evaluated the factors for granting a stay and concluded that MOAC had not shown irreparable harm, a likelihood of success on the merits, or that a stay would be in the public interest, and entered an order denying a stay. Resp. App. 8a ("I do believe that, generally speaking, risk of mootness standing alone doesn't constitute

irreparable injury, although there are times when, again, the very fact of 363(m) might."), 9a ("I don't believe a stay is in the public interest"), 11a-12a ("I don't think you've made the – in this case – the necessary very strong showing [on the merits], so really none of the factors are met here."); Resp. App. 13a-15a. The transfer of the lease occurred five days later. Pet. App. 23a.

Although MOAC harshly accuses Transform of "gamesmanship," Pet. at 3, a review of the transcript reveals a more complicated picture. First, it is clear that the Bankruptcy Court directed the discussion by first announcing its view that the order arose under § 365, not § 363, with Transform's counsel then acquiescing in the court's view. Second, it is evident that MOAC understood the law and knew that § 363(m) was a threat to its appellate rights; indeed, MOAC cited in its stay motion the very cases upon which the Court of Appeals ultimately rested its decision. Nonetheless, MOAC elected to rely on Transform's acquiescence in the Bankruptcy Court's view rather than further pursue a stay, knowing the cost of an appellate bond would be significant.

MOAC's Appeal to the District Court

On appeal, MOAC argued that the Transfer Order should be reversed because Transform was not an acceptable assignee under § 365(b)(3). Although the District Court rejected most of MOAC's arguments, it agreed (after acknowledging going back and forth on the matter, *see* Pet. App. 99a) with one of them: that Transform was not sufficiently like the Sears of 1991 (when the lease was entered into) to qualify as an

assignee under the terms of the statute. Pet. App. 95a.

After this ruling, Transform and MOAC reached an agreement under which the parties could market the property without consummating any transaction affecting either party's appellate rights. They also expressly agreed not to use this consent stay for any purpose other than to enforce it. The stipulation was entered as an order of the District Court. Resp. App. 16a-22a.

Transform then moved for rehearing, asserting that the District Court lacked appellate jurisdiction to reverse the Transfer Order under § 363(m). In response, MOAC argued that § 363(m) was inapplicable because the lease transfer had been authorized under § 365. Pet. App. 45a-46a. Rejecting MOAC's argument, the District Court found that the lease transfer was both itself a sale, Pet. App. 42a ("a transfer of an interest in property for consideration"), and likewise "inextricably intertwined" with the larger asset sale, thus doubly implicating the provisions of § 363(m), Pet. App. 43a (citation omitted). Because the sole relief that MOAC sought—setting aside the lease transfer—would plainly affect the validity of a sale under § 363 (either outright or by rendering part of the asset sale invalid), MOAC's remedy was barred by § 363(m) and the appeal was therefore moot for want of an effective remedy. Pet. App. 48a. Although Transform had not previously argued, under § 363(m), that the court was barred from granting appellate relief that affected the validity of the lease transfer, the District Court found that the issue was jurisdictional and could not be

waived, and, further, that Transform was not judicially estopped from raising it. Pet. App. 29a-34a. The court therefore dismissed Petitioner's appeal. Pet. App. 48a. MOAC moved for rehearing, asserting that Transform was not a good faith purchaser; that motion was denied. *See* Pet. App. 10a.

MOAC'S Appeal to the Court of Appeals

MOAC appealed to the Second Circuit, arguing that the Transfer Order was not integral to the Sale Order such that appellate relief would be subject to § 363(m). Pet. App. 7a-8a. MOAC also contended that Transform had waived any argument under § 363(m), or, in the alternative, was judicially estopped from asserting it. Pet. App. 7a-8a. MOAC further claimed, as it does here, that § 363(m) is not jurisdictional under *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Pet. App. 9a. Transform cross-appealed the District Court's original decision with respect to § 365(b)(3)(A).

The Opinion of the Court of Appeals

Rejecting MOAC's arguments, the Court of Appeals affirmed the judgment of the District Court for three reasons. First, it agreed that the lease transfer was "integral to the sale of Sears's assets to Transform, especially since both the Sale Order and the Transfer Order expressly state that the latter is integral to the former." Pet. App. 6a. As the court noted, "integral" means "essential to completeness." Pet. App. 6a n.2 (citation omitted). Here, the transfer of the MOAC Lease was plainly essential to the completeness of the asset sale because the right to

designate leases for transfer was an essential element of what Transform purchased. Pet. App. 6a-7a.

Second, the Court of Appeals reasoned that relief affecting the validity of the asset sale, including setting aside the lease transfer, was foreclosed under § 363(m), rendering MOAC's appeal moot. Pet. App. 7a-8a. Quoting its prior decision in *In re WestPoint Stevens*, 600 F.3d 231, 247 (2d Cir. 2010), the court explained: "[s]ection 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.'" Pet. App. 5a. When, as here, an appellant seeks relief affecting the validity of a sale under § 363(b) (without first obtaining a stay or showing a lack of good faith) the appeal is statutorily moot because § 363(m) deprives the court of the ability to grant such relief. Pet. App. 5a ("Thus, as the text makes clear, in the absence of a stay, § 363 limits appellate review of a[n unstayed] final sale to 'challenges to the "good faith" aspect of the sale' without regard to the merits of the appeal." (quoting *In re WestPoint Stevens*, 600 F.3d at 247)); *see also id.* (§ 363(m) effectively "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.").

Third, the Court of Appeals determined that § 363(m) is not waivable because, by denying all effective relief in cases of this kind, it implicates the court's jurisdiction. Pet. App. 8a-9a. In support of its analysis, the court cited to its earlier opinions in *In re*

WestPoint Stevens and *In re Gucci*, 105 F.3d 837, 838 (2d Cir. 1997). Pet. App. 8a. In *Gucci*, the court explained that "[o]ur appellate jurisdiction over an *unstayed* sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser." 105 F.3d at 839 (emphasis in original). Thus, when an appellant seeks relief affecting the validity of a sale to a good faith purchaser, the court, in the absence of a stay, is deprived of jurisdiction because "the court has no remedy that it can fashion even if it would have determined the issues differently." *Id*. at 840 (quoting *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990)).

In conducting its analysis, the Court of Appeals rejected MOAC's reliance on *Arbaugh*, noting that the statute addressed in *Arbaugh* was wholly unlike § 363(m). Pet. App. 9a. Additionally, binding precedent in the Second Circuit—decided after *Arbaugh*—reiterated that § 363(m) is jurisdictional. Pet. App. 9a. Finally, the Court of Appeals affirmed the District Court's rejection of MOAC's "good-faith" argument as untimely and did not reach Transform's cross-appeal. Pet. App. 10a.

REASONS FOR DENYING THE PETITION

The Court should deny certiorari for five reasons. First, MOAC's formulation of the question presented includes a highly fact-bound contention (*i.e.*, that "a remedy *could* be fashioned that does not affect the validity of the sale") at odds with what the courts below actually decided. This is not the kind of issue

this Court ordinarily undertakes to review. *See* Sup. Ct. R. 10.

Second, regardless of how the questions presented are framed, none of the issues decided below implicates any actual conflict among the circuit courts. The closest MOAC comes to identifying a conflict is with its recitation of *dicta* in decisions of the Third and Seventh Circuits. Ultimately, however, the alleged circuit split is illusory. Among other things, no reported decision of any other court of appeals in the 40 years since § 363(m) was enacted has ever turned on waiver. The decision below is thus *sui generis*.

Third, the decision below does not conflict with this Court's precedents. Section 363(m) is a highly unusual statute unlike others the Court has reviewed for their jurisdictional effect. The statute plainly denies an effective appellate remedy in all cases in which an appellant seeks relief affecting the validity of an unstayed sale under § 363(b), other than where the issue is the transferee's good faith. Ordinarily, the inability of an appellate court to grant effective relief *is* jurisdictional under the case and controversy requirement of Article III. As this Court has explained, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). In any event, the statute here is fundamentally unlike the definitional provision at issue in *Arbaugh*.

Fourth, this case otherwise presents an exceptionally poor vehicle to address the effect and operation of § 363(m). Among other reasons, it is evident that, even if MOAC were able to bypass § 363(m), it still would not have an effective remedy. MOAC has failed to explain how, at this point, Transform's interest may be divested; and the statute of limitations governing the sole avenue for doing so—11 U.S.C. § 549—has expired. In any event, assuming *arguendo* that the transfer may be reversed, the leasehold interest would simply revert to Sears' bankruptcy estate—not to MOAC—to be administered like any other asset remaining in the estate. Accordingly, the prospect of constitutional mootness under Article III arises, as does MOAC's questionable standing to assert a remedy that would benefit Sears' estate. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160-61 (2016).

Finally, this case is not typical of the kinds of matters usually decided under § 363(m), which, among other things, characteristically involve other kinds of property. Further, MOAC's reliance in its petition on a consent stay should not be considered because MOAC did so in violation of the terms of that stay.

For all of these reasons, MOAC's Petition should be denied.

I. MOAC'S FORMULATION OF THE QUESTION PRESENTED INCLUDES A HIGHLY FACT-BOUND ISSUE INAPPROPRIATE FOR REVIEW.

As noted, the Court of Appeals resolved three issues. First, it agreed with the District Court's highly fact-bound determination that the lease transfer was "integral" to the asset sale, and thus the remedy MOAC seeks—setting aside the transfer—*could not* be implemented without affecting the validity of the sale. Pet. App. 5a-7a. Second, it agreed with the District Court that relief affecting the validity of the asset sale, including setting aside the lease transfer, was foreclosed under § 363(m). Pet. App. 7a-8a. Third, it agreed with the District Court that § 363(m) is not waivable because, by denying all effective relief in cases of this kind, it defeats the court's jurisdiction. Pet. App. 8a-9a.

In its formulation of the question presented, MOAC inverts and collapses these issues into a single compound statement with an embedded factual assertion: that "a remedy *could* be fashioned that does not affect the validity of the sale." Pet. at I (emphasis added).

It is understandable why MOAC would wish to include this issue as part of its question presented: if it did not, the issue would not be preserved for review. Under Supreme Court Rule 14.1(a), a question presented must be "expressed concisely in relation to the circumstances of the case" and "[o]nly questions set out in the petition, or fairly included therein, will be considered by the Court." Similarly, Rule 24.1(a)

directs that, although "[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari . . . the brief may not . . . change the substance of the questions already presented . . . ." And the reason the issue whether "a remedy *could* be fashioned that does not affect the validity of the sale" would not be preserved if MOAC failed to state it in its question presented is because the issue is not subsumed in the other issues MOAC presents. Rather, they are mutually exclusive.

MOAC sought one remedy below: overturning the lease transfer. Either this remedy affects the validity of a sale, or it does not. And it if does not affect the validity of a sale, there is no occasion to consider whether § 363(m) is jurisdictional or subject to waiver. It is only if the remedy MOAC seeks *does* affect the validity of a sale that § 363(m) applies and these additional issues come into play. The trouble with MOAC's inclusion of the factual issue whether "a remedy *could* be fashioned that does not affect the validity of the sale," however, is that it is precisely the kind of fact-bound question the Court does not ordinarily undertake to consider. *See* Sup. Ct. R. 10. And perhaps the best evidence that the issue is not worthy of review is that MOAC makes no effort to demonstrate that it is—it simply slips the issue into its question presented.

Properly framed to reflect what the courts below actually decided and the correct relationship between the issues, the questions presented are:

1. Did the Court of Appeals err in concluding that the transfer of the lease was integral to the sale of

Sears' assets such that an appellate court could not set aside the lease transfer without affecting the validity of the asset sale?

If such a remedy *could* be fashioned, then § 363(m) does not apply. If such a remedy *could not* be fashioned, the second and third questions presented are:

2. When a lease transfer is integral to an asset sale under § 363 of the Bankruptcy Code, does § 363(m) bar setting aside the lease transfer to a good-faith purchaser?

3. May the provisions of § 363(m), which deny effective relief in appeals of this kind, be waived?

II. HOWEVER FRAMED, THE ISSUES DECIDED BELOW DO NOT IMPLICATE A SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS.

Regardless of how the issues decided below are framed, they are not properly the subject of a bona fide circuit split. Section 363(m) was enacted in 1978. Since then, no reported decision of any other court of appeals has ever addressed, let alone turned on, the issue whether § 363(m) is subject to waiver. The decision below is thus unique in addressing this question.

With respect to the other issues MOAC cites, there is likewise no conflict among the decisions of the courts of appeals. The few cases that consider whether a specific transaction is integral to a sale

such that § 363(m) applies have all adopted the same approach. The only discord MOAC identifies potentially bearing on the circumstances of this case involves non-dispositive statements—classic *dicta*—in two decisions from the Third and Seventh Circuits quarreling with the Second Circuit's use of the label "jurisdictional." But this does not create a genuine conflict because the decisions of the Third and Seventh Circuits did not turn on this quarrel. It is a longstanding axiom that "[t]his Court reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (internal quotation marks and citations omitted); *see also Jennings v. Stephens*, 574 U.S. 271, 277 (2015) ("This Court . . . does not review lower courts' opinions, but their judgments."); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984) (collecting cases). In presenting an issue that made no difference in any other decision, MOAC turns this principle on its ear.

MOAC focuses much of its attention on the Third Circuit's decision in *In re Energy Future Holdings*, 949 F.3d 806 (3d Cir. 2020), claiming a conflict among "two of the most important bankruptcy jurisdictions." Pet at 6. But the purported conflict is one in name only: with regard to appellate relief that affects the validity of a sale, the Second and Third Circuits—along with the other courts of appeals to have addressed the operation of § 363(m)—have adopted the same approach.

In relevant part, *Energy Future Holdings* involved two questions: (i) whether an order confirming a Chapter 11 plan could constitute an authorization of

a sale, and (ii) whether the relief requested in the case would have affected the validity of a sale. *Id*. at 818. On the first question, the court concluded that the confirmation order was "inextricably intertwined" with a subsequent order authorizing a merger, thus collectively authorizing the relevant sale. *Id*. at 819-20. On the second question, it concluded that the relief sought was barred by § 363(m) because it affected the sale's validity. *Id*. at 821. Nothing in the court's *holding* conflicts with the decision below.

It is true that, in *dicta*, the Third Circuit quarreled with the jurisdictional label: "we have construed § 363(m) as a constraint not on our jurisdiction, but on our capacity to fashion relief." *Id*. at 820. But at no point did the court indicate that this quarrel would have had any effect on the outcome in the case. The court found that it could not grant relief without affecting the validity of the sale; the issue whether § 363(m) is jurisdictional had no bearing on the resolution of the merits. Likewise, no issue of waiver was implicated. Moreover, further review of the approaches taken by the Second and Third Circuits illustrates how much of a semantic difference this really is and how aligned in practice they actually are.

In re WestPoint Stevens, one of the decisions the court below relied upon, held that, as a "rule of statutory mootness," "section 363(m) is a limit on our jurisdiction and that, absent a stay of the Sale Order, we only retain authority to review challenges to the 'good faith' aspect of the sale." 600 F.3d at 247-48 (internal quotation marks and citations omitted). Notably, the court did not say that it had no jurisdiction to entertain *any* relief. The court

explained that "[a] narrow exception may lie for challenges to the Sale Order that are so divorced from the overall transaction that the challenged provisions would have affected none of the considerations on which the purchaser relied." *Id.* at 249 (citing *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998)).[5] In other words, the Second Circuit is in accord with the other circuits: whereas § 363(m) protects the integrity of sales, it does not apply to relief that would *not* affect a sale's validity. Applying this precedent, the court below held that, "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 merits of the petitioner's appeal." Pet. App. 8a-9a (emphasis added).[6]

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[5] Like the court below, the Third Circuit in *Krebs* applied the following test: "there are two prerequisites for section 363(m) 'statutory' mootness: (1) the underlying sale or lease was not stayed pending the appeal, and (2) the court, if reversing or modifying the authorization to sell or lease, would be affecting the validity of such a sale or lease." 141 F.3d at 499. The issue of waiver was not raised or addressed in *Krebs*. Concluding that the relief that the appellant sought would affect the validity of the relevant sale, the court found that the appeal was "moot." *Id.* at 500.

[6] In its opinion below, the Court of Appeals cited *Cinicola v. Scharfeenberger*, 248 F.3d 110, 125 (3d Cir. 2001) as additional support for the proposition that "[w]e 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." Pet. App. 5a-6a.

Moreover, even if (contrary to the decisions below) overturning the Transfer Order would not affect the validity of any sale, *there is still no circuit split*. The court below did *not* determine that, under § 363(m), relief that does not affect the validity of the sale is also somehow barred. Like every other court of appeals, it concluded only that relief that *does* affect the validity of the sale is barred.

In *Energy Future Holdings*, the Third Circuit took *exactly the same approach* as did the Second Circuit here. Relying on the same precedent as the Second Circuit, the Third Circuit explained that, if an appeal is from the authorization of a good faith sale, it can only fashion a remedy "that will not *affect the validity of the sale*." *Id.* at 821 (emphasis added) (quoting *Krebs Chrysler-Plymouth*, 141 F.3d at 498-99). Just like the Second Circuit's examination of whether the relief requested is collateral or integral to a sale order, the Third Circuit explained that "a challenger seeking to avert § 363(m)'s bar must demonstrate that the relief affects only collateral issues not implicating a central or integral element of a sale." *Id.* (internal quotation marks and citation omitted).

The Sixth Circuit has drawn the same distinction. In *In re Brown*, 851 F.3d 619, 623 (6th Cir. 2017), it "adopt[ed] 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." *See also In re C.W. Mining Co.*, 641 F.3d 1235, 1239 (10th Cir. 2011) ("[Section] 363(m) forecloses any remedy . . . that would affect the validity of the trustee's sale. But it does not

preclude a remedy that would not affect the validity of the sale.").

The circumstances in *Brown* are also far afield from those at issue here. In that case, the debtor sought to claim part of the value of a parcel of real estate as exempt from his bankruptcy estate under section 522 of the Bankruptcy Code. 11 U.S.C. § 522. After the bankruptcy trustee sold the property in question, the debtor appealed. The Sixth Circuit concluded that the appeal was not moot, reasoning that it could afford effective relief by directing that some of the *proceeds* of the sale (*i.e.*, funds realized in exchange for the sale) be distributed to the debtor. *Brown*, 851 F.3d at 623. As the court reasoned, directing such relief would not affect the validity of the sale. *Id.*

At bottom, the Second, Third, Sixth, and Tenth Circuits engage in the same analysis in applying § 363(m), considering whether the relief sought will affect the validity of the sale to a good faith purchaser, in which case it is barred if the order approving the sale was not stayed.[7] While the circuits do label these approaches in different ways (*i.e.*, referring to them as "jurisdictional" or "remedial" or a question of "mootness"), in substance the courts effectively use the *same test* to determine whether a court may review an order consistent with the restrictions imposed by § 363(m). And none of the other decisions MOAC cites turned on the label applied to § 363(m).

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[7] *See also* Pet. at 18 n.2, 21 n.3 (describing the Eighth, First, and D.C. Circuits' analysis examining whether the relief would affect the validity of the sale).

Moreover, none would entertain an appeal, such as this one, that seeks relief that would affect the sale itself, rather than a collateral issue such as the disposition of proceeds—an issue the Second Circuit did not address below.

The Seventh Circuit's decision in *Trinity 38 Development, LLC v. Colfin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) is also of no assistance to MOAC. There, the court held that "§ 363(m) does not make any dispute moot or prevent a bankruptcy court from deciding what shall be done *with the proceeds of a sale or lease*." (emphasis added). *Trinity* is thus just like *Brown*—an appeal seeking to redirect proceeds, not an appeal seeking to undo a sale. Quite clearly, directing distribution of the proceeds has nothing to do with the validity of the sale—it has to do with the distribution of what is realized from a valid sale. In *dicta*, the Seventh Circuit, like the Third Circuit in *Energy Future Holdings*, quarreled with the "mootness" and "jurisdictional" labels. *Trinity*, 917 F.3d at 602. But the court did so to clean up an intra-circuit conflict within the Seventh Circuit and align the Seventh Circuit's substantive analysis with the approach taken by every other court of appeals, which focuses on whether the requested relief would affect the validity of a consummated sale. Once again, the jurisdictional label was not dispositive as there was no issue of waiver.

The circuit conflict MOAC identifies is one of semantics, not substance. The Petition should be denied.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

Like many provisions of the Bankruptcy Code, § 363(m) is relatively unique. As discussed above, it denies an effective appellate remedy in all cases in which an appellant seeks relief affecting the validity of an unstayed sale authorized under § 363(b) (other than where the issue is the transferee's good faith). Ordinarily, the inability of an appellate court to grant effective relief deprives the court of jurisdiction to hear the case. That is because federal courts do not issue advisory opinions, they only hear those that have concrete consequences because the court is able to fashion an effective remedy. For this reason, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology of Cal.*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653).

Under § 363(m), the statutorily designated event that prevents an appellate court from granting relief affecting the validity of a sale to a good faith purchaser is the appellant's failure to obtain a stay. This Court has never considered the jurisdictional nature of this kind of statutory provision. Nonetheless, a fairly close analogue also arising in the context of federal appellate jurisdiction is this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007).

In *Bowles*, the Court considered the effect of 28 U.S.C. § 2107(c) on an appellate court's jurisdiction to decide a habeas appeal. Section 2107(c) set a 14-day

time limit to take an appeal from a district court's denial of habeas relief. In reliance on an erroneous determination by the district court that petitioner had 17 days, petitioner filed his appeal late.

Recognizing that Congress determines the subject matter jurisdiction of the federal courts, *id.* at 211, and that "the notion of subject-matter jurisdiction obviously extends to classes of cases . . . falling within a court's adjudicatory authority," *id.* at 213 (omission in original) (citations and internal quotation marks omitted), the Court concluded that "it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases,'" *id.* Applying this reasoning, the Court determined that § 2107(c) was indeed jurisdictional because it did exactly that: denied adjudicative authority over a class of cases otherwise within the court's appellate jurisdiction in the absence of compliance with the relevant statutory requirements. *Id.* Notably, in reaching this conclusion, the Court distinguished its prior decision in *Arbaugh* on the basis that § 2107(c) imposed a dispositive statutory constraint on a court's ability to entertain an appeal. *See id.* at 211.

Arbaugh involved a definitional provision, 42 U.S.C. § 2000e(b), that defined the term "employer" under Title VII as a business with fifteen or more employees. After a jury awarded petitioner damages on her Title VII claim, respondent raised for the first time that it was not an employer within the meaning of Title VII because it had fewer than 15 workers. *Arbaugh*, 546 U.S. at 508. Rejecting respondent's argument that the 15-employee requirement was

jurisdictional, the Court concluded that it was simply an element of plaintiff's claim for relief. *Id.* at 516. In particular, the Court observed that the requirement "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

In contrast, § 363(m) *does* speak in jurisdictional terms, specifically by denying an appellate court the ability to grant relief affecting the validity of a sale authorized under § 363. The reason the language of § 363(m) is of the jurisdictional variety (in ways that the statute addressed in *Arbaugh* is not) is exactly as the Second Circuit has explained: the withdrawal of an appellate court's ability to grant relief is a classic hallmark of mootness, which is characteristically jurisdictional. *See In re WestPoint Stevens*, 600 F.3d at 247; *see also Hyman v. City of Gastonia*, 466 F.3d 284, 289-91 (4th Cir. 2006) (construing 28 U.S.C. § 2105 directing that "[t]here shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction" as a jurisdictional constraint).

The nature of jurisdiction in bankruptcy is also relevant. Bankruptcy jurisdiction is fundamentally *in rem*, with property of the estate constituted *in custodia legis*—in the custody of the court. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood,* 541 U.S. 440, 447-48 (2004); *Straton v. New*, 283 U.S. 318, 321 (1931) (the jurisdiction of the bankruptcy court "is so far in rem that the estate is regarded as in custodia legis from the filing of the petition"). Once an asset has been transferred from the estate, the court's *in*

rem jurisdiction characteristically ends.[8] In context, § 363(m) is best viewed as a codification of the ancient principle that, in the absence of a stay, the court's *in rem* jurisdiction over estate property terminates once the property is transferred out of the court's custody, as does an appellate court's jurisdiction to fashion relief inconsistent with the transfer.[9] Consistent with these principles, the decision below does not conflict with this Court's precedents.

IV. THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE FOR REVIEWING THE ISSUES DECIDED BELOW.

Finally, this case offers an exceptionally poor vehicle for the consideration of the issues decided below. The particular facts are anomalous and unlikely to recur, especially in a context involving the interplay between §§ 363 and 365. More fundamentally, even if MOAC could get past § 363(m), MOAC would lack an effective remedy. As noted, the only remedy MOAC sought below was to set aside the lease transfer under § 365; any other remedy (if one ever existed) has been waived. In the absence of a stay, the transfer of the lease has long since been

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[8] In cases involving *in rem* jurisdiction, the existence of either the original *res* or some valid substitute is ordinarily required to maintain jurisdiction and avoid appellate mootness. *See Lozman v. City of Riviera Beach*, 568 U.S. 115, 120 (2013); *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 96 (1992).

[9] The predecessor to § 363(m), Bankruptcy Rule 805, was understood as merely declaratory of this long-standing principle of *in rem* jurisdiction. *See In re Abington Realty Corp.*, 530 F.2d 588, 590 (4th Cir. 1976).

consummated and MOAC never explains how, at this point, Transform might be divested of its interest in the property. Moreover, Transform cured Sears' defaults under the lease, deposited funds in escrow, and assumed liability for and has paid royalties, rents, utilities, taxes, insurance, fees, common-area maintenance charges, promotion funds, and percentage rent obligations, for the past two years. MOAC never acknowledges these obstacles to a reversal of the lease transfer.

Critically, setting aside the Transfer Order would not undo the transfer of the lease; it would simply render the transfer, at most, unauthorized. *See* 11 U.S.C. § 363(b)(1). A different provision of the Bankruptcy Code, § 549, governs the recovery of unauthorized transfers from a bankruptcy estate. 11 U.S.C. § 549(a)(2)(B). But the statute of limitations embedded in this provision has long since expired, rendering the transfer unavoidable. *Id.* § 549(d). In any event, if the Transfer Order were reversed, there is no basis for the leased property to revert to MOAC unencumbered by the leasehold interest; the leasehold interest was an asset of Sears' bankruptcy estate and, at most, would revert to the estate.

As the Transfer Order provides, prior to its transfer, the MOAC Lease constituted property of Sears' estate. Pet. App. 107a-08a. The Order approved not *only* the transfer of the lease, but also (as a prerequisite) the *assumption* of the lease by the estate under § 365. Pet. App. 111a, 114a-15a (authorizing the assumption of the lease under § 365). Sears' defaults were then cured by Transform's payments, also required by the Transfer Order. In

addition, the order authorized and directed the transfer of the remaining roughly 70-year leasehold interest from the estate to Transform, not from MOAC to Transform. Pet. App. 111a-12a. Thus, undoing the transfer would, at most, merely reverse the transfer, reverting the assumed lease back to Sears' bankruptcy estate.[10] Critically, there would be no benefit to MOAC.

For this reason, the Court is not presented with an actual case or controversy. The only beneficiary of MOAC's requested relief is Sears' bankruptcy estate, and thus MOAC lacks a legitimate interest in the outcome sufficient to give it standing. For these reasons, this case is properly a candidate for dismissal, not certiorari review. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties.'" (citations omitted)); *Campbell-Ewald Co.*, 577 U.S. at 160-61 ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during

[10] Although MOAC objected to the assignment of the lease to Transform, it did not independently object to the estate's assumption of the lease. On appeal, MOAC argued, and the District Court agreed, that *Transform* could not take assignment of the lease under the requirement in § 365(b)(3)(A) that, "in the case of an assignment," the assignee have certain characteristics similar to the debtor. 11 U.S.C. § 365(b)(3)(A); Pet. App. 95a. That restriction does not apply to the estate when the estate is assuming the lease.

litigation, the action can no longer proceed and must be dismissed as moot." (citations omitted)).

Finally, MOAC's assertion that this case presents an ideal candidate for certiorari review because the parties have entered into a consensual stay (and thus have maintained the status quo) is misplaced. *See* Pet. at 33-34. The status quo has not been maintained. Transform has paid millions of dollars in connection with its acquisition of the lease and otherwise performed all of its obligations. Moreover, the terms of the consensual, court-ordered stay include the following provision: "Neither party shall seek to introduce or otherwise use this Order in any fashion to support their positions in any further proceedings except to enforce compliance with the terms hereof." Resp. App. 21a. By presenting the consent stay as a reason for certiorari review, MOAC is plainly violating the very consent stay that it invokes. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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May 20, 2022

APPENDIX

APPENDIX A — TRANSCRIPT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 20, 2019

[1]UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

IN THE MATTER OF:

SEARS HOLDINGS CORPORATION,

Debtor.

United States Bankruptcy Court
300 Quarropas Street, Room 248
White Plains, NY 10601

September 18, 2019
10:25 AM

B E F O R E :
HON ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

[2]HEARING Re: Notice of Agenda of Matters Scheduled for Hearing on September 18, 2019 at 10:00 a.m.

Motion to Shorten Time for MOACs Motion (i) for a Stay Pending Appeal; and (ii) to Expedite Transmittal of Record on Appeal to district Court (related document(s)5110)

Motion to Stay Pending Appeal and to Expedite Transmittal of Record on Appeal to District Court

Appendix A

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[5]P R O C E E D I N G S

THE COURT: Good morning.

MR. BEEBY: Good morning, Your Honor.

THE COURT: In re Sears Holdings Corporation. Let me just -- I think everyone got the word on this, but the confirmation hearing in Sears has been adjourned, and the only matter on today's calendar is the motion by MOAC, M-O-A-C, Mall Holdings LLC, for a stay pending appeal of my September 5, 2019 order authorizing the assumption of assignment of the MOAC mall lease to Transform.

So I've read the parties' pleadings in connection with this matter. I'm happy to hear oral argument. So MOAC have the burden, so you can go first.

MR. BEEBY: Thank you, Your Honor. My name is Alex Beeby with Larkin Hoffman on behalf of MOAC Mall Holdings. I'm here with Daniel Lowenthal of Patterson, Belknap, Webb & Tyler. And I believe Tom Flynn may be listening on the phone but not participating.

As a preliminary matter, there is also a related motion to shorten time to have this expedited hearing, which there's been no objections.

THE COURT: That's correct. I didn't see any objection to that. The parties agree to the matter, so --

MR. CHESLEY: Richard Chesley on behalf of Transform. No, Your Honor. No objection.

[6]THE COURT: All right. So that motion is granted.

MR. BEEBY: With regard to the stay motion, essentially MOAC is looking to reserve its right for appellate review of some very important legal issues, which -- for which there are no yet binding decisions.

The Mall -- MOAC is looking to protect Mall of America and its tenants. And respecting your decision, Your Honor, we believe that there is a strong argument on appeal. The decision -- your decision is based on legal interpretations that have not yet been reviewed by binding courts and extending some of those legal interpretations to new circumstances. Also note that there's no reason that a tenant search cannot continue. There's been one underway for several months now. And again, I want to reiterate that there are some important legal issues here that do warrant appellate review. And foreclosing review of those issues at that time would not be in the public interest either.

THE COURT: Well, the irreparable harm here is not based on a particular imminent transaction, right? Are we aware of any proposed sublease of the -- of any material portion of the space?

MR. BEEBY: No, Your Honor. And that would be dealing with equitable mootness. Thea's both legal --

THE COURT: Well, what is the harm then?

MR. BEEBY: The harm is that if there is no stay, [7] the appeal itself would be rendered legally moot.

MR. CHESLEY: By?

THE COURT: By -- well, there's a case I refer the Court to, a couple of cases. I mentioned the In re (indiscernible) in the -- in the dispute.

THE COURT: But it would be rendered moot by the subletting, right?

MR. BEEBY: No. I mean --

THE COURT: What else -- what else would render it moot?

MR. BEEBY: By virtue of 363. So this lease was assigned. The assignment is a product of the 363 sale, and 363(m) comes into play. Which in In re Gucci, which is a Second Circuit case here, which is 105 F.3d 837. In that case, a sale appeal was rendered legally moot by a one-day --

THE COURT: But you're not -- you're not appealing the whole sale.

MR. BEEBY: No, we're not.

THE COURT: You're appealing the assignment order.

MR. BEEBY: Correct.

THE COURT: So and if you were appealing the whole sale, which is already closed, I understand your argument. I would also require a bond equal to the sale consideration price. But we're just talking here about the --

[8]I really believe at this point, we're taking about just one of the roughly 600 -- well, I guess a few stores were -- oh, well, no. It was all leased. 600 leases that we're talking about here. In that context, I can't imagine 363(m) as far as the sale is concerned applying here. Are you going to rely on 363(m)? I mean, if you were, I would think the sale would've closed already.

MR. CHESLEY: Correct, Your Honor.

THE COURT: So it -- so it would be moot already.

MR. CHESLEY: Correct, Your Honor.

THE COURT: 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.

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.

THE COURT: The specific assign.

MR. CHESLEY: Correct, Your Honor.

THE COURT: Okay. All right. So I think the focus really is on the sublease, and there you have the procedure under 6.3, which is a lengthy procedure. It would certainly give you plenty of time to seek to expedite an appeal. But the record before me, which hasn't been [9]contested, is that it's going to take months to sublease this premises.

In fact, I believe that two years was fairly tight and required a condition, which is that the landlord not interfere with the process. So I just -- it doesn't seem like there's any -- no, obviously you want to generally have appeals for -- promptly, and four district judges in this courthouse are really quite good in ruling promptly on appeals, but I don't see the urgency here.

MR. BEEBY: Well, Your Honor. Our argument is based on looking at other cases in which there has been an assignment of the lease that was rendered moot where -- and they're across the country -- where there is no stay, that a stay is required for assignment of a -- to protect the appeal of an assignment of a lease.

THE COURT: Well, we just went through that. They're not going to rely on 363(m) because this transaction was done -- you don't need a further closing, right?

MR. BEEBY: No, Your Honor.

THE COURT: No. There's no further closing. This is already done, so if you're really making that argument,

then it really is moot already because you should've appealed the sale order. 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 Mr. Chesley's [10]just reiterated for the second time.

MR. BEEBY: And that's -- and I appreciate that. My concern would be that a review in court would independently --

THE COURT: Well, but if --

MR. BEEBY: -- look to the appeal as being moot.

THE COURT: They're -- they would be judicially estopped because one of the four factors that -- and one of the two, by far, most important factors for a stay pending appeal is the likelihood of irreparable harm. So if I deny your motion because there's no likelihood of irreparable harm, then I can't see how they could then go -- notwithstanding the representation to me -- and go to the district court and say that 363(m) applies because that's the only irreparable harm you're saying exists is the potential application of 363(m).

MR. BEEBY: That is correct, Your Honor.

THE COURT: Okay.

MR. BEEBY: That is the court -- and if they're -- we would seek leave to seek a new stay should the circumstances come about in which an equitable mootness argument would become right.

THE COURT: Okay. But it just, to me, that -- at this point, you really haven't carried your burden on that -- on that score, as I think you just acknowledged because [11]you're basically saying you would seek the right -- we would reserve the right to seek a stay if that was going to happen.

MR. BEEBY: That is -- that is absolutely --

THE COURT: But that's going to be a whole other set of facts.

MR. BEEBY: Correct.

THE COURT: Because they're under the lease, you know. 6.3, there's a whole procedure for notice about pending transactions.

MR. BEEBY: Do you have any further questions, Your Honor? I believe that actually addresses --

THE COURT: Okay.

MR. BEEBY: -- pretty much all of the issues before the Court, unless there are other issues that --

THE COURT: Well, I mean, I -- just go -- for the -- I mean, given that there is no real showing of irreparable harm -- and, by the way, I do believe that, generally speaking, risk of mootness standing alone doesn't constitute irreparable injury, although there are times when, again, the very fact of 363(m) might. But then, of

course, you -- then you have the bond requirement, which I think if 363(m) were in fact to be relied on by both sides, the bond here would be enormous, as it was in Adelphia. That's the second part of Judge Scheindlin's opinion or set [12]of opinions in the case, which is the case you're relying on for the mootness point.

But I also -- because of the lack of irreparable harm, I don't believe a stay is in the public interest given the need under the two-year deadline that my order proposes for Transform to market the property and the cloud that the stay would have over the marketing process.

And finally, on the -- on the issue of the merits, obviously it's always a bit awkward for an appellant to argue that there's a substantial showing (indiscernible) on the merits when it's making that argument to the judge that issued the order, which is what you have to do under Rule 8007.

But I've always been of the belief that not only is no judge perfect but also that there are issues where it truly is a close call, and I would like to think that I would know that when rendering an opinion on the stay pending appeal or request for a stay pending appeal.

And of course, under the majority and, I believe, controlling standard in the second circuit, which may also be the controlling standard set by the Supreme Court, evaluating the merits factor in conjunction with the irreparable harm factor is basically a balance. The more irreparable harm, the less of a showing on the merits and vice versa.

[13]Here, I think you'd have to have a huge showing on the merits because there's no irreparable harm. It would be more than substantial. I think it would have to be quite strong.

And while, at this point, we're dealing with district court and bankruptcy court opinions, we're also dealing with legislative history and a basic underlying principle. First, it appears to me that Judge (indiscernible) opinion and the multiple opinions on Toys "R" Us are well reasoned and consistent with the statute which has an introductory clause that refers to adequate assurance performance under the lease, referring to the lease.

And as importantly, perhaps more importantly, although Congress in the bankruptcy code at times varies the contractual expectations of the parties -- most obviously since bankruptcy permits satisfaction of a default with tiny bankruptcy dollars under certain circumstances -- generally speaking, the parties' rights under the non-bankruptcy law govern their rights vis-à-vis each other.

And it's extremely unusual, perhaps only -- I can think of perhaps only one instance, and there the courts are in disagreement, where Congress in the bankruptcy code gave a non-debtor party greater rights than under their contract. That one instance that I can think of is under section 1114 [14]where Congress was under enormous pressure by the public in light of the LTV case to prevent the termination of retiree benefits.

And arguably, at least according to two out of three judges of the Third Circuit, overrode provisions in actual benefit agreements that permitted a debtor to terminate those agreements and provided, at least for permanent terminations, that the debtor could not do that without going through the 1114 process. Other courts, including myself, have said that even there, Congress couldn't have meant that it would write out a provision beneficial to a debtor in a -- in a contract that governed the parties' pre-bankruptcy relationship.

Of course, in that context, there's a bit of a hook because Congress could've been aware that a decision to enforce an agreement that would deprive retirees of ongoing benefits is a decision that's reviewable by the court. But it appears to me truly inconceivable that where sophisticated parties agreed to the terms of a lease, particularly a lease that gave the parties a buyout mechanism whereby a landlord -- namely MOAC -- could preserve control, and 6.3 of this lease does, it would confer on the landlord benefits that were not in the lease itself.

Frankly, I don't -- I -- you know, bankruptcy has [15] been held to be consistent with the takings provision because bankruptcy is also in the constitution. But to say that that extra right could be added for a non-bankrupt party might raise serious constitutional issues, i.e. rewriting the parties' agreement for the benefit of the non-debtor. In any event, I just don't see that Congress meant to do that and the parties were bound by their arguments.

So, I don't think you've made the -- in this case -- the necessary very strong showing, so really none of the

factors are met here. But the real -- the key inquiry is on the irreparable harm, for what its' worth. So I'll deny them option for a stay.

MR. BEEBY: Thank you, Your Honor.

MR. CHESLEY: Richard Chesley. We will submit an order.

THE COURT: You don't have to formally settle that, but you should run it by your counsel. And you should refer to the hearing, including the representations made on the record of the hearing.

MR. CHESLEY: That's what we'll do, Your Honor. Thank you.

THE COURT: There's no issue about that.

MR. BEEBY: Thank you, Your Honor.

THE COURT: Okay. Thank you.

As far as the request for expedited treatment, I'm [16]not going to grant that because I don't see a need for expedited treatment, and I don't like to give like friends upstairs more work than they need to. If you think you need to speed this up, you can -- you're free to make that request of them as time goes by.

MR. CHESLEY: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 10:45 AM)

APPENDIX B — ORDER DENYING MOTION IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 27, 2019

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.[1]

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1. 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

Appendix B

ORDER DENYING MOTION OF MOAC MALL HOLDINGS LLC (I) FOR A STAY PENDING APPEAL; AND (II) TO EXPEDITE TRANSMITTAL OF RECORD ON APPEAL TO DISTRICT COURT

Upon MOAC Mall Holdings LLC's *Motion of MOAC Mall Holdings LLC (I) for a Stay Pending Appeal; and (II) to Expedite Transmittal of Record on Appeal to District Court* (ECF Nos. 5083 and 5110) (the "**Motion**") for a stay of the *Order (I) Authorizing Assumption and Assignment of Lease With MOAC Mall Holdings LLC and (II) Granting Related Relief* (ECF No. 5074) ("**Assumption and Assignment Order**") pending appeal of the Assumption and Assignment Order, to expedite the transmittal of the record on appeal, and alternatively, for an extension of the mootness stay; and Transform Holdco LLC, for itself and on behalf of its affiliate Transform

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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); 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.

Appendix B

Leaseco LLC, having filed *Transform Holdco LLC's Objection to Motion of MOAC Mall Holdings LLC (I) for a Stay Pending Appeal; and (II) to Expedite Transmittal of Record on Appeal to District Court* (ECF No. 5152) (the "**Objection**"); and the Court having jurisdiction to consider the Motion and the Objection pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b); and the Court having held a hearing on the Motion and the Objection on September 18, 2019 (the "**Hearing**"); and upon the record of and representations made at the Hearing; and, after due deliberation and for the reasons stated by the Court at the Hearing, the Court having determined that MOAC Mall Holdings LLC has not carried its burden to obtain the requested stay and that there is an insufficient basis to direct expedited treatment of its appeal, it is hereby

ORDERED that the Motion is denied; and it is further

ORDERED that the Assumption and Assignment Order shall be immediately enforceable and effective as of its entry on September 5, 2019.

Dated: White Plains, New York
September 26, 2019

/s/Robert D. Drain
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C — STIPULATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 10, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Bankr. Case No. 18-23538 (RDD)
(Jointly Administered)

Case No. 19-cv-09140 (CM)

In re

SEARS HOLDINGS CORPORATION, *et al.*,

Debtors.[1]

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1. The debtors (collectively, 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); lnnovel 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); SR – Rover

Appendix C

MOAC MALL HOLDINGS LLC,

Appellant,

v.

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

Appellees.

STIPULATION OF TRANSFORM HOLDCO LLC, SEARS HOLDINGS CORPORATION, AND MOAC MALL HOLDINGS LLC FOR STAY PENDING APPEAL OF DISTRICT COURT DECISION

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de Puerto Rico, LLC (f/k/a 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); Rover Business Unit, LLC (f/k/a 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); 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 Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

Appendix C

Transform Holdco LLC (the "*Buyer*"), for itself and on behalf of its affiliate Transform Leaseco LLC ("*Transform Leaseco*" and together with the Buyer, "*Transform*"), Sears Holdings Corporation ("Sears"), and MOAC Mall Holdings LLC ("*MOAC*") stipulate as follows:

WHEREAS, on September 5, 2019, the bankruptcy court below entered an *Order (I) Authorizing Assumption and Assignment of Lease With MOAC Mall Holdings LLC and (II) Granting Related Relief* [Bankr. ECF No. 5133] (the "*Bankruptcy Order*");

WHEREAS, on September 20, 2019, MOAC filed a motion for a stay pending appeal of the Bankruptcy Order [Bankr. ECF No. 5110]. The bankruptcy court denied that motion for stay pending appeal, [Bankr. ECF No. 5246] and thus there was no stay of the Bankruptcy Order. As a result, Transform had the right to market a lease ("*Lease*") that was assumed and assigned to Transform by the Bankruptcy Order at the Mall of America (the "*Mall*") in Minneapolis, Minnesota;

WHEREAS, MOAC appealed the Bankruptcy Order on September 12, 2019 [Bankr. ECF No. 5133], and this Court entered its *Decision on Appeal,* 2020 WL 953528, vacating and remanding the Bankruptcy Order, on February 27, 2020 (the "*Decision*");

WHEREAS, Rule 8025 of the Federal Rules of Bankruptcy Procedure and Rule 8(a) of the Federal Rules of Appellate Procedure provide that this Court has the authority to issue a stay pending appeal of this Court's Decision; and

Appendix C

WHEREAS, Transform intended to seek a stay pending appeal. Transform conferred with MOAC and Sears to seek their consent to a stay pending appeal, and MOAC and Sears have consented to a stay on the terms set forth herein.

AGREEMENT

NOW, THEREFORE, the Parties stipulate and agree as follows:

1. The Parties agree that this stipulated Order is intended to satisfy the requirements of Rule 8025 of the Federal Rules of Bankruptcy Procedure and this Court's Individual Practices and Procedures.

2. Upon entry of the Court's approval of this stipulated Order and until any ruling of the Second Circuit Court of Appeals, judgment of this Court shall be stayed pending appeal to the Second Circuit Court of Appeals, and local Bankruptcy Rule 8024-1 notwithstanding shall not automatically become the order or judgment of the Bankruptcy Court or require a motion for further proceedings to be filed.

3. As a condition of MOAC's consent to such stay, from the date hereof until the termination of the stay, Transform shall continue to pay rent and other costs and fees due under the Lease during the pendency of any appeal of the Decision, and otherwise comply with the terms of the Lease. In addition, from the date hereof until the termination of the stay, Transform shall not sublease

or enter into any similar agreement or contract related to any of the property at the Mall subject to the Lease, or otherwise voluntarily take or induce any out-of-court action that could in any way impair MOAC's ability to vindicate its position in these proceedings, including on further appeal, without written consent of MOAC and its counsel of record. Transform will not take any out-of-court action that might cause MOAC's position on appeal to be mooted.

4. As a further condition of MOAC's consent to such stay, from the date hereof until the termination of the stay, MOAC shall have the right to market the Lease, however, shall not sublease or enter into any similar agreement or contract related to any of the property at the Mall subject to the Lease, or otherwise voluntarily take or induce any out-of-court action that could in any way impair Transform's ability to vindicate its position in these proceedings, including on further appeal, without written consent of Transform and its counsel of record. MOAC will not take any out-of-court action that might cause Transform's position on appeal to be mooted.

5. The terms and conditions of this stipulated Order shall be immediately effective and enforceable upon entry. Once this stipulation is approved by the Court, it shall remain in place until the earlier of (i) the expiration of the time period within which to appeal any judgment of this Court; (ii) if an appeal is taken, the sending down of the mandate of the Second Circuit Court of Appeals.

6. Other than expressly set forth herein, this Order shall not be construed to affect in any way the legal positions of the parties with respect to the Lease. Neither party shall seek to introduce or otherwise use this Order in any fashion to support their positions in any further proceedings except to enforce compliance with the terms hereof.

7. This Court shall retain jurisdiction with respect to any matters, claims, rights, or disputes arising from or related to the implementation of this stipulated Order.

Dated: March 9, 2020

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-and-

Appendix C

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IT IS SO ORDERED

Dated: March 12, 2020
New York, NY

/s/
THE HONORABLE COLLEEN MCMAHON, CHIEF U.S.D.J.