No. _____

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC AND SRZ LIQUIDATING TRUSTEE, SUCCESSOR IN INTEREST TO SEARS HOLDING 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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QUESTIONS PRESENTED

After litigating for four years, including in this Court, on the premise that the Sears lease at Mall of America is a "lease" for purposes of the assumption and assignment provisions of Bankruptcy Code Section 365, respondents did an about-face on remand and argued, for the first time, that the lease was not a "true lease" at all, and that Section 365(d)(4)'s deemed rejection provision for unassumed leases was inapposite. That position was not only irreconcilable with the parties' years of litigating over the meaning of Section 365(b)(3) but also contrary to the parties' numerous express stipulations that the lease *was* a lease subject to the requirements of Section 365(b)(3) and (d)(4).

The district court and court of appeals absolved respondents of their repeated waivers because the stipulation that the MOAC lease was a "lease for purposes of Section 365(b)(3)" was more explicit than their stipulation that the lease was a "lease of nonresidential real property" and that Section 365(d)(4)'s deadline to assume or reject such leases applied to it. In so ruling, the court of appeals applied, in effect, a "magic words" standard that is inconsistent with other circuits' construction of stipulations. Moreover, its ruling assumes that the word "lease" could have different meanings for Sections 365(b)(3) and (d)(4), which other circuits reject.

The questions presented are:

Whether parties must invoke a particular phrase and explicitly acknowledge all possible consequences for a stipulation to constitute waiver; and

Whether the term "lease" means different things in different subsections of Bankruptcy Code Section 365.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner MOAC Mall Holdings LLC was an appellant-cross-appellee 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 an appellee-cross-appellant in the court of appeals.

Respondent SRZ Liquidating Trustee, as successor in interest to Sears Holdings Corporation, was an appellee in the court of appeals.

RELATED CASES

- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC & SRZ Liquidating Trustee, successor in interest to Sears Holdings Corp. (In re Sears Holdings Corp.)*, No. 24-1354 (L), U.S. Court of Appeals for the Second Circuit. Judgment entered December 16, 2024.
- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC & Sears Holdings Corp. (In re Sears Holdings Corp.)*, No. 19-CIV-09140 (CM), U.S. District Court for the Southern District of New York. Order entered May 3, 2024.
- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC & Sears Holding-Corp. (In re Sears Holdings Corp.)*, No. 20-1846 (L), U.S. Court of Appeals for the Second Circuit. Judgment entered November 6, 2023.
- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC (In re Sears Holdings Corp.)*, No. 21-1270, U.S. Supreme Court. Judgment entered April 19, 2023.
- *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 court of appeals (App. 1a-15a) is not reported in the national reporter but is available at 2024 WL 5113165. The opinion of the United States District Court for the Southern District of New York (App. 16a-73a) is reported at 661 B.R. 298. The earlier opinion of the court of appeals on remand from this Court (App. 74a-79a) is not reported in the national reporter but is available at 2023 WL 7294833.

An earlier opinion of this Court is reported at 598 U.S. 288. An earlier opinion of the court of appeals, vacated by this Court (App. 80a-90a), is not reported in the national reporter but is available at 2021 WL 5986997. A prior opinion of the district court, since vacated (App. 91a-128a), is reported at 616 B.R. 615. The earlier opinion of the district court, initially vacated and subsequently affirmed (App. 129a-180a), is reported at 613 B.R. 51. The bankruptcy court's vacated order (App. 181a-205a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2024. App. 1a. On January 17, 2025, the court of appeals entered a stay of its mandate to allow petitioner to file the present petition for a writ of certiorari. App. 206a. 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 are reproduced in full in an appendix hereto. App. 212a-233a.

INTRODUCTION

This is the second time this case has come before the Court to address important and recurring questions of bankruptcy law. The Court previously resolved a circuit split as to whether the statutory mootness provision of Section 363(m) of the Bankruptcy Code precluded, as a jurisdictional matter, MOAC Mall Holdings LLC (MOAC) from appealing the bankruptcy court's approval of the assumption and assignment of the lease for an anchor tenant location at the Mall of America (the Lease) by the bankrupt retailer Sears to Transform Holdco LLC (Transform) under the lease provisions of Section 365. In defeating MOAC's request for a stay of that order, Transform waived its reliance on Section 363(m)'s mootness provision. But after the district court reversed the bankruptcy court's assignment order on the merits, concluding that Transform did not meet the Bankruptcy Code's requirements to be an assignee of a shopping center lease, Transform reversed course and argued that Section 363(m) precluded MOAC's appeal as a jurisdictional matter. Constrained by circuit precedent, the district court dismissed MOAC's appeal, and the court of appeals affirmed. After this Court determined that Section 363(m) is not jurisdictional and thus subject to Transform's waiver, the court of appeals affirmed the district court's original merits decision, concluding that Transform was not a permissible assignee of the Lease because it did not have a similar financial condition and operating performance to Sears as of the 1991 entry into the Lease as required by Section 365(b)(3).

With Sears and Transform having lost on the merits, Section 365(d)(4) prescribed MOAC's remedy. Section 365(d)(4) provides that "an unexpired lease of

nonresidential real property" that is not assumed or assumed and assigned within a statutory maximum 210-days after the lessee's bankruptcy filing "shall be deemed rejected, and the [lessee] shall immediately surrender that nonresidential real property to the lessor." 11 U.S.C. 365(d)(4).

Faced with these unforgiving consequences of having not obtained a valid assumption and assignment within the statutory deadline, Transform reversed course again, arguing for the first time, on remand from this Court, that the MOAC Lease was no "lease" at all. Transform argued that Section 365(d)(4) did not apply because the Lease was not a "true" or "bona fide" lease. This attempt to recharacterize the Lease and escape the statutory remedy of deemed rejection and surrender was not only irreconcilable with five years of litigation under the "lease" provisions of Section 365 but also contrary to the parties' repeated stipulations that the Section 365(d)(4) deadline applied, that the Lease was a "lease of nonresidential real property" (the precise language of Section 365(d)(4)), and that the Lease was "a shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*." These stipulations were entered into for the very purpose of extending the Section 365(d)(4) deadline so that MOAC's objections to the assumption and assignment could be heard in the bankruptcy court without expedited litigation.

The district court declined to apply the plain language of Section 365(d)(4), and instead held that the Lease was not a "true lease" for purposes of Section 365(d)(4)'s deemed-rejected provision, concluding, without the parties having developed any evidentiary record, that the Lease was more akin to a sale or financing. The district court reasoned that, under circuit precedent,

long-term leases with prepaid rent are not "true leases" and are excluded *only* from the deemed rejection provision of Section 365(d)(4) but are otherwise subject to the other "lease" provisions of Section 365.

In affirming the district court, the court of appeals created circuit splits on two issues, and the resolution of either (or both) of these issues would require application of the deemed rejection remedy mandated by Section 365(d)(4).

First, the court of appeals determined that Sears and Transform had not waived their "true lease" arguments through their repeated stipulations to the applicability of Section 365(d)(4) because the stipulations did not include an affirmative statement that "Section 365(d)(4) governs the MOAC Lease." App. 12a. The court concluded that, had the parties intended to acknowledge that Section 365(d)(4) applied to the Lease, they would have expressly stated that the Lease was a "lease of nonresidential real property" *pursuant to Section 365(d)(4)* in the same way the parties stipulated that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*." *Ibid.*

The standard imposed by the court of appeals is contrary to the standard for waiver by stipulation of all other courts of appeal to have considered the issue, including the Third, Fifth, Seventh, and Ninth Circuits, which reject a "magic words" test and instead require that stipulations be read in context. The context here could not have been clearer—the parties agreed that the Section 365(d)(4) deadline applied, repeatedly extended the deadline by agreement, and stipulated that the Lease was a "lease of nonresidential real property," the exact term that makes Section 365(d)(4) applicable. The

court of appeals' imposition of such an exacting standard for waiver by stipulation would lead to untenable results. It would require litigants to catalogue in impossibly long stipulations every potential legal consequence of a factual stipulation for it to be binding. These types of "magic words" requirements have been routinely rejected by this Court, including in this very case, where the Court reiterated the established rule that "Congress need not use 'magic words' to convey its intent that a statutory precondition be treated as jurisdictional." *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 598 U.S. 288, 298 (2023).

Second, the court of appeals accepted that the term "lease" can mean different things under different subsections of Section 365. The court of appeals recognized that the parties' repeated stipulations that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*" was sufficiently clear to waive any argument that Section 365(b)(3) did not apply. But the court of appeals concluded that this did not mean that the Lease was a lease of nonresidential real property pursuant to Section 365(d)(4). That conclusion not only ignored the parties' stipulation elsewhere that the Lease *was* a "lease of nonresidential real property," but necessarily assumed the term "lease" can mean different things in different subsections of Section 365. That is contrary to the decisions of the Third, Seventh, and Ninth Circuits with respect to this precise provision; those courts have uniformly held that the term "lease" has a consistent meaning throughout Section 365 and the Bankruptcy Code as a whole. The court of appeals' reasoning also ignores this Court's longstanding "*presum[ption]* that the same word carries a single meaning throughout a

given statute." *Azar* v. *Allina Health Servs.*, 587 U.S. 566, 598 (2019).

Even under the court of appeals' "magic words" test, its judgment could not stand if this Court agrees with the majority of circuits that a "lease" is a "lease" for all purposes of Section 365. If the term "lease" has a consistent meaning throughout Section 365, then the parties' stipulation that the Lease is a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*"—a stipulation the court of appeals acknowledged as sufficiently clear—would necessarily also mean that the Lease is a "lease of nonresidential real property" *pursuant to* Section 365(d)(4). The court of appeals' determination that there was no waiver by stipulation can only be sustained by a reading that affords the term "lease" different meanings across different subsections of the same section, which this Court should reject.

The Court's resolution of either circuit split in MOAC's favor would mandate deemed rejection of the Lease and immediate surrender of the premises under Section 365(d)(4). The writ of certiorari should be granted, and the decision below should be reversed.

STATEMENT OF THE CASE

A. Legal Framework

The Bankruptcy Code provides two distinct avenues for a chapter 11 debtor to monetize estate assets outside the ordinary course of business. Under Section 363, a debtor may sell "property of the estate" with bankruptcy court approval. 11 U.S.C. 363(b)(1). Adequate notice of the proposed sale must be provided, and all parties in interest have the opportunity to raise and litigate objections in the bankruptcy court. *Ibid.*

Chapter 11 debtors may also monetize certain contract rights and unexpired leases under the comprehensive scheme of a different section of the Bankruptcy Code, Section 365, which permits the "assumption and assignment" of contracts and leases to third-party assignees, even if the terms of such contract or lease would restrict assignment without consent of the counterparty, see 11 U.S.C. 365(f)(2), and even if there was a default because of the debtor's financial condition and commencement of a bankruptcy case, see 11 U.S.C. 365(b)(3). Section 365 imposes several threshold requirements for executory contracts and unexpired leases to be assumed and assigned, including that defaults be "cured" and the non-debtor counterparty be provided "adequate assurance of future performance under such contract or lease." 11 U.S.C. 365(b)(1)(A), (C). For shopping center leases, "adequate assurance of future performance" includes that the "financial condition and operating performance of the proposed assignee * * * shall be similar to the financial condition and operating performance of the debtor * * * as of the time the debtor became the lessee under the lease." 11 U.S.C. 365(b)(3)(A).[1]

Section 365 includes specific requirements and deadlines for different types of "unexpired leases," namely, leases of "personal property," see, *e.g.*, 11 U.S.C. 365(d)(2), and leases of "real property," see, *e.g.*, 11 U.S.C. 365(b)(1), which are further subdivided into leases of "nonresidential real property," see, *e.g.*, 11 U.S.C. 365(c)(3), (d)(4), and leases of "residential real

[1] Transform, a sub-leasing company with no intent to operate the premises, was previously found to be an ineligible assignee of the Lease under Section 365(b)(3)(A) because it did not have the operating performance and financial condition similar to Sears as of 1991. App. 77a.

property," see, *e.g.*, 11 U.S.C. 365(d)(2). Each category of unexpired leases has a deadline by which a debtor must assume a lease, either for itself or for assignment to a third-party. Unlike for residential leases, where Section 365(d)(2) permits a debtor to assume or assume and assign the lease at any time prior to plan confirmation, Congress in Section 365(d)(4) "establish[ed] a *firm, bright line deadline* by which an unexpired lease of *nonresidential* real property must be assumed or rejected." H.R. Rep. No. 31, 109th Cong., 1st Sess. 86 (2005) (emphasis added). If a chapter 11 debtor does not assume or reject an unexpired lease of *nonresidential* real property within a statutory maximum of 210 days after the bankruptcy filing, the lease "shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor." 11 U.S.C. 365(d)(4)(A)(i) (providing initial deadline of 120 days); 11 U.S.C. 365(d)(4)(B)(i) (permitting extension of additional 90 days with any further extensions requiring lessor consent).

Recognizing these limitations and deadlines can be harsh to chapter 11 debtors, and that fundamental principles of bankruptcy mandate the substance of a transaction should control over its form, the Second Circuit and other courts of appeals have held that the "lease" provisions of Section 365 only apply to "true" or "bona fide" leases. *In re PCH Assocs.*, 804 F.2d 193, 199-200 (2d Cir. 1986) ("[L]eases failing to meet the 'bona fide' definition are not to be treated as leases for purposes of the Bankruptcy Code."). As a result, a debtor may seek to recharacterize a purported lease as, for example, a sale and financing transaction, *id.* at 199, by arguing that the "economic substance" of the transaction is not truly a lease. If the transaction is properly characterized as a

sale and financing transaction, then the assets could be sold under Section 363 instead of being subject to the assumption and assignment provisions applicable to leases under Section 365. 11 U.S.C. 363(f) (permitting sale of estate property "free and clear" of security interests).

When a chapter 11 debtor seeks to monetize an asset documented by a lease agreement, the debtor can, as occurred here, acknowledge that the agreement is a "lease" and proceed under the assumption and assignment provisions of Section 365, including its deemed rejection and surrender consequences for failing to meet the Section 365(d)(4) deadline. Or, alternatively, the debtor can seek to sell its rights as an asset under the sale provisions of Section 363.

If the debtor seeks to recharacterize the lease agreement as something other than a "true" or "bona fide" lease in order to proceed under Section 363, the counterparty to the lease agreement would then have an opportunity to contest that position through an objection, and the economic substance of the agreement can be litigated and determined in the bankruptcy court. There is, however, a "strong presumption that a deed and lease . . . are what they purport to be," and there must be "substantial evidence upon which the bankruptcy court and the district court could rely to find that the transaction is something other than a true lease." *PCH*, 804 F.2d at 200 (citation omitted). Consistent with that standard, "[t]he burden of proof at trial will rest with [the] party seeking to characterize the Agreement as something 'other than what it purports to be.'" *WorldCom, Inc.* v. *General Elec. Glob. Asset Mgmt. Servs. (In re WorldCom, Inc.)*, 339 B.R. 56, 62 (Bankr. S.D.N.Y. 2006) (citation omitted). Bankruptcy courts

assess a multi-factor test for recharacterizing leases, including:

> (i) whether the "rental" payments were calculated to compensate the lessor for the use of the land, or rather were structured for some other purpose, such as to ensure a particular return on an investment; (ii) whether the purchase price was related to the fair market value of the land, or whether it was calculated as the amount necessary to finance the transaction; (iii) whether the property was purchased by the lessor specifically for the lessee's use; (iv) whether the transaction was structured as a lease to secure certain tax advantages; (v) whether the lessee assumed many of the obligations normally associated with outright ownership, including the responsibility for paying property taxes and insurance.

Hotel Syracuse, Inc. v. *City of Syracuse Indus. Dev. Agency (In re Hotel Syracuse, Inc.)*, 155 B.R. 824, 838 (Bankr. N.D.N.Y. 1993). "The evidentiary record of many cases on recharacterization include expert testimony on the commonality of the particular lease provisions as well as an analysis of the overall structure of the particular lease in question." *Prince Fashions* v. *60G 542 Broadway Owner, LLC (In re Prince Fashions, Inc.)*, No. 19-23079, 2024 WL 3517624, at *12 (Bankr. S.D.N.Y. July 23, 2024). For example, "*PCH Associates* was resolved after a three day trial on the merits, including extensive expert testimony, in which the court admitted parol evidence on the parties' intention in entering into the underlying transactions." *Ibid.* (quoting

Barney's, Inc. v. *Isetan Co. (In re Barney's, Inc.)*, 206 B.R. 328, 336 (Bankr. S.D.N.Y. 1997)).

B. Factual and Procedural History

The debtor and proposed assignee in this case proceeded with nearly five years of litigation under the "lease" provisions of Section 365. Only when faced with the consequences of their failure to timely satisfy Section 365's adequate assurance requirements—deemed rejection and surrender of the premises—and nearly five years after the factual record was closed, did the debtor and assignee reverse course and argue that the Lease was no lease at all. Sitting as an appellate court on remand, the district court determined that the Lease was not a "true lease," recharacterizing the parties' agreement without any factual record as to the parties' intent, and the court of appeals affirmed.

1. The Parties

Sears Holdings Corporation was the parent entity of Sears, Roebuck and Co. (Sears), an American retailer of appliances, electronics, and other general goods. Sears filed for chapter 11 bankruptcy on October 15, 2018.

MOAC d/b/a Mall of America is a premiere, 5.6 million square-foot shopping center in Bloomington, Minnesota. MOAC was in development when it entered into the Lease with Sears on May 30, 1991. MOAC entered into the Lease for one of three anchor locations in the shopping center because of Sears' strong reputation, brand recognition, and ability to draw customers. Because of Sears' strength as a retailer, MOAC offered the Lease to Sears on favorable terms of $10 per year in rent, with Sears also responsible for the initial construction of its tenant space and ongoing payment of taxes,

utilities, insurance, and common area maintenance. App. 132a.

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 in order to acquire substantially all of Sears' assets, including acquiring hundreds of its leases through assumption and assignment under Section 365. Transform, which had no intent to occupy the leased premises for itself, was formed to operate as a sub-leasing company. App. 137a.

2. The Asset Sale Under Section 363

On February 8, 2019, the bankruptcy court approved the sale of substantially all of Sears' assets to Transform under Section 363. 18-23538 Docket entry No. 2507 (Bankr. S.D.N.Y. Feb. 8, 2019). None of Sears' leases, including the Lease at Mall of America, nor any of Sears' rights under the Lease agreement, were conveyed to Transform on the sale closing date. See generally *ibid.* Transform did, however, acquire a "designation right" with respect to approximately 600 leases, including the MOAC Lease. *Id.* at 56. This meant that, at a later date after the asset sale closed, Transform could select which leases it sought to have assumed and assigned to it under Section 365.

The sale order established procedures by which Transform was able, pursuant to Section 365, to seek the assumption and assignment of the designatable leases. The sale order included an express finding that "[e]ach of the Designatable Leases," defined to include the MOAC Lease, "*constitutes an unexpired lease * * * within the meaning of section 365 of the Bankruptcy*

Code, and at [Transform's] election, will be deemed assumed and assigned by the Debtors on the Assumption Effective Date subject to compliance with and the procedures set forth in the Asset Purchase Agreement and herein." C.A. App. 0278-0279 (emphasis added). Consistent with the asset purchase agreement and the sale order, neither Sears nor Transform ever asserted or reserved any argument in the bankruptcy court that the MOAC lease was not "an unexpired lease * * * within the meaning of section 365" in an effort to recharacterize the Lease as outside the scope of Section 365, or argue that it was an asset that had been conveyed outright to Transform by the sale order.

The February 8 Sale Order was not appealed, and the asset sale to Transform closed on February 11, 2019.

3. The Proposed Lease Assignment under Section 365

More than two months after the sale closed, Transform filed a notice with the bankruptcy court designating the MOAC Lease for proposed assumption and assignment under the lease provisions of Section 365. C.A. App. 1614. In compliance with the procedures for objections set forth in the sale order, MOAC timely objected to the Lease's assignment on the grounds that the adequate assurance requirements of Section 365(b)(3)(A) for shopping center leases was not satisfied because Transform was not similarly situated to Sears. C.A. App. 1631.

4. The Parties' Stipulations that Section 365(d)(4) Applied

At the time MOAC filed its objection, there were only eleven days remaining on the statutory maximum 210-day period under Section 365(d)(4) within which the

Lease must have been assumed or it would be statutorily deemed rejected. To avoid expedited litigation, Sears, Transform, and MOAC entered into several stipulations to extend the Section 365(d)(4) deadline by consent.

On three separate occasions, the parties stipulated that the Lease was a "lease of nonresidential real property" in extending the Section 365(d)(4) deadline. First, the parties defined the term "Lease" as an unexpired "lease * * * of nonresidential real property," the verbatim language of Section 365(d)(4). App. 252a ("The Landlord and the Debtors are parties to that certain *lease* expiring on August 31, 2022 (as amended and/or modified, the 'Lease') *of nonresidential real property* (the 'Premises') located at the Mall of America, Bloomington, Minnesota (Store No. 1722).") (emphases added). The parties further stipulated that "[t]he deadline for the Debtors to assume or reject the leases pursuant to section 365(d)(4) of the Bankruptcy Code, *including the Lease*, was May 13, 2019." App. 254a (emphasis added). The parties repeated these stipulations two additional times in extending the Section 365(d)(4) deadline ultimately to August 31, 2019. App. 252a-256a.

These stipulations specific to Section 365(d)(4) were in addition to the parties' stipulation that "the Lease is a shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*," App. 263a, which is a subtype of "leases of nonresidential real property" subject to the Section 365(d)(4) deadline.

In the parties' stipulation of undisputed fact for the bankruptcy court hearing, the parties again stipulated that the Lease was a "lease expiring on August 31, 2022 * * * of nonresidential real property," that the "deadline for the Debtors to assume or reject the Lease pursuant to Section 365(d)(4) * * * is currently August 31, 2019,"

and that "the Lease is a shopping center lease pursuant to 11 U.S.C. 365(b)(3)." App. 261a-263a.

5. The Bankruptcy Court's Erroneous Assumption and Assignment Order and Five Years of Ensuing Appeals About Whether Transform Could Assume a Shopping Center Lease

The bankruptcy court approved the assumption and assignment of the Lease to Transform over MOAC's objection on August 23, 2019, and entered an order to that effect on September 5, 2019.

At no time during the bankruptcy proceedings did Sears or Transform raise any argument that the Lease was not a "true" or "bona fide" lease subject to Section 365, which would have been contrary to their repeated stipulations. MOAC thus had no reason or opportunity in the bankruptcy court to develop a factual record or present expert testimony as to whether the MOAC Lease was anything other than a "true" or "bona fide" lease.

MOAC timely appealed the bankruptcy court's order, and so began five years of litigation, including before this Court, premised on the MOAC Lease being a "lease" subject to Section 365.

On appeal, MOAC argued that Transform failed to satisfy the adequate assurance requirements of Section 365(b)(3) for assignees of shopping center leases and, consistent with the statutory consequence in Section 365(d)(4) of a failure to timely assume, requested the district court order that the Lease be deemed rejected. The district court initially vacated the bankruptcy court's order assigning the Lease, holding that Transform failed to satisfy the adequate assurance requirements of Section 365(b)(3). App. 171a. In so ruling, the district court

acknowledged, consistent with Section 365(d)(4), that MOAC "wants the lease to revert to it." App. 130a. In its 43-page opinion, the district court addressed the adequate assurance of future performance requirements applicable to shopping center leases under Section 365(b)(3). The district court did not address—because neither Transform nor Sears raised—any argument that the Lease was not a "true lease" such that Section 365's requirements were irrelevant.

Transform then raised a belated jurisdictional argument in the district court asserting that Section 363(m) provided a jurisdictional bar for the appeal in the absence of a stay, notwithstanding that Transform had waived reliance on Section 363(m) in defeating MOAC's motion for a stay pending appeal in the bankruptcy court. App. 92a. This reversal in position was contrary to Transform's repeated representations to the bankruptcy court that Transform would *not* argue that the Section 365 assumption and assignment order was subject to statutory mootness under Section 363(m), which applies to unstayed sale orders. App. 93a. The bankruptcy court had agreed with Transform that Section 363(m) was inapposite, because MOAC was not appealing the sale, which already closed, but only the lease assumption and assignment order. 18-23538 Docket entry No. 5413, at 7:22-8:22 (Bankr. S.D.N.Y. Sept. 20, 2019).

Constrained by then-circuit precedent characterizing Section 363(m) as a jurisdictional bar, the district court vacated its original decision and dismissed MOAC's appeal. App. 93a. MOAC appealed to the Second Circuit, which affirmed. Following a petition for writ of certiorari, this Court reversed, holding that Section 363(m) is not jurisdictional, and is thus subject to waiver. *MOAC*, 598 U.S. at 304-305. This Court

remanded for the court of appeals to consider if Transform had waived reliance on Section 363(m) and, if so, whether Transform satisfied Section 365(b) for assignment of a shopping center lease. *Ibid.*

In the nearly four years of appeals concerning jurisdiction to hear MOAC's appeal on the merits as to whether Transform was a permitted assignee under the lease provisions of Section 365, Transform and Sears never raised with the district court, the court of appeals, or this Court, any suggestion that the Lease was not a "true lease," which would have rendered Section 365 inapplicable from the start and avoided four years of litigation.

On remand from this Court, the court of appeals affirmed the district court's original vacatur of the bankruptcy court's assumption and assignment order. The court of appeals held that Transform did not provide "adequate assurance of future performance of [the] lease as required by § 365(b)(3)(A)," agreeing with the district court that, for the Lease to be assignable to Transform, Transform would have been required to have the same financial condition and operating performance as Sears as of the commencement of the Lease in 1991. App. 77a (brackets in original). It was at this stage that Transform, for the first time in over five years of litigation, raised an argument that the Lease was not a "true" lease, in addition to several other arguments to evade the statutory consequences of Section 365(d)(4). 20-1846 Docket entry No. 189, at 7 (2d Cir. June 26, 2023). In remanding to the district court, the court of appeals declined to address such "merits questions" and cautioned that Transform's new arguments would be "subject to the doctrines of waiver, forfeiture, abandonment, and estoppel." App. 78a.

6. The District Court's Decision on Remand

On remand, the district court rejected Transform's arguments that Transform was entitled to retain the Lease. App. 38a-43a. The court declined, however, to apply the plain language of Section 365(d)(4) and declare that, because the Lease had not been assumed and assigned within the statutory period, the Lease was deemed rejected and the premises should be surrendered to MOAC. Instead, the district court held that the Lease was not a "true lease" for purposes of Section 365(d)(4)'s deemed-rejected provision, concluding, without any evidentiary record, that the Lease was more akin to a sale or financing based solely on the facts that it was a long-term lease with prepaid rent. App. 59a.

The district court interpreted the court of appeals' holding in *International Trade Administration* v. *RPI*, 936 F.2d 744 (2d Cir. 1991), to mean that long-term leases with prepaid rent are not "true leases" and excluded *only* from the deemed rejection provision of Section 365(d)(4) but are otherwise subject to the other "lease" provisions of Section 365. App. at 59a. The district court ruled that the Lease should be "returned" to the SRZ Liquidating Trust (the Trust)—Sears' successor in interest—and dismissed MOAC's appeal for lack of remedy. Because Sears and Transform had entered into an agreement for Sears to provide Transform with the Lease or its economic benefits if MOAC were successful in its appeals, Transform remained the beneficiary of the Lease under the district court's order, notwithstanding that the district court and court of appeals had both determined that Transform was *ineligible* to be the assignee. App. 77a, 171a.

The district court concluded that Sears' and Transform's attempt to assume and assign the lease pursuant to Section 365, their years of litigating under Section 365, and their repeated stipulations as to application of the lease provisions of Section 365, did not amount to waiver, forfeiture, abandonment, or estoppel of arguments that the Lease was not a "true lease" for purposes of Section 365(d)(4). The district court concluded that Sears and Transform had no reason to raise the "true lease" argument at an earlier stage of the litigation. App. 66a. It reasoned that the "true lease" inquiry only applied to the statutory consequences for failing to timely assume a lease under Section 365(d)(4) and did not apply to the other lease provisions of Section 365. App. 59a.

The district court entered a stay of its order pending appeal. App. 208.

7. The Second Circuit Appeal

On appeal, the court of appeals decided that Transform and Sears had neither waived nor forfeited their argument that the Lease was not a "true lease" subject to Section 365(d)(4)'s deemed rejection provision. App. 10a-14a. The court held that the parties' agreement that the deadline "pursuant to Section 365(d)(4)" applied to the "Lease," the parties' definition of the term "Lease" to mean an unexpired "lease of * * * nonresidential real property" (the precise language of Section 365(d)(4)), and their further stipulation that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*," did not establish that Sears and Transform had "*intentionally* relinquished [arguments] that the * * * Lease was not a 'true lease' under Section 365(d)(4)." App. 11a.

The court of appeals based its waiver decision on the absence of an affirmative statement that "Section 365(d)(4) governs the MOAC Lease," App. 12a, concluding that if the parties had intended to acknowledge that Section 365(d)(4) applied to the Lease, the parties would have expressly stated that the Lease was a "lease of nonresidential real property" *pursuant to Section 365(d)(4)* in the same way the parties stipulated that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*." App. 12a. In so holding, the court of appeals not only imposed what amounted to a "magic words" requirement to establish waiver but also necessarily accepted the district court's premise that the term "lease" can mean different things for different subsections of Section 365.

The court of appeals affirmed the district court's judgment, made without the development of any factual record, that the Lease was not in economic substance a "true lease" such that Section 365(d)(4) did not apply. The court had no record before it to address whether the parties, in 1991, intended for the Lease to be an outright transfer of the premises to Sears, which would have required consideration of the unique nature of an anchor tenant location within a mall surrounded by other MOAC property and tenants. The court did not address whether the parties intended for the transaction to be a sale instead of a lease, if that would mean, for example, that Sears had no ability to access the property or have parking for its customers, or the implications recharacterization would have on lease provisions concerning common area maintenance, utilities, and other obligations of MOAC as lessor.

The court of appeals also affirmed the district court's rejection of forfeiture, agreeing that Sears and

Transform had no obligation to raise a "true lease" argument earlier. App. 13a. The court concluded that "[t]he Section 365(d)(4) issue only became live" *after* it was determined that Transform was not an eligible assignee of the lease, notwithstanding that, if Sears had sought to recharacterize the Lease as a sale, Sears' rights would have had to have been transferred to Transform as part of the sale (rather than merely conveying to Transform a designation right as to the Lease). *Ibid.*

At MOAC's request, the court of appeals entered an order staying its mandate pending the outcome of MOAC's petition for a writ of certiorari. App. 206a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Creates A Circuit Conflict By Requiring Parties To Invoke "Magic Words" And Explicitly Acknowledge All Possible Consequences For A Stipulation To Constitute Waiver

This Court should grant a writ of certiorari because the court of appeals' holding creates a circuit split as to the applicable standard for federal courts to find a waiver of legal arguments based on factual stipulations. The standard for waiver employed by the court of appeals effectively requires the parties to use a particular phrase in a stipulation to constitute waiver, notwithstanding the clear context of that stipulation. That standard demands an exactitude that has been rejected by at least the Third, Fifth, Seventh, and Ninth Circuits.

Notwithstanding the parties' stipulations that the "Lease" was an unexpired "lease of * * * nonresidential real property," the triggering language of Section 365(d)(4), agreeing on multiple occasions that the Section 365(d)(4) deemed-rejection deadline was the

deadline for the assumption and assignment of leases, "including the Lease," specifying that "the Lease is a shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*," a subcategory of nonresidential leases, and litigating under the nonresidential real property "lease" provisions of Section 365 for five years, the court of appeals concluded Sears and Transform had not "*intentionally* relinquished [arguments] that the * * * Lease was not a 'true lease' under Section 365(d)(4)." App. 11a. The court of appeals based its decision on the absence of an affirmative statement that "Section 365(d)(4) governs the MOAC Lease," App. 12a, even though that legal conclusion necessarily follows from the parties' stipulation that the Lease was an unexpired "lease of * * * nonresidential real property." App. 235a, 243a, 252a, 261a; see 11 U.S.C. 365(d)(4) (establishing statutory deadline to assume any "lease of nonresidential real property under which the debtor is the lessee").

The Third Circuit's analysis in *L & L Painting Co.* v. *Odyssey Contracting Corp. (In re Odyssey Contracting Corp.)*, 944 F.3d 483 (2019), demonstrates that "magic words" are not required to find waiver, and a stipulation must instead be viewed in its entire context. The court in *Odyssey* held that a debtor waived its right to appeal a bankruptcy court's order by entering into a stipulation that the party would "withdraw" and "dispose" of its claims if the bankruptcy court determined that it was the breaching party, even though there was no express waiver of appellate rights as to the bankruptcy court's determination. *Id.* at 490. The Third Circuit concluded that while the "stipulation does not specifically refer to [the debtor]'s right to appeal the Bankruptcy Court's determination, * * * several aspects of the * * * language indicate an intent to waive that right." *Id.* at 488. The

court focused on the debtor's agreement that should the bankruptcy court determine after trial that the debtor was the breaching party, the debtor would "thereupon . . . withdraw[] and dispose[] of" its claims, and "*th[e] proceeding shall be deemed to be finally concluded in all respects*." *Ibid.* (first and second brackets in original). The debtor asserted that this language only reflected its intent to dispose of its claims after the resolution of one or more appeals. *Ibid.* The Third Circuit appropriately analyzed the question of waiver with reference to the context of the parties' agreement as a whole, requiring neither magic words nor explicit acknowledgment of the consequences of the stipulation to find waiver. See *ibid.* As the Third Circuit previously explained in *Washington Hospital* v. *White*, 889 F.2d 1294 (1989), it is necessary to read provisions of a stipulation together in determining its force and effect. *Id.* at 1301-1302 (remanding for factfinding on parties' intent in ambiguous stipulation); see also *Waldorf* v. *Shuta*, 142 F.3d 601, 612, 616-617 (3d Cir. 1998) (holding courts cannot relieve parties of the consequences of the plain language of their stipulations absent express limitations).

Here, the court of appeals based its holding on only one provision of the parties' stipulation in which the parties agreed that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*." The court determined that, had the parties intended to waive their right to argue that the Lease was not a "true lease," and that Section 365(d)(4) did not apply, they would have used the same "pursuant to" phrasing when making agreements with respect to applicability of Section 365(d)(4). This exacting standard led the court of appeals to disregard other provisions of the parties' stipulations by which they agreed that the Lease was a "lease of

nonresidential real property," and that the Section 365(d)(4) deadline applied. App. 10a-12a. Even looking to only the one stipulation driving the court of appeals' decision, the agreement that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*" confirms, *in context*, that the Lease is a "lease of nonresidential real property." A "shopping center lease" is, by definition, a subset of the broader category "lease of nonresidential real property" (the class of leases to which Section 365(d)(4) applies). Indeed, the parties had elsewhere defined the term "Lease" as a "lease * * * of nonresidential real property," App. 235a, 243a, 252a, 261a, and the bankruptcy court's order that established the process for the assumption and assignment of leases included an express finding that "[e]ach of the Designatable Leases," defined to include the MOAC Lease, "*constitutes an unexpired lease * * * within the meaning of section 365 of the Bankruptcy Code*," without distinguishing the term "lease" among the various subsections of Section 365. C.A. App. 0278-0279 (emphasis added).

The Fifth, Seventh, and Ninth Circuits similarly reject the Second Circuit's heightened standard of waiver. In *Reese* v. *Commissioner*, 615 F.2d 226, 232 (1980), the Fifth Circuit affirmed the tax court's interpretation of a stipulation as concerning only the facts and amount of losses sustained by taxpayers upon the sale of two properties and not whether the losses were capital or ordinary losses. While the "stipulation [was] not a model of clarity," the court concluded that "the context in which it was made more than adequately supports the construction given it by the Tax Court" to find waiver. *Ibid.* Considering such factors as the "discussion prior to the recess during which the stipulation was agreed upon" and statements from a party's attorney, the Fifth Circuit

ascertained the parties' intent from the broader context of the stipulation rather than requiring precise, particularized phrasing. *Ibid.*

Similarly, in *Floralife, Inc.* v. *Floraline International, Inc.*, 807 F.2d 518, 519 (1986), the Seventh Circuit concluded that where parties stipulated to the entry of a final order, but the stipulation lacked particularized phrasing as to the substance of the consented-to final order, the court could enter an injunction that deviated from the parties' precisely stipulated language where the context of the stipulation was sufficient to determine its force and effect. The Seventh Circuit considered that the broader construction was necessary so as not to leave the stipulation meaningless. See *id.* at 519-520 ("[I]f the 'order' is deemed limited to the word 'Floraline,' thus excluding such colorable imitations as 'FloraLine,' it is not worth the paper it is typed on, since it would enable Floraline to continue its trademark infringement, even while complying with the 'order' by abandoning the trademark 'Floraline.'"). Here, the court of appeals failed to heed the wisdom of that approach.

The Ninth Circuit in *Vuitton et Fils, S.A.* v. *J. Young Enterprises, Inc.*, 609 F.2d 1335, 1337 (1979), similarly cautioned against requiring unequivocal statements to find waiver. There, the parties entered into a stipulated injunction, but the district court entered the stipulation as a judgment, disposing of the entire case. In reversing the district court's entry of judgment, the Ninth Circuit emphasized that "[a] court may examine the contents of the stipulation and the nature of the case to determine the force and effect that should be given a stipulation." *Ibid.*

The need for a standard, as reflected in these circuits' approaches, that places context above particularized language is on perfect display in this case. Sears and Transform, released from their stipulations for lack of an unequivocal statement, would have wasted five years of judicial resources only to be allowed to revive arguments they could have pursued at the start of the litigation, but instead repeatedly waived and forfeited.

The uniform approach by other circuits is consistent with courts', including this Court's, rejection of rigid "magic words" tests in other contexts as well. See, *e.g.*, *FAA* v. *Cooper*, 566 U.S. 284, 291 (2012) ("We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon 'is a tool for interpreting the law' and that it does not 'displac[e] the other traditional tools of statutory construction.' ") (citation omitted; brackets in original); *Coughlin* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 605 (1st Cir. 2022) ("magic words" are not required in determining whether Congress intended Bankruptcy Code to unequivocally abrogate sovereign immunity), aff'd sub nom. *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 599 U.S. 382 (2023); *PFT Roberson, Inc.* v. *Volvo Trucks N. Am., Inc.*, 420 F.3d 728, 732 (7th Cir. 2005) ("This magic-words approach [in construing contracts] is not the law."); *Brooks* v. *United States*, 723 F. App'x 703, 705 (11th Cir. 2018) (unpublished) (noting in criminal context, "motion practice is not talismanic, and we do not require petitioners to recite magic words"); *CW Gov't Travel, Inc.* v. *United States*, 63 Fed. Cl. 369 (2004) (affirming that "magic words" are not needed to establish claim under Contract Dispute Act).

This Court previously denounced in this case the need for "magic words" in assessing statutory limitations as jurisdictional. *MOAC*, 598 U.S. at 298 ("Congress need not use 'magic words' to convey its intent that a statutory precondition be treated as jurisdictional. '[T]raditional tools of statutory construction' can reveal a clear statement.") (quoting *Boechler, P.C.* v. *Commissioner*, 596 U.S. 199, 203 (2022)) (brackets in original).

The court of appeals' holding in this case creates a clear circuit conflict on the fundamental standard federal courts are to apply when determining waiver by stipulation. It is necessary and appropriate for this Court to resolve the conflict by rejecting a magic-words standard and hold, consistent with every other circuit to have addressed the standards for waiver, that parties need not use particular language or explicitly acknowledge through a laundry list all possible implications before they will be held to the necessary consequences of their factual stipulations.

II. The Second Circuit's Holding Creates A Further Circuit Conflict As To Whether The Term "Lease" Can Mean Different Things In Different Subsections Of Section 365

The Court should also grant a writ of certiorari because the court of appeals' holding creates a further conflict among circuit courts as to whether the term "lease" can mean different things in different subsections of Section 365. The court of appeals' conclusion that Sears and Transform did not waive or forfeit their "true lease" arguments under Section 365(d)(4) by proceeding and litigating under the "lease" provisions of Section 365 for nearly five years and by stipulating that the Lease was

a "shopping center lease" under Section 365(b)(3), among other stipulations, can only stand if the term "lease" can mean different things in different subsections of Section 365.

The court of appeals concluded that the parties' stipulation that the Lease was a "shopping center lease pursuant to *11 U.S.C. § 365(b)(3)*" did not mean that the Lease was a "lease" of nonresidential real property pursuant to Section 365(d)(4). App. 11a. But if the term "lease" has the same meaning throughout Section 365, the Lease could not possibly be a "shopping center lease" if it was not also a "lease of nonresidential real property." The court of appeals' conclusion to the contrary created a circuit split with every court of appeals that has considered the issue and concluded that the term "lease" has a meaning consistent not only throughout Section 365, but throughout the Bankruptcy Code as a whole. Indeed, until its holding in this case, the Second Circuit was considered by its sister circuits to be among the courts that have so held that the "true lease" analysis applies to Section 365 generally, not just to Section 365(d)(4). See *United Airlines, Inc.* v. *HSBC Bank USA, N.A.*, 416 F.3d 609, 612 (7th Cir. 2005) (including Second Circuit among "every appellate court that has considered the issue" and held that only a " 'true lease' counts as a 'lease' under § 365."). The court of appeals rejected that interpretation of its precedent as dicta, thereby confirming that its analysis was predicated on the term "lease" having a different construction in different subsections of Section 365. App. 11a, n.3 ("*PCH* required us only to interpret the contours of Section 365(d)(3) and (4), and we held that 'sections 365(d)(3), (4) requires a bona fide lease.' Any discussion in *PCH* about

applying the 'true lease' analysis to Section 365 as a whole is *dicta*[.]").

As the Seventh Circuit explained in *United Airlines*, the question of what constitutes a "lease" for purposes of federal bankruptcy law has broad ramifications in bankruptcy and requires a consistent definition. 416 F.3d at 610. The Seventh Circuit observed that "[t]he statute * * * must refer to substance throughout § 365. Nothing else respects both the structure of the Bankruptcy Code and the way the legal community understood the distinction between leases and security agreements in the 1970s." *Id.* at 614.

This has been the uniform law of every circuit to have considered the issue since the Ninth Circuit's decision in *In re Pacific Express, Inc.*, 780 F.2d 1482, 1486-1487 (1986), which held that only a "true lease" is subject to the "lease" provisions of Section 365. The Ninth Circuit explained that "[a] 'lease' which is really a disguised security agreement does not require assumption or rejection under section 365." *Id.* at 1487. This meant that *none* of Section 365's requirements, including the adequate protection requirements particular to assignment of shopping center leases under Section 365(b)(3), apply if the lease is not a "true lease." Indeed, the Ninth Circuit said so expressly, observing that "[c]ommentators have agreed that *whether section 365 applies at all* depends on the crucial determination of whether a purported lease is a true lease or a security lease." *Id.* at 1487 n.5 (emphasis added).

Since that time, the Third Circuit joined the Seventh and Ninth Circuits in interpreting the term "lease" consistently throughout the Bankruptcy Code (not merely throughout Section 365). See *In re Pillowtex, Inc.*, 349

F.3d 711, 716 (3d Cir. 2003) (holding, in the context of a motion to compel lease payments under former Section 365(d)(10), that "[w]hether an agreement is a true lease or a secured financing arrangement under the Bankruptcy Code is a question of state law") (emphasis added); see also *In re Continental Airlines, Inc.*, 932 F.2d 282, 291-295 (3d Cir. 1991) ("Congress specifically directed that the term 'lease' in § 1110 [addressing aircraft leases] be considered in connection with its usage elsewhere in the Code" and "intended to protect only true leases.").

No prior court has ever held that the "true lease" inquiry applies specifically to Section 365(d)(4) but not the other subsections of Section 365. The court of appeals' holding is not only contrary to the entire weight of authority but also inconsistent with the longstanding "*presum[ption]* that the same word carries a single meaning throughout a given statute." *Azar* v. *Allina Health Servs.*, 587 U.S. 566, 598 (2019).

III. This Case Presents An Ideal Vehicle To Resolve These Circuit Splits

This case presents an ideal vehicle for the Court to resolve either or both of these circuit splits. Both issues are clearly presented and were 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 these critical issues of law.

The Court's resolution of these issues would also be outcome determinative in the case below. Under the standard for waiver adopted by all other circuits, Sears and Transform would be held to their stipulations that the Lease was a "lease of nonresidential real property" subject to the deadline under Section 365(d)(4). Because

the statutory consequences for failing to satisfy that deadline are clear and mandatory—deemed rejection and immediate surrender of the property—MOAC would be entitled to recover the property. Respondents failed, within the statutory period, to assume and assign the lease, and never sought any alternative relief (such as a standalone assumption or assumption and assignment to a proper assignee) within the statutory deadline. Thus, if Sears and Transform were held to their stipulations that the "Lease" is, in fact, a "lease," deemed rejection under Section 365(d)(4) is the only possible outcome.

The SRZ Liquidating Trust (as successor to Sears) argued below that it should be allowed a new window within which to seek assumption, but that is not an option. Among other reasons, no such belated request is possible because leases can only be assumed and assigned *prior to confirmation of a chapter 11 plan*, see 11 U.S.C. 365(d)(2), and the Sears bankruptcy plan was confirmed on October 15, 2019, 18-23538 Docket entry No. 5370 (Bankr. S.D.N.Y.). Relatedly, the SRZ Liquidating Trustee is not a bankruptcy "trustee" with any powers under Section 365 to assume a lease. See 11 U.S.C. 365(d)(2) (providing assumption powers to "the trustee"); 11 U.S.C. 1107(a) (providing debtor in possession, not liquidating trustee, with rights and powers of bankruptcy trustee).[2]

[2] Transform raised a host of other arguments on remand that it was entitled to retain the Lease, notwithstanding that it was an ineligible assignee, including that an unavailable avoidance action under Bankruptcy Code Section 549 would have been MOAC's exclusive remedy and that the common law judicial sale doctrine immunized the assignment from reversal. This Court had already observed, in rejecting Transform's mootness arguments, that setting aside the assignment would be "typical appellate relief," *MOAC*, 598

But even if the Court did not set aside the court of appeals' "magic words" standard, MOAC would still win under that demanding standard if the term "lease" was construed consistently throughout Section 365. In that case, Sears and Transform would be held to their stipulations that the "Lease" is a "lease" for purposes of Section 365, which would encompass the deemed rejection remedy of Section 365(d)(4). Thus, the Court would be free to consider either or both issues, and the resolution of either would require reversal.

The present case is also an ideal vehicle for the Court's review because the status quo ante has been preserved for more than five years of litigation, most recently through the district court and the court of appeals' orders granting stays pending appeal. The premises at the Mall of America have remained vacant, and there are no arguments of equitable mootness. Thus, an issue that might otherwise escape the Court's resolution is presented cleanly here.

These issues are important for the efficient functioning of the bankruptcy and broader judicial processes. If accepted, the court of appeals' approach would encourage debtors to engage in piecemeal lease litigation. By not forcing litigation of a "true lease" issue at the outset in the bankruptcy court, this approach permits debtors to attempt to assume and assign leases under Section 365, and then, if unsuccessful, spring an entire new round of litigation on counterparties over whether the lease was a "true lease" to begin with.

U.S. at 296. And the district court confirmed as much in a thorough opinion rejecting Transform's arguments. App. 30a, 36a-43a.

Moreover, the implications of the court of appeals' ruling are not limited to bankruptcy cases. By requiring stipulations to anticipate and note every potential consequence to constitute waiver, the force and effect of everyday stipulations within the Second Circuit have been cast into doubt, and parties will now be encouraged to resurrect disputes that were reasonably viewed as resolved simply because a stipulation did not include "magic words" detailing with impossible precision every possible implication of the waiver.

This case presents the Court with the ideal opportunity to resolve key conflicts among courts that are likely to recur not only in the bankruptcy context, but in civil cases generally.

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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