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SEARS'S BANKRUPTCY: FROM ROEBUCK TO NO BUCKS



Photo: Mike Segar – Reuters

BY: DREW HOVE, TAYLOR SMITH & BEI YANG
THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

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CAST OF PLAYERS

The Debtor - Sears Holdings

Sears Holdings Corporation – Sears Holdings Corporation (“Sears Holdings” or “Sears”), a Delaware corporation, was the primary debtor involved in the jointly administered bankruptcy. Sears Holdings was formed after the merger with Kmart, making both Kmart and Roebuck subsidiaries of Sears Holdings.

Sears, Roebuck & Co. – Sears, Roebuck & Co. (“Roebuck”), a New York corporation, was a subsidiary of Sears Holdings and the original corporation formed by Richard Sears and Alvah Roebuck in 1886, which began its operations through the mail-order business model.

Sears Holdings Management Corporation – Sears Holdings Management Corporation (“SHMC”), a Delaware corporation, was a subsidiary of Sears Holdings that oversaw much of its management operations.

Edward S. Lampert – Edward S. Lampert (“Eddie Lampert” or “Lampert”), was the CEO of Sears Holdings prior to its filing for bankruptcy. He is the founder, chairman, and CEO of ESL Investments and is the founder of Transform Holdco, LLC.

Robert A. Riecker – Robert A. Riecker was the CFO of Sears Holdings prior to and throughout the bankruptcy process.

Kmart Corporation – Kmart Corporation (“Kmart”), a Michigan corporation, was a subsidiary of Sears Holdings after a 2005 merger. Kmart was formed in 1899 and had traditionally operated as a big box department store.

Sears Roebuck Acceptance Corporation – Sears Roebuck Acceptance Corporation (“SRAC”), a Delaware corporation, was a subsidiary of Sears Holdings that issued commercial paper, medium-term notes, and discrete underwritten debt in order to raise funds. SRAC was one of the most prominent holders of unsecured debt prior to Sears Holdings filing for bankruptcy.

Sears Reinsurance Holding Corporation – SRe Holding Corporation, a Delaware corporation, was a subsidiary of Sears Holdings who wholly owned Sears Re.

Sears Reinsurance Company Ltd. – Sears Reinsurance Company Ltd. (“Sears Re”), a Bermuda corporation, was a subsidiary of Sears Holdings operating primarily to provide reinsurance to third-party insurance companies and self-insurance reserves.

Sears Home Improvement Products, Inc. – Sears Home Improvement Products, Inc (the “SHIP business”), a Pennsylvania corporation, was a subsidiary of Sears Holdings prior to its filing for bankruptcy. Sears Holdings attempted to sell the SHIP business early during the bankruptcy to finance some of the debt, but the transaction failed, and it was eventually sold to Transform Holdco, LLC.

The Bankruptcy Players

The Honorable Robert D. Drain – The Honorable Robert D. Drain (“Judge Drain”), was the bankruptcy judge for the Southern District of New York who oversaw Sears Holdings’s bankruptcy. Prior to being appointed as the bankruptcy judge, Judge Drain was a partner at the New York law firm Paul, Weiss, Rifkind, Wharton & Garrison, LLP, attorneys for Sears Holdings throughout the bankruptcy.

M-III Advisory Partners, LP – M-III Advisory Partners, LP (“M-III Partners”), was the Debtors’ restructuring officers and advisors throughout Sears Holdings’s bankruptcy.

Weil, Gotshal & Manges, LLP – Weil, Gotshal & Manges, LLP (“Weil, Gotshal & Manges” or “Weil Gotshal”), was the first firm to act as attorneys for the debtors, later joined by Paul, Weiss, Rifkind, Wharton & Garrison, LLP.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP – Paul, Weiss, Rifkind, Wharton & Garrison, LLP (“Paul Weiss”), was the second firm to proceed as attorneys for the debtors and was Judge Drain’s law firm prior to his appointment as bankruptcy judge for the Southern District of New York.

Richard C. Morrissey – Richard C. Morrissey (“United States Trustee”), was the United States Trustee in New York, New York who was appointed to oversee Sears Holdings’s bankruptcy.

Black & Decker US, Inc. – Black & Decker US, Inc. (“Stanley Black & Decker”), a Maryland corporation, that purchased the iconic Craftsman brand from Sears Holdings in 2017.

ESL Investments – ESL Investments is a privately-owned hedge fund created, owned, and managed by Eddie Lampert. The hedge fund is based in Connecticut and was a major player throughout Sears Holdings’s bankruptcy.

Pension Benefit Guarantee Corporation – Pension Benefit Guarantee Corporation (“PBGC”), a District of Columbia corporation, was one of the most prominent unsecured creditor of Sears Holdings’s.

Service.com, LLC – Service.com, LLC, a Michigan company, operated a website that helps consumers find local professionals for home-improvement services. It reached an agreement with Sears Holdings for the sale of the SHIP business, however, the transaction eventually failed.

Cyrus Capital Partners, LP – Cyrus Capital Partners, LP is a registered investment advisor with offices in New York and London. It invests across the entire capital structure of companies and takes on long and short positions in debt. Cyrus Capital Partners negotiated with Debtors for the successful purchase of the SRAC Medium Term Notes.

Transform Holdco LLC – Transform Holdco, LLC (“Transform Holdco” or “New Sears”), a Connecticut company, was the purchaser of substantially all of Sears Holdings’s assets, including its brand name. Transform Holdco an affiliate of ESL Investments.

Official Committee of Unsecured Creditors – Official Committee of Unsecured Creditors (“OCC”) was a committee appointed by the United States’ Trustee to represent the interests of unsecured creditors through the bankruptcy process. The committee consisted of:

- Pension Benefit Guarantee Corporation – Washington, DC
- Oswaldo Cruz – Rio de Janeiro, Brazil
- Winiadaewoo Electronics America, Inc. – Ridgefield, NJ
- Apex Took Group, LLC – Sparks, MD
- Computershare Trust Company, NA – Melbourne, Australia
- The Bank of New York Mellon Trust Company, NA – New York, NY
- Basil Vasiliou – Birmingham, United Kingdom
- Simon Property Group, LP – Indianapolis, IN
- Brizmor Operating Partnership, LP – New York, NY

I. INTRODUCTION

On October 15, 2018, Sears Holdings Corporation, along with its subsidiaries, filed a voluntary petition in the Southern District of New York declaring Chapter 11 Bankruptcy. The Chapter 11 “reorganization” ultimately led to what looks more like a Chapter 7 liquidation. Nonetheless, substantially all of Sears’s assets, along with its brand name, are now vested in Transform Holdco, LLC, an entity controlled by ESL Investments, Inc.

This paper outlines the steps taken by Sears Holdings Corporation to close underperforming stores and sell many of its assets, including, but not limited to, its real estate, inventory, lease rights, to Transform Holdco, LLC as it fights to prove its worth in the retail market once again. Sears’s negotiations with ESL Investments, together with its acquisition of additional debt, resulted in a sale of substantially all of its assets as a going concern, including its previously successful brand name, to Transform Holdco, LLC. Active backlash from the Committee of Unsecured Creditors, landlords, consignment merchandise lenders, and various other interested parties means that ESL Investments and Eddie Lampert will face the threat of additional litigation on issues regarding the global sale and the creditors’ claims. As of the date that this paper was written, Sears Holdings’s Chapter 11 Plan is heavily reliant on the prospect of these claims, which it hopes will produce proceeds to be distributed by a liquidating trust.

This paper provides information about the process of Chapter 11 Bankruptcy and tells the story of this insider-driven reorganization of the once prominent retail giant, Sears.

II. BACKGROUND

A. FOUNDING

Around 1886, Richard Sears was a railroad station agent in North Redwood, Minnesota.¹ After successfully purchasing and re-selling some originally “unwanted” watches, Richard Sears started a mail-order watch business in Minneapolis in 1886.² One year later, he decided to move to Chicago where he set out an advertisement soliciting watchmakers in the Chicago Daily News.³

Not long after, Alvah Roebuck answered the advertisement and one of the “world’s best-known business partnerships” was formed.⁴ Together, Sears and Roebuck began a catalog business that sold watches and jewelry and incorporated under the Sears, Roebuck & Company name in 1893.⁵ At the time of incorporation, America was still a rural society, and in order to reach customers, Sears used the United States Postal Service to distribute mail-order catalogs throughout the country.⁶ Initially these catalogs offered only watches and jewelry, but by the turn of the twentieth century, Sears expanded its product offerings significantly.⁷ “When it became clear that a sleepy, overpriced retail sector would crumple before it, there was nothing to stop the company from selling anything and everything.”⁸

By the early 1900s, Sears’s catalog was much more broad and included shoes, women’s garments, wagons, fishing tackle, stoves, furniture, musical instruments, saddles, firearms,

¹ Chris Isidore, *Sears’ Extraordinary History: A Timeline*, CNN (2015). <https://perma.cc/5CRE-622S>.

² *Id.* <https://perma.cc/5CRE-622S>.

³ Kenneth Howard Smith, *Alvah C. Roebuck – Black English Parents – Sears and Roebuck Never Say*, FAMILY HISTORY CHANNEL (Mar. 28, 2013, 9:42 AM). <https://perma.cc/P5VC-F7WF>.

⁴ *Id.* <https://perma.cc/P5VC-F7WF>.

⁵ Isidore, *supra* note 1. <https://perma.cc/5CRE-622S>.

⁶ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 10.

⁷ *Id.* [3.pdf](#) at 11.

⁸ Shoshanna Delventhal, *Who Killed Sears? 50 Years on the Road to Ruin*, INVESTOPEDIA (Feb. 6, 2019). <https://perma.cc/9AJF-HFFX>.

buggies, bicycles, baby carriages, and glassware.⁹ Consumers could order everything from the comfort of their own home, pay a fair price, and have the goods shipped right to them.¹⁰ “Sales exploded, and if you picked up a big enough chunk of stock when the company went public, [you never had] to work again.”¹¹

B. EXPANSION

In 1925, as Americans moved to urban areas, Sears began opening brick-and-mortar stores to supplement its already successful mail-order business model and reach its customer base.¹² Sears rapidly expanded and opened hundreds of stores across America and the sales from these stores surpassed its mail-order catalog revenue for the first time in 1931.¹³ From the 1930s to the 1980s, Sears moved beyond the retail sector by adding Allstate Insurance, Dean Witter Reynolds Organization, Inc., and Coldwell Banker Real Estate Group, among others.¹⁴ In 1973, Sears opened the prominent Sears Tower (now known as the Willis Tower) in downtown Chicago.¹⁵ This iconic landmark served as Sears’s headquarters for a short period before Sears ultimately sold the building to Willis Group Holdings in 1988.¹⁶ Sears also introduced the Discover credit card in 1985. It developed a number of well-known private-label brands such as Kenmore appliances,

⁹ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 11.

¹⁰ Delventhal, *supra* note 8. <https://perma.cc/9AJF-HFFX>.

¹¹ *Id.* <https://perma.cc/9AJF-HFFX>.

¹² Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 13.

¹³ *Id.* [3.pdf](#).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; *History & Facts, WILLIS TOWER*, <https://perma.cc/XYG5-ARVA>.

DieHard automotive batteries, and Craftsman tools.¹⁷ Sears became, in its own words, “where America shops.”¹⁸

C. *TURN OF THE CENTURY: THE 2000S*

In the early 21st century, Sears consolidated its retail business, which by this time primarily centered on stores that were anchored in suburban shopping malls.¹⁹ Additionally, Sears sold off Allstate, Dean Witter, Coldwell Banker, Discover Card, along with the Sears Tower, among other brands and assets.²⁰ In 2004, Sears merged with Kmart Holding Corporation and, in connection with this merger, Sears Holdings was formed to serve as the parent entity of the company in its new form.²¹

At the head of this merger was Eddie Lampert, former chairman of Kmart Holding company who had acquired a 53% stake in the company after Kmart declared bankruptcy in 2002.²² At this point in time, Eddie Lampert was considered a superstar, having left Goldman Sachs Group in 1988 at the age of twenty-five in order to start a hedge fund.²³ Moreover, he attracted a variety of media attention and was once likened to Warren Buffett.²⁴ Just one “week after the merger with Sears was announced, Bloomberg reported that Kmart’s market capitalization was \$8.6 billion.”²⁵ Lampert, apparently seeking the “\$500 million a year in savings”²⁶ that he

¹⁷ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#).

¹⁸ Jesse Coffey, A Tribute to Sears, Vol. 1: Where America Shops (09-16-77), YOUTUBE (Mar. 24, 2019), <https://www.youtube.com/watch?v=e4RX3NdiRH0>.

¹⁹ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 10.

²⁰ *Id.* at 14.

²¹ *Id.* at 14.

²² Delventhal, *supra* note 8. <https://perma.cc/9AJF-HFFX>.

²³ *Id.* <https://perma.cc/9AJF-HFFX>.

²⁴ Bob Bryan, *Warren Buffett Predicted the Fall of Eddie Lampert and Sears Over a Decade Ago*, BUSINESS INSIDER (Jan. 8, 2019 12:59 PM). <https://perma.cc/9Y8R-66CC>.

²⁵ Delventhal, *supra* note 8. <https://perma.cc/9AJF-HFFX>.

²⁶ *Kmart to Acquire Sears in \$11 Billion Deal*, NBC (2004). <http://perma.cc/5AGY-77WJ>.

considered attainable after a merger between the two, embarked on a journey to the top and ascended to the Chief Executive Officer role at Sears in 2013.²⁷

A little over thirteen years after the merger between the two companies, Lampert's glorified status "seem[s] ridiculous."²⁸ While Sears Holdings' sales rose in the first full year after Kmart and Sears consolidated their operations, the company's sales fell in each of the following nine years.²⁹ The only upswing the company experienced was after the financial crisis of 2007 obliterated eighty-five percent of its value.³⁰ Still, its recovery was trivial and short-lived.³¹ "The Chicago Tribune reported in March 2010 that Sears was losing market share. Shares peaked again that April at less than two-thirds their pre-crisis high. Sears has not recovered since."³²

Under the command of Eddie Lampert, by July of 2014, Sears had "amassed a mountain of debt."³³ Sears placed much of the blame of its demise on Amazon, but the company acknowledged additional causes in 2016 when it listed its primary competitors as Walmart, Target, Home Depot, Lowes, among a few others.³⁴ "As of October 2018, Sears had lost 96 [percent] of its value since it began trading under its current ticker, [Sears Holdings Corp.], in May 2003."³⁵ While one might attribute this in full to the internet, specifically the internet giant, Amazon, it is clear that all brick-and-mortar stores experienced the same revolution and a select few of these stores were able to successfully escape and uphold the reputation of their band's name. Namely, Lowes, Best Buy, and Home Depot all have seen their share prices double.³⁶

²⁷ Delventhal, *supra* note 8. <https://perma.cc/9AJF-HFFX>.

²⁸ *Id.* <https://perma.cc/9AJF-HFFX>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Daniel Jennings, Sears: The Death Spiral Continues, SEEKING ALPHA (Nov. 9, 2014). <https://perma.cc/6DFN-RK95>.

³⁴ Delventhal, *supra* note 8. <https://perma.cc/9AJF-HFFX>.

³⁵ *Id.* <https://perma.cc/9AJF-HFFX>.

³⁶ *Id.* <https://perma.cc/9AJF-HFFX>.

With Sears’s demise imminent, the former giant began looking for solutions. After deciding to sell arguably the most iconic Sears owned brand, Craftsman, it became apparent that even the \$900 million Stanley Black & Decker would pay for that brand could not save the company.³⁷ Soon after Sears began closing stores, the worst was obvious.³⁸ On October 15, 2018, Sears filed for Chapter 11 bankruptcy.³⁹

III. WHAT LED TO CHAPTER 11

The raging, successful, and stable characteristics “once applied to Sears, but now [better describe] the company that’s blamed for—or credited with—its looming demise, Amazon.”⁴⁰ Having played the role of a retail juggernaut for nearly a century, Sears is now in the same position as the stores it drove out of business in the early 1900s.⁴¹ According to Sears, several factors necessitated the commencement of its Chapter 11 case.⁴² These factors included declining revenues, unfavorable market conditions in the retail industry, and the company’s significant and ongoing cash flow and liquidity issues, all of which the company insists were exacerbated by the contraction in credit terms over the course of business and the expenses associated with store operations.⁴³

A. PREPETITION CORPORATE STRUCTURE

On the petition date, Sears Holdings Corporation was at the top of an immense corporate structure. Many of company’s business functions were duplicated after the merger with Kmart Corporation. This, coupled with Sears’s longstanding existence, are much of the rationale for the

³⁷ Paul R. La Monica, *Sears Sells Craftsman to Stanley Black & Decker*, CNN BUSINESS (Jan. 5, 2017 2:33 PM), <https://perma.cc/3STD-F976>.

³⁸ Jennings, *supra* note 33. <https://perma.cc/6DFN-RK95>.

³⁹ Voluntary Petition for Non-Individuals Filing for Bankruptcy. Case 18-23538. [1.pdf](#).

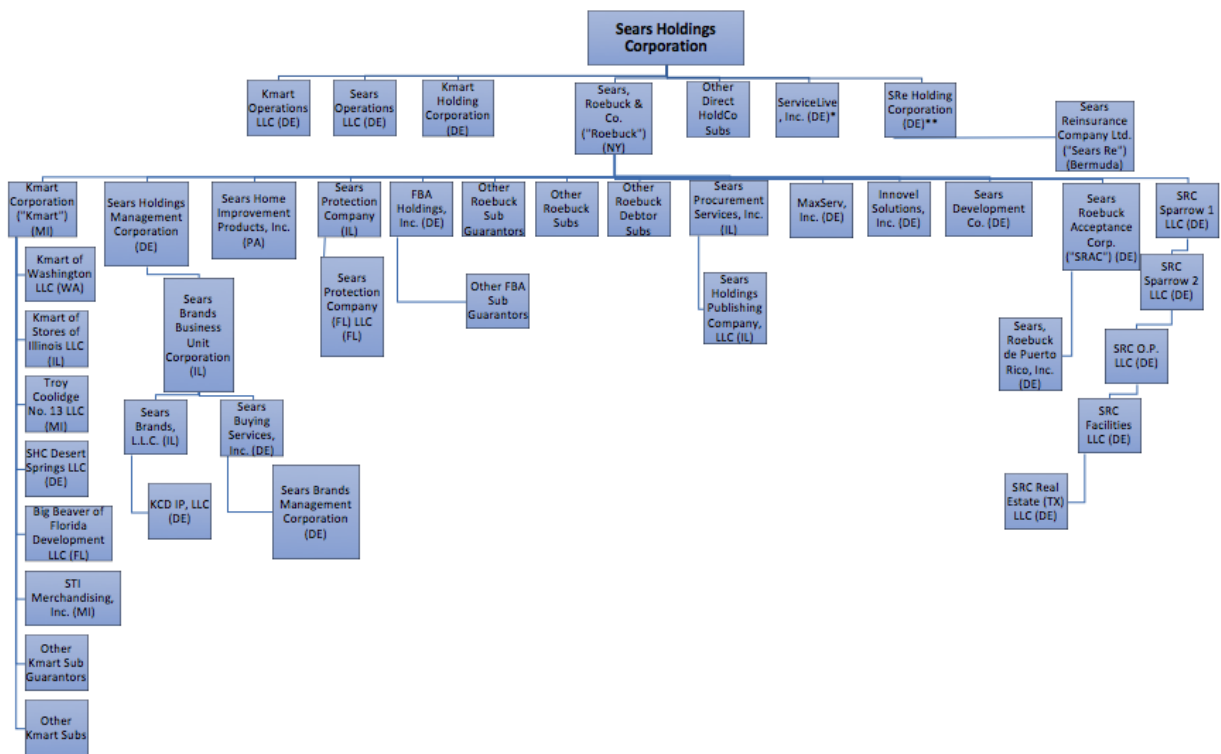
⁴⁰ Delventhal, *supra* note 8. <https://perma.cc/9AJF-HFFX>.

⁴¹ *Id.* <https://perma.cc/9AJF-HFFX>.

⁴² Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 36.

⁴³ *Id.*

widespread enterprise. The image below depicts Sears Holdings’s corporate structure as of the petition date.⁴⁴



Also adding to the size of the business is the separation of operations between the brands, Sears and Kmart, divided again, in part, due to separation by location. Much of this is evident after reading the entity’s name.⁴⁵ However, some of these entities demonstrate Sears’s forward-thinking approach prior to filing for bankruptcy. To that end, ServiceLive, Inc. is an expansion of the Sears Home Improvement theme in that sought to offer home improvement, repairs, and the like at the touch of an application downloaded from mobile phones.⁴⁶ Innovel Solutions, Inc. was a freight forwarding company offering logistic services to major retailers.⁴⁷ Moreover, MaxServ, Inc. was a diagnostic assistance and support company helping with the installation, repair, and care of

⁴⁴ *Id.* at 69.

⁴⁵ For example, the businesses that Sears Operations LLC, Kmart of Stores of Illinois LLC, Sears Home Improvement Products, Inc. engage in are fairly self-explanatory.

⁴⁶ *About*, SERVICELIVE, <https://perma.cc/7YXC-X8PU>.

⁴⁷ Innovel Solutions, <https://perma.cc/G3FN-4HQ8>.

appliances, electronic goods, personal computers, lawn, garden equipment, as well as other similar services.⁴⁸

While some of these entities seem like novel investments by Sears, others offer a bit of insight as to what was to come. For example, Sears Reinsurance Company Ltd. is a wholly owned insurance subsidiary of Sears Holdings.⁴⁹ “[I]t exists to perform a valuable role for Sears Holdings by providing reinsurance to third-party insurance companies and self-insurance reserves . . . located in a safe-haven insurance jurisdiction that would allow claims to be paid in the event of a credit event from the parent company.”⁵⁰ After all of Sears Reinsurance Company Ltd.’s securities were given to SRe Holding Corporation, a statement was issued by Sears Holdings implying that Sears Re was deemed, by the Bermuda Monetary Authority, to be holding capital in excess of the statutory limit.⁵¹ “Notably, the creation of SRe Holding Corporation, and the control over the [credit mortgage-backed securities] portfolio, [in essence power] Eddie Lampert's optionality to unlock value that was previously encumbered as collateral for reinsurance reserves, [and] presents a vast array of tantalizing monetization possibilities in the coming months and years.”⁵² These statements were made in 2014 and the capital held by some of these entities may be diminished, if not eliminated, at the time this paper is written. Nonetheless, this demonstrates a key point in Sears bankruptcy: Eddie Lampert, prior to his resignation as Sears’s CEO, had substantial power to allocate, relocate, and spend Sears’s available capital as he saw fit.

B. *WHY THE DECLINING REVENUES?*

Over fiscal years 2013 through 2018, Sears’s revenues declined \$19.5 billion, approximately a 53.8% decrease.⁵³ In 2017 alone, Sears’s revenues decreased by \$5.4 billion,

⁴⁸ *Company Profile, MaxServ, Inc.*, BLOOMBERG, <https://perma.cc/5DKZ-885E>.

⁴⁹ Bishop Research and Analytics, *Sears Holdings’ Valuation Part 4: SRe Holding, Sears Re, and REMIC Early 2014 Update*, SEEKING ALPHA (Mar. 21, 2014, 7:17 AM) <https://perma.cc/7MFH-AZ5V>.

⁵⁰ *Id.* <https://perma.cc/7MFH-AZ5V>.

⁵² *Id.*

⁵³ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#).

approximately a 24.6% decrease.⁵⁴ Sears insisted that the company's revenues declined in large part due to store closings, which were prevalent given the draining market conditions and fierce competition.⁵⁵ Sears highlighted the key competitors leading to its declining revenues as Walmart, Target, Kohls, J.C. Penney, Macy's, The Home Depot, Lowe's, Best Buy, and Amazon.⁵⁶ Also included in Sears's competition was the online sector of retailers, including Amazon, which added pressure to brick-and-mortar store sales that resulted in a steady decline in mall traffic.⁵⁷

While all the reasons explained by Sears make logical sense, its downfall may have been a misfortune of its own making. Since Eddie Lampert took the reigns as the main decision maker for Sears in 2004, he "implemented a relentless cost-cutting campaign."⁵⁸ After Lampert became CEO of Sears, he extended billions of dollars in loans from his hedge fund, ESL Investments, to the company, but that money was not used to revamp Sears's stores, technology, or its suffering image.⁵⁹ Instead Lampert directed Sears to buy back \$5.8 billion of common stock between 2005 to 2010 while its earnings during that same period were only \$3.8 billion.⁶⁰ Lampert argued that the stock buybacks were a way to "provide liquidity for shareholders who [were] looking to sell and increase ownership of the company for investors who [held] on."⁶¹ However, stock buybacks are often criticized as a waste of company resources because they can be seen as only creating the "appearance of improved earnings" and lead to underinvestment in value adding areas such as store improvements.⁶²

⁵⁴ *Id.* [3.pdf](#).

⁵⁵ *Id.*

⁵⁶ *Id.* at 37.

⁵⁷ *Id.*

⁵⁸ Nathan Bomey and Charisse Jones, *Sears, Kmart Stores Ailing as CEO Eddie Lampert's Fund Gets Hundreds of Millions*, USA TODAY (2018). <https://perma.cc/424F-5KQG>

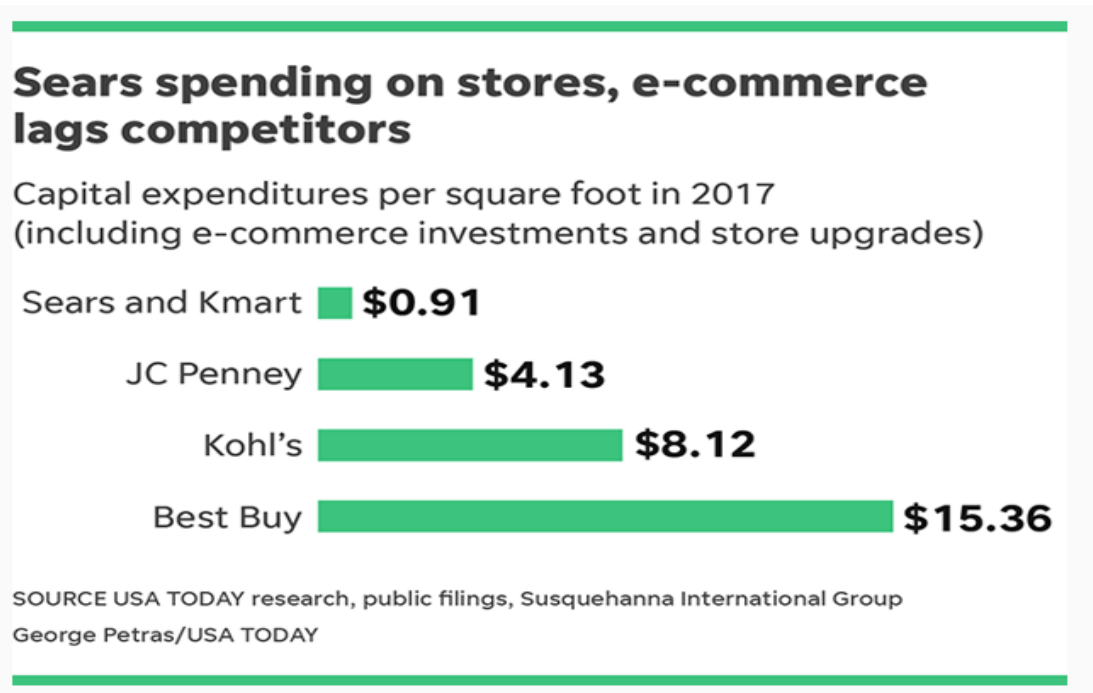
⁵⁹ *Id.* <https://perma.cc/424F-5KQG>.

⁶⁰ Hayley Peterson, *Sears' CEO Blames the Media for Company's Decline – But His Obsession With Wall Street Set It Up for Failure*, BUSINESS INSIDER (2017). <https://perma.cc/UT46-3JPZ>.

⁶¹ *Id.* <https://perma.cc/UT46-3JPZ>.

⁶² *Id.*

Competitors have taken the opposite approach in this “competitive market place” that Sears complained of by investing in their facilities.⁶³ For example:⁶⁴



Other questionable moves made by Lampert since he joined Sears included:⁶⁵

- Selling the Craftsman brand in 2017 for \$900 million;
- Transferring 235 of the most valuable Sears store properties in 2015 to a real estate investment trust called Seritage Growth Properties, where Lampert was the largest shareholder and chairman, for \$2.7 billion; and Seritage then leased these properties back to Sears for \$109 million in rent in 2017, \$43 million in expenses, and \$35 million in lease termination fees.
- Selling off the Lands' End brand in 2014, in which ESL investments had a stake worth \$578 million.

⁶³ Nathan Bomey and Charisse Jones, *Sears, Kmart Stores Ailing as CEO Eddie Lampert's Fund Gets Hundreds of Millions*, USA TODAY (2018). <https://perma.cc/424F-5KQG>.

⁶⁴ *Id.* <https://perma.cc/424F-5KQG>.

⁶⁵ *Id.*

Many critics and creditors of these actions have insisted that Lampert “orchestrated a multiyear and multifaceted scheme to strip the company of assets and capitalize on its decline.”⁶⁶ When considering these transactions, the story regarding the cause of Sears’s decline takes a different posture from that presented by the company itself.

C. CASH FLOW AND LIQUIDITY ISSUES

According to Sears, as of 2018 the company lacked sufficient liquidity to continue normal business operations.⁶⁷ On October 15, 2018, Sears had \$5.6 billion in debt, \$922 million of which was unsecured, which had been incurred to offset declining revenues, honor its pension obligations, and obtain inventory.⁶⁸ Close to all of Sears’s assets were encumbered, including over 200 property locations, intellectual property, credit card receivables, pharmacy receivables, inventory, and even much of the company’s cash.⁶⁹ As of the commencement of the Chapter 11 case, Sears annual cash interest expense was \$400 million and it had a negative cash flow of approximately \$125 million per month.⁷⁰

Sears also had legacy liabilities in the form of pension obligations. It contributed \$546.9 million to these pensions in fiscal year 2017 and another \$359.3 million during fiscal year 2018 which had a substantial, negative effect on its cash flow and liquidity.⁷¹ These contributions were only made with respect to past services performed by retirees because the current employees of Sears did not earn pension benefits.⁷²

Sears liquidity issues were made worse in 2018 by some vendors demanding accelerated payment schedules, while others began requiring the company to pay cash in advance as a

⁶⁶ Nathan Bomey, *Ex-Sears CEO Eddie Lampert Orchestrated ‘Scheme’ to ‘Steal’ Sears, Creditors Allege*, USA TODAY (2019). <https://perma.cc/8BH5-YG5X>.

⁶⁷ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 37.

⁶⁸ *Id.* at 38.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

condition to the continued delivery of inventory.⁷³ This resulted in a 78% reduction in trade credit and required Sears to finance much of its inventory with third party financing, which limited the company's ability to purchase its essential inventory.⁷⁴ This further aggravated Sears's liquidity position "by shrinking the borrowing base. . . on which the company relie[d] to fund its working capital requirements."⁷⁵

⁷³ *Id.* at 39.

⁷⁴ *Id.*

⁷⁵ *Id.*

D. PREPETITION CAPITAL STRUCTURE⁷⁶

As of the petition date, Sears Holdings was indebted under the below listed facilities. To highlight a few of the points this image demonstrates, the imperative facilities will be discussed below.⁷⁷

As of Commencement Date: Debt Facilities	Principal Outstanding (\$ millions)
Revolving Credit Facility	\$ 836.0
First Lien Letters of Credit	123.8
First Lien Term Loan A	--
First Lien Term Loan B	570.8
FILO Term Loan	125.0
Total First Lien Debt	\$ 1,655.6
Stand-Alone L/C Facility	\$ 271.1
Second Lien Term Loan	\$ 317.1
Second Lien Line of Credit	525.0
Alternative Tranche Line of Credit Loans	45.0
Second Lien PIK Notes	175.4
Second Lien Notes	89.0
Total Second Lien Debt	\$ 1,151.5
IP/Ground Lease Term Loan	231.2
Consolidated Secured Note A	108.1
Consolidated Secured Note B	723.3
Total Secured Loan Debt	\$ 1,062.6
Holdings Unsecured PIK Notes	\$ 222.6
Holdings Unsecured Notes	411.0
SRAC Unsecured PIK Notes	107.9
SRAC Unsecured Notes	185.6
Total Unsecured Debt	\$ 927.0
Total Funded Debt	\$ 5,067.8
Intercompany Notes	
KCD Asset-Backed Notes	\$ 900.0
SRAC Medium Term Notes	2,311.8
Total Intercompany Debt	\$ 3,211.8
Sparrow Structure	
Sparrow Term Loan	\$ 111.0
Sparrow Mezzanine Term Loan	513.2
Total Sparrow Structure Debt	\$ 624.2

First, pursuant to the First Lien Credit Agreement, Sears Roebuck Acceptance Corp. (“SRAC”) and Kmart Corp. were indebted to a “syndicate of financial institutions and other institutional lenders” under an asset-based revolving credit facility for \$1.5 billion, a term loan in

⁷⁶ *Id.* [3.pdf](#) at 19.

⁷⁷ *Id.* at 70.

an amount of \$1 billion,⁷⁸ a term loan in an amount of \$750 million, and a “first-in, last-out” term loan in an amount of \$125 million (together the “First Lien Credit Facility”).⁷⁹ The obligations under this First Lien Credit Agreement were guaranteed by Sears Holdings, which indebted Sears for a total amount of \$1.656 billion in respect to loans and advancements made or guarantees issued.⁸⁰ Moreover, this amount was secured by a lien on, “among other things, the credit card receivables, pharmacy receivables, inventory, . . . and cash owned by the First Lien Guarantors.”⁸¹

Second, the Stand-Alone Letter of Credit Facility Lenders⁸² provided the company with \$271.1 million in letters of credit, which were to mature in December 2019.⁸³ The letters of credit issued through this Stand-Alone L/C Facility Agreement were used to guarantee workers’ compensation insurance policies and other obligations. Though this provided significantly more financing to the Debtors, these letters of credit were also guaranteed by the same First Lien Guarantors referenced above and secured with liens on the same First Lien Collateral.⁸⁴

Third, the Second Lien Credit Facility Lenders, who unsurprisingly were the same lenders as in the Stand-Alone Letter of Credit Facility, provided the Debtors with a term loan in the amount of \$300 million, a line of credit of up to \$600 million, and a tranche line of credit loan in an amount of \$45 million (together the “Second Lien Credit Facility”).⁸⁵ These obligations were guaranteed by Sears Holdings, SRAC, and Kmart Corp., and were secured by a lien on, no surprise here, credit

⁷⁸ This term loan was repaid in full as of October 15, 2018. *Id.* [3.pdf](#) at 21.

⁷⁹ *Id.* “ESL [held] approximately \$70.0 million of the outstanding principal amount due under the FILO Term Loan.” *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* The “First Lien Guarantors” were the initial borrowers under the First Lien Credit Agreement, SRAC and Kmart, plus Sears Holdings “and each domestic subsidiary of Sears Holdings that owns any credit card receivables, pharmacy receivables or inventory.” *Id.*

⁸² Perhaps not too surprising, the “Stand-Alone Letter of Credit Facility Lenders” were comprised of two entities, both of which were affiliates of ESL Investments. *Id.* at 22.

⁸³ *Id.* at 21–22.

⁸⁴ *Id.*

⁸⁵ *Id.* at 23–25. The term “tranche line of credit loan” refers to a system of releasing loan funds in phases that the International Monetary Fund [] uses to govern its lending activities with member countries.” Credit Tranche, INVESTOPEDIA.COM (Jan. 25, 2018). <https://perma.cc/ZAG4-L4SE>. These work to release bits of credit that the International Monetary Fund makes available as the member country makes desired financial reforms. *Id.*

card receivables and inventory owned by the Second Lien Guarantors.⁸⁶ This lien was junior in priority to the lien securing the First Lien Credit Facility and the Stand-Along Letters of Credit Facility. As of the petition date, Sears and its subsidiaries were indebted to the Second Lien Credit Facility Lenders in an amount of \$887.1 million in respect to advances, plus unliquidated amounts.⁸⁷ Notably, the \$300 million term loan was “convertible at the option of the applicable Second Lien Credit Facility Lenders or, under certain circumstances, Sears Holdings, into equity of Sears Holdings.”⁸⁸

Fourth, pursuant to the Second Lien Paid in Kind (“PIK”) Notes Indenture among Sears Holdings and its subsidiaries, Sears issued 6.625 percent Second Lien PIK Notes due 2019 in an original principal amount of \$169.8 million.⁸⁹ These notes were issued for the benefit of the Second Lien Credit Facility and were secured jointly under this Facility by the Second Lien Collateral. Sears issued these PIK notes in March 2018 during an exchange transaction for a like principal amount of Second Lien PIK Notes.

The intended effect of the [issuance] Second Lien Notes . . . was to eliminate the cash interest expense associated with, and extend the maturity by one year on, the principal amount of Second Lien Notes that were tendered, while granting to tendering holders and, under certain circumstances, Sears Holdings, the right to convert Second Lien PIK Notes into equity of Sears Holdings.⁹⁰

⁸⁶ The “Second Lien Guarantors” comprised of the same three entities guaranteeing the First Lien Credit Agreement, Sears Holdings, SRAC, and Kmart Corp. Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 24.

⁸⁷ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York at 24 – 25. Case 18-23538.

⁸⁸ *Id.* at 24. Moreover, interest on this term loan was payable, “at the election of Sears Holdings, in whole or in part, in cash or by increasing the principal amount of the outstanding Second Lien Term Loan.” *Id.* This allowed Eddie Lampert to determine whether to pay himself under the terms of the loan, whether to increase the principal amount of the outstanding loan, or simply convert the loan into equity.

⁸⁹ *Id.* at 25. PIK (“Paid in Kind”) notes add an interesting twist to Sears’s capital structure. PIK notes are usually incurred by the company in favor of an equity investor that has bought out the company. There are not generally paid in cash but, rather, the interest is just added to the principal balance which grows and grows. The case of insolvency, the equity investor may walk away from their equity stake but insist that the PIK notes were true debt (not disguised equity) and demand payment in the liquidation or conversion of the “debt” to new equity in a reorganization or recapitalization. These PIK notes very well may have been issued to an entity controlled by Eddie Lampert. Payment-in-Kind, INVESTOPEDIA.COM, <https://perma.cc/83V2-ALCF>.

⁹⁰ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York at 25. Case 18-23538.

Moreover, under the Second Lien Notes Indenture, Sears Holdings was indebted as guarantors of the Second Lien Notes that were issued at 6.625 % interest in an amount of \$1.25 billion.⁹¹

Although one might suspect that Sears might not have much left to “secure” additional loans, it had a few valuable items left. Notably, Sears had not taken a loan secured by its intellectual property. However, pursuant to the IP/Ground Lease Term Loan, Sears was indebted for an additional \$100 million, secured by “substantially all of the unencumbered intellectual property of Sears Holdings and its subsidiaries other than intellectual property relating to the *Kenmore* and *DieHard* brands, as well as certain real property interests, in each case subject to certain exclusions.”⁹² Notwithstanding this already substantial amount of debt, the IP/Ground Lease Lenders⁹³ made additional advances of \$150 million. As of the petition date, Sears owed approximately \$152.4 million of the outstanding amount under the IP/Ground Lease Term Loan to ESL Investments.⁹⁴

Additionally, pursuant to the Holdings Unsecured Indenture, between Sears Holdings Corporation and Computershare Trust Company, as trustee, Sears issued eight percent Senior Unsecured Notes Convertible PIK Notes due in 2019 in a principal amount of \$214 million.⁹⁵ These PIK notes were issued in an exchange transaction through which holders of Holdings Unsecured Notes tendered such notes in exchange for Holdings Unsecured PIK Notes. The effect of this transaction was said to eliminate the cash interest expense associated with the principal amount of Holdings Unsecured Notes that were tendered and grant tendering holders the right to convert Holdings Unsecured PIK notes into equity of Sears Holdings, much like the Second Lien

⁹¹ *Id.* at 26.

⁹² *Id.* at 27.

⁹³ Which included the two ESL Investments controlled entities referenced above, JPP, LLC and JPP II, LLC. These two entities also offered Sears financing, in part, pursuant to Consolidated Secured Note B, Holdings Unsecured PIK Notes, and the Holdings Unsecured Notes, which eventually indebted Sears in an amount well exceeding \$1 billion. *Id.* at 27–30.

⁹⁴ *Id.* at 27.

⁹⁵ *Id.* at 28–29.

PIK Notes. As of the petition date, the outstanding principal amount of the notes was \$222.6 million, plus other fees and expenses.⁹⁶

SRAC Unsecured PIK Notes were issued under substantially the same circumstances as the First and Second Lien PIK Notes that Sears Holdings issued, but at an interest rate of seven percent per annum or increasing the principle amount at a rate of twelve percent per annum. These were issued to The Bank of New York Mellon Trust Company, N.A. in an original amount of \$101.9 million. Sears now owes \$107.9 million on these notes, plus fees and expenses.⁹⁷ Additionally, SRAC issued unsecured notes of various interest rates to “affiliates” of the Company (“SRAC Medium Term Notes”). As of the Commencement Date, the outstanding amount on the SRAC Medium Term Notes was \$2.3 billion, plus other fees, expenses, charges, and other obligations incurred in connection with this transaction.⁹⁸

Indeed, the debt seems insurmountable but, presumably, Sears’s management concluded that this additional financing would offer time, effectively allowing the management team to go back to the drawing board and restructure their business. However, the above listed loans by no means concluded Sears’s debt structure. The company still had debt by virtue of: intercompany claims and notes as a result of its centralized cash management system; asset-backed notes held by KCD IP, LLC and U.S. Bank, N.A. secured by the intellectual property of *Kenmore*, *Craftsman* and *DieHard*; and SRAC Medium Term Notes Sears issued to its non-Debtor affiliate, SRAC.

Furthermore, the Sparrow Term Loan was made among SRC O.P. LLC, SRC Facilities LLC and SRC Real Estate (TX), LLC, as borrowers (the “Sparrow Borrowers”), and lenders including JPP, LLC and JPP II, LLC (collectively, the “Sparrow Lenders”).⁹⁹ This loan was mainly secured by the Sparrow Borrowers’ interests in 138 real properties. Sears Holdings provided a limited guaranty of the Sparrow Borrowers’ obligations under the Sparrow Term Loan.¹⁰⁰

⁹⁶ *Id.* [3.pdf](#) at 28–29.

⁹⁷ *Id.* at 30–31.

⁹⁸ *Id.* at 32–33.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

The Sparrow Mezzanine Term Loan was extended to SRC Sparrow 2 LLC (the “Sparrow Mezzanine Borrower”), and the lenders under this loan also included JPP, LLC and JPP II, LLC (collectively, the “Sparrow Mezzanine Lenders”).¹⁰¹ The term loan that was extended by the Sparrow Mezzanine Lenders was secured by a pledge of equity interests in SRC O.P. LLC, the parent company of the Sparrow Borrowers. Sears Holdings also provided a limited guaranty of the Sparrow Mezzanine Term Loan.¹⁰² Keep in mind, Eddie Lampert controlled ESL Investments which, in turn, controls JPP, LLC and JPP II, LLC (the Sparrow Lenders and Sparrow Mezzanine Lenders), the issuing entities for both of the Sparrow Loans.¹⁰³ This placed another Lampert controlled lender at the front of the line in the bankruptcy process by giving them yet another security interest in collateral.

Finally, in March 2016, Sears Holdings entered into a five-year plan protection and forbearance agreement with the Pension Benefit Guaranty Corp.¹⁰⁴ Pursuant to this agreement, the company agreed to gather its real estate assets and intellectual property held by SRC Depositor Corp., SRC O.P. Corp., SRC Real Estate (TX), LP, among others in order to grant a springing lien on these assets in favor of the PBGC. These assets included intellectual property related to the *Kenmore*, *Craftsman*, and *DieHard* brands. The springing lien would occur upon the occurrence of a set of conditions, including nonpayment and bankruptcy.¹⁰⁵

*E. LIST OF CREDITORS HOLDING THE 20 LARGEST UNSECURED CLAIMS*¹⁰⁶

Pursuant to Local Rule 1007-2(a)(4) Sears provided the following list of the twenty largest unsecured claims against the company.¹⁰⁷

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ JPP is Administrative Agent for Sears \$300 Million Second Lien Loan, ABL Advisor (2016). <https://perma.cc/UE9G-2NYQ>.

¹⁰⁴ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 35.

¹⁰⁵ *Id.* at 35–36. The Pension Benefit Guarantee Corporation eventually lifted the liens held on *Craftsman* in exchange for a substantial deposit of \$280.6 million, presumably to allow Sears the freedom of later selling the brand. *Id.*

¹⁰⁶ *Id.* at 72–75.

¹⁰⁷ *Id.* at 72.

List of Creditors Holding the 20 Largest Unsecured Claims					
No.	Creditor	General Location	Nature of Claim	Amount of Claim	Contingent, Unliquidated, Disputed, or Partially Secured
1	The Pension Benefit Guaranty Corporation (PUBGC)	Washington, D.C.	Pension Benefits	Unknown	Unliquidated
2	SRAC Medium Term Notes	New York, NY	Unsecured Notes	\$ 3,211,800,000	
3	Holdings Unsecured Notes (8%)	Canton, MA	Unsecured Notes	\$ 411,000,000	
4	Holdings Unsecured PIK Notes (8%)	Canton, MA	Unsecured Notes	\$ 222,600,000	
5	SRAC Unsecured Notes	Brooklyn, NY	Unsecured Notes	\$ 185,600,000	
6	SRAC Unsecured PIK Notes	New York, NY	Unsecured Notes	\$ 107,900,000	
7	Whirlpool Corporation	Benton Harbor, MI	Trade Debt	\$ 23,409,729	
8	Frigidaire Company	Carol Stream, IL	Trade Debt	\$ 18,617,186	
9	Winia Daewoo Electronics America	Ridgefield Park, NJ	Trade Debt	\$ 15,180,156	
10	Cardinal Health	Dublin, OH	Trade Debt	\$ 13,877,913	

List of Creditors Holding the 20 Largest Unsecured Claims					
No.	Creditor	General Location	Nature of Claim	Amount of Claim	Contingent, Unliquidated, Disputed, or Partially Secured
11	Icon Health & Fitness, Inc.	Chicago, IL	Trade Debt	\$ 12,102,200	
12	HK Greatstar Int'l Co. Ltd.	Kowloon, Hong Kong	Trade Debt	\$ 10,354,683	
13	Samsung Electronics America HA	Ridgefield Park, NJ	Trade Debt	\$ 8,054,247	
14	Apex Tool International, LLC	Sparks, MD	Trade Debt	\$ 6,605,582	
15	Black & Decker US, Inc.	Baltimore, MD	Trade Debt	\$ 5,893,734	
16	Eastern Prime Textile Limited	Kwun Tong, Hong Kong	Trade Debt	\$ 5,761,992	
17	Winners Industry Company Limited	Tsuen Wan, Hong Kong	Trade Debt	\$ 5,359,201	
18	Tata Consultancy Services Ltd.	Edison, NJ	Trade Debt	\$ 5,333,545	
19	Active Media Services, Inc.	Pearl River, NY	Trade Debt	\$ 5,192,874	
20	Automotive Rentals, Inc.	Philadelphia, PA	Trade Debt	\$ 4,830,313	

The total amount owed to the twenty largest unsecured claims was \$5,936,107,071.¹⁰⁸ The largest unsecured claim was for \$1.74 billion by The Pension Benefit Guaranty Corporation while most of the unsecured claims were by companies who were owed trade debt (accounts payable) and five of the larger claims were for unsecured notes.¹⁰⁹

An unsecured note is “a loan that is not secured by the issuer’s assets. . . but [typically] offers a higher rate of return.”¹¹⁰ The bankruptcy process “distributes property when there is not

¹⁰⁸ *Id.* [3.pdf](#).

¹⁰⁹ *Id.*

¹¹⁰ James Chen, *What is an Unsecured Note*, INVESTOPEDIA (2018). <https://perma.cc/LHY8-H5R4>.

enough to go around.”¹¹¹ Being an unsecured creditor leaves that party with lower priority when the property of the debtor is distributed and shares in whatever assets are left pro rata with other unsecured creditors.¹¹² The bankruptcy process allowed for these unsecured creditors voices to be heard, however their position throughout the process is not where a creditor would like to have found themselves, junior to secured and administrative and other priority claims.

F. LIST OF CREDITORS HOLDING THE 5 LARGEST SECURED CLAIMS

Pursuant to Local Rule 1007-2(a)(5), Sears provided a list as of October 15, 2018, of the five largest secured claims against it.¹¹³

No.	Holder	Mailing Address	Amount of Claim	Type of Collateral	Estimated Value of Collateral
1.	First Lien Revolving Credit Agreement (Bank of America, N.A. and Wells Fargo Bank, National Association)	Bank of America, N.A. Attn: General Counsel 100 North Tryon Street, Charlotte, NC 28255 Wells Fargo, National Association Attn: General Counsel 420 Montgomery Street, San Francisco, CA 94104	\$836,000,000	Credit Card Receivables, Pharmacy Receivables, Inventory, Prescription Lists, Deposit Accounts, and Cash	Unknown
2.	Consolidated Secured Note B (held by JPP, LLC and JPP, II L.L.C.)	C/O ESL Investments, Inc. Attn: Edward S. Lampert, CEO 1170 Kane Concourse, Suite 200 Bay Harbor Islands, FL 33154	\$723,300,000	Real Estate	Unknown

¹¹¹ MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 72 (Charles J. Tabb ed., 5th ed. 2015).

¹¹² Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 77–78.

¹¹³ *Id.*

No.	Holder	Mailing Address	Amount of Claim	Type of Collateral	Estimated Value of Collateral
3.	2016 First Lien Term Loan ("B") (Bank of America, N.A. and Wells Fargo Bank, National Association)	Bank of America, N.A. Attn: General Counsel 100 North Tryon Street, Charlotte, NC 28255 Wells Fargo, National Association Attn: General Counsel 420 Montgomery Street, San Francisco, CA 94104	\$570,800,000	Credit Card Receivables, Pharmacy Receivables, Inventory, Prescription Lists, Deposit Accounts, and Cash	Unknown
4.	Second Lien Line of Credit Loans (JPP, LLC as administrative agent)	C/O ESL Investments, Inc. Attn: Edward S. Lampert, CEO 1170 Kane Concourse, Suite 200 Bay Harbor Islands, FL 33154	\$570,000,000	Credit Card Receivables and Inventory	Unknown
5.	Second Lien PIK Term Loan (6 5/8% Senior Secured Convertible PIK Toggle Notes Due 2019)	Computershare Trust Company N.A. P.O. Box 43078 Providence, RI 02940	\$317,100,000	Credit Card Receivables and Inventory	Unknown

The total amount of Sears's secured debt from the five largest secured claims was \$3,017,200,000.¹¹⁴ Interestingly, two of these claims belonged to Eddie Lampert's hedge fund, ESL Investments.¹¹⁵ These two claims alone composed \$1,293,300,000 of the secured debt owed by Sears.¹¹⁶ This means that Lampert managed ESL Investments "[went] to the head of the queue

¹¹⁴ *Id.* [3.pdf](#).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

in bankruptcy” and had a “secured claim to the extent of the value of [its] interest in the collateral.”¹¹⁷ The records show Lampert’s hedge fund was positioned at the front of the line when loans are repaid.¹¹⁸

IV. FIRST DAY MOTIONS

Along with the bankruptcy petition, the Debtors filed a number of first day pleadings to facilitate their Chapter 11 cases, which Robert A. Riecker of Sears stated he believed “would be necessary and critical to the debtor’s ability to successfully execute a restructuring and was in the best interests of the debtors’ estates and creditors.”¹¹⁹

The first day motions and orders that are filed in a Chapter 11 case depend on the particulars of a case, the needs of the debtor, and the willingness of the court to enter those orders.¹²⁰ Under Rule 6001, “except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within twenty-one days after the filing of the petition, issue an order.”¹²¹ With regard to first-day financing motions, the most important rule is 4001.¹²² The rule provides for a minimum of fourteen days’ notice before the commencement of a final hearing on the use of cash collateral or on a motion to obtain credit.¹²³ However, like Rule 6001, 4001 allows for the court to grant relief at a preliminary hearing prior to the fourteenth day, “as necessary to avoid immediate and irreparable harm.”¹²⁴ First day motions typically fit into one of three groups: motions that

¹¹⁷ BERNSTEIN & KUNEY, *supra* note 111, at 332; *see also* 11 U.S.C. § 506.

¹¹⁸ Nathan Bomey & Charisse Jones, *Sears, Kmart Stores Ailing as CEO Eddie Lampert’s Fund Gets Hundreds of Millions*, USA TODAY (June 18, 2018, 1:50 PM). <https://perma.cc/424F-5KQG>.

¹¹⁹ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 47–48.

¹²⁰ BERNSTEIN & KUNEY, *supra* note 111, at 273.

¹²¹ Fed. R. Bankr. P. 6001.

¹²² BERNSTEIN & KUNEY, *supra* note 111, at 272.

¹²³ *Id.* at 272; *see also* Fed. R. Bankr. P. 4001.

¹²⁴ BERNSTEIN & KUNEY, *supra* note 111, at 272; *see also* Fed. R. Bankr. P. 4001.

facilitate administration of the estate, motions that smooth day to day operations, and substantive motions.¹²⁵

A. *MOTIONS AND ORDERS THAT FACILITATE ADMINISTRATION OF THE ESTATE*

I. *VOLUNTARY PETITIONS & MOTION FOR JOINT ADMINISTRATION OF CHAPTER 11 CASES*

On October 15, 2018, the Debtors filed Chapter 11 voluntary petitions for bankruptcy individually.¹²⁶ Sears then filed a motion for joint administration on the same day.¹²⁷ Sears urged in its motion that the purpose of this request was to allow for an efficient and convenient administration of the Debtor’s interrelated Chapter 11 cases, which makes great sense given that there were fifty related debtors, with at least 200,000 various creditors.¹²⁸

Sears moved for this joint administration under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure which provides that if, “two or more petitions are pending in the same court by or against . . . a debtor and an affiliate, the court may order a joint administration of the estates.”¹²⁹ Under Section 105(a) of the Bankruptcy Code the court has power to “issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.”¹³⁰ In this case, joint administration allowed for Sears’s bankruptcy to be maintained under one file and on one docket for all fifty of the debtors involved.¹³¹

There were no objections made to this motion by any party. On October 16, 2018, just one day after the motion for joint administration was filed, Bankruptcy Judge Robert D. Drain granted

¹²⁵ BERNSTEIN & KUNEY, *supra* note 111, at 273–75.

¹²⁶ Initially, each subsidiary and affiliate began administration under its own docket. *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy. Case 18-23538. [1.pdf](#).

¹²⁷ Motion of Debtors for Entry of Order Directing Joint Administration of Related Chapter 11 Cases. (“Joint Administration Motion”). Case 18-23538. [4.pdf](#).

¹²⁸ *Id.* at 14.

¹²⁹ Fed. R. Bankr. P. 1015(b).

¹³⁰ 11 U.S.C. § 105(a).

¹³¹ Joint Administration Motion at 14.

the motion and ordered each of the cases onto Sears Holdings Corporation's docket (Docket No. 18-23538) with no qualifications as to the grant of relief in any way.¹³²

2. CASE MANAGEMENT PROCEDURES

Sears filed a motion seeking entry of an order approving and implementing case management procedures to establish requirements for filing and serving notices, motions, applications, declarations, objections, responses, memoranda, briefs, supporting documents, and other papers filed in the Chapter 11 case.¹³³ The case management procedures also sought to delineate standards for notices of hearings, agenda letters, fix periodic omnibus hearing dates, articulate mandatory guidelines for the scheduling of hearings and objection deadlines, and limit matters that were to be required to be heard by the court.¹³⁴ The reasoning behind this motion was that given the size and scope of its bankruptcy, the case management procedures would facilitate a Chapter 11 case that would be less burdensome.¹³⁵ Bankruptcy Rules 2002(m) and 9007 empower the court with the authority to regulate the manner in which notices required under the bankruptcy rules are provided.¹³⁶

There were no objections to this motion, and on October 17, 2018, Judge Robert D. Drain approved the case management procedures proposed by Sears.¹³⁷

In addition to this motion Sears filed an application on October 15, 2018 to appoint Prime Clerk, LLC as claims and noticing agent for the debtors to “maximize the efficiency of the distribution of notices and the processing of claims.”¹³⁸ Prime Clerk would serve its goal by

¹³² Order Directing Joint Administration of Related Chapter 11 Cases. Case 18-23538. [118.pdf](#).

¹³³ Motion of Debtors for Entry of Order Implementing Certain Notice and Case Management Procedures. Case 18-23538. (“Case Management Procedure”). [22.pdf](#).

¹³⁴ *Id.*

¹³⁵ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 49.

¹³⁶ Motion for Certain Notice and Case Management Procedures at 5. *see also* Fed. R. Bankr. P. 2002(m), 9007.

¹³⁷ Order Implementing Certain Notice and Case Management Procedures. Case 18-23538. [139.pdf](#).

¹³⁸ *Id.*; Application of Debtors Pursuant to 11 U.S.C. §105(a), 28 U.S.C. §156(c), and Local Rule 5075-1 for an Order Appointing Prime Clerk LLC as Claims and Noticing Agent for the Debtors. Case 18-23538. [27.pdf](#). Prime Clerk provides access to all information associated with a case, allowing the user to review notice records, claim data, and provides an encompassing bankruptcy administration system. <https://perma.cc/W3GU-R8VG>.

assuming the responsibility of being the claims and noticing agent for over 200,000 creditors and other parties in interest.¹³⁹

On October 16, 2018 Judge Drain approved the order.¹⁴⁰ The fees and expenses of Prime Clerk were ruled to be an administrative expense of Sears's estate under Section 503(b)(1)(A) of the Bankruptcy Code.¹⁴¹ However, Judge Drain did qualify the order by requiring Prime Clerk to, (1) immediately notify the clerk of the court and counsel for Sears when unable to provide services, (2) continue providing services during the Chapter 11 case even if not paid unless otherwise ordered by the court, and (3) request any payment of indemnification by an application to the court and in no event would Prime Clerk be indemnified in the case of its own bad faith, self-dealing, breach of fiduciary duty, gross negligence, or willful misconduct.¹⁴²

3. MOTION FOR EXTENDING TIME TO FILE SCHEDULES & STATEMENTS

On October 15, 2018 Sears requested that the court extend the fourteen-day period to (1) file their schedules of assets and liabilities, (2) schedules of executory contracts and unexpired leases, and (3) statements of financial affairs, as required under Rule 521 and 1007, by an additional forty-five days, without prejudice to the right to request even more time if necessary.¹⁴³ Sears insisted that relief should be granted for two reasons.¹⁴⁴ First, "the vast amount of information that had to be assembled and compiled and the time required to complete the schedules constitute good and sufficient cause for granting the extension" under Rule 1007(c).¹⁴⁵ Second,

¹³⁹ Application of Debtors Pursuant to 11 U.S.C. §105(a), 28 U.S.C. §156(c), and Local Rule 5075-1 for an Order Appointing Prime Clerk LLC as Claims and Noticing Agent for the Debtors. Case 18-23538. [27.pdf](#) at 4.

¹⁴⁰ Order Appointing Prime Clerk LLC as Claims and Noticing Agent for the Debtors. Case 18-23538. [113.pdf](#).

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 3-4.

¹⁴³ Motion of Debtors for Entry of Order Extending Time to File Schedules of Assets and Liabilities, Schedules of Executory Contracts and Unexpired Leases, and Statements of Financial Affairs. Case 18-23538, [28.pdf](#); *see also* Fed. R. Bankr. P. 521, 1007.

¹⁴⁴ Motion of Debtors for Entry of Order Extending Time to File Schedules of Assets and Liabilities, Schedules of Executory Contracts and Unexpired Leases, and Statements of Financial Affairs at 3. Case 18-23538.

¹⁴⁵ *Id.*

under Section 105(a) of the Code, the court is empowered to “issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.”¹⁴⁶

This motion went unopposed and on October 16, 2018, Judge Drain approved the order extending the time to file schedules and statements an additional forty-five days without prejudice to seek further.¹⁴⁷

4. MOTION FOR ORDER WAIVING REQUIREMENTS REGARDING EQUITY HOLDERS

Next, Sears requested an order from the Court waiving the requirement to (1) file a list of creditors, (2) prepare and file the list of equity security holders, and (3) provide equity security holders with a copy of the notice announcing the commencement of the Chapter 11 cases and the meeting of the creditors to be held under Rule 341.¹⁴⁸ Sears also requested relief to implement their own procedures for notifying creditors and other parties in interest of the commencement of the bankruptcy.¹⁴⁹

First, Sears insisted on waiving the requirement to file a list of creditors under Rule 521(a)(1) and 1007(a)(1) because without the relief requested, the Rules would require each of the debtors to file a separate list of creditors.¹⁵⁰ Sears submitted that waiving this task “is within the Court’s equitable powers under Section 105 of the Bankruptcy Code.”¹⁵¹ Sears also outlined that it had filed a motion on the same day to hire Prime Clerk, LLC as its claims and noticing agent, and that the court pursuant to Section 156(c) can use outside services to provide notices and other

¹⁴⁶ *Id.*; *see also* Fed. R. Bankr. P. 105(a).

¹⁴⁷ Order Extending Time to File Schedules of Assets and Liabilities, Schedules of Executory Contracts and Unexpired Leases, and Statements of Financial Affairs. Case 18-23538. [103.pdf](#).

¹⁴⁸ Motion of Debtors for Entry of Order Waiving the Requirement to (A) File List of Creditors (B) Prepare and File the List of Equity Security Holders and (C) Provide Equity Security Holders with the Notice of Commencement, and (II) Granting Debtors Authority to Establish Procedures for Notifying Creditors of Commencement of Chapter 11 Cases. Case 18-23538. [21.pdf](#).

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.* at 4.

¹⁵¹ *Id.*; *see also* 11 U.S.C. § 105(a).

administrative information to parties in interest, as long as the costs are paid from the assets of the estate.¹⁵²

Secondly, Sears stated that the requirements of Rule 1007(a)(3), requiring that the debtor file a list of the debtor's equity holders of each class showing the number and kinds of interests of each holder, and the last known address for each holder; and the requirements of Rule 2002(d) requiring the debtor to provide notice to all equity security holders of the bankruptcy and any Section 341 meeting were too cumbersome and within the court's equitable powers to excuse them under Section 105.¹⁵³ Sears supported these motions by stating that they had 108 million shares outstanding that they would have to track down and that all of these individuals will find out about the proceedings through the news anyway.¹⁵⁴

On October 16, 2018, Judge Drain waived all the requirements where relief was requested and approved the order.¹⁵⁵ Judge Drain did require Sears to furnish Prime Clerk with a consolidated list containing the names and last known addresses of Sears's creditors, and made Sears responsible (along with Prime Clerk) for mailing a notice of commencement to all of the

¹⁵² Motion of Debtors for Entry of Order Waiving the Requirement to (A) File List of Creditors (B) Prepare and File the List of Equity Security Holders and (C) Provide Equity Security Holders with the Notice of Commencement, and (II) Granting Debtors Authority to Establish Procedures for Notifying Creditors of Commencement of Chapter 11 Cases. [21.pdf](#); *see also* 28 U.S.C. § 156(c).

¹⁵³ Motion of Debtors for Entry of Order Waiving the Requirement to (A) File List of Creditors (B) Prepare and File the List of Equity Security Holders and (C) Provide Equity Security Holders with the Notice of Commencement, and (II) Granting Debtors Authority to Establish Procedures for Notifying Creditors of Commencement of Chapter 11 Cases; *see also* Fed. R. Bankr. P. 1007(a)(3), 2002(d); 11 U.S.C. §105(a).

¹⁵⁴ Motion of Debtors for Entry of Order Waiving the Requirement to (A) File List of Creditors (B) Prepare and File the List of Equity Security Holders and (C) Provide Equity Security Holders with the Notice of Commencement, and (II) Granting Debtors Authority to Establish Procedures for Notifying Creditors of Commencement of Chapter 11 Cases at 6. However, Sears already had to give notice to its shareholders, so this should not have been considered overly burdensome.

¹⁵⁵ Order (I) Waiving the requirement to (A) File List of Creditors (B) Prepare and File the List of Equity Security Holders and (C) Provide Equity Security Holders with the Notice of Commencement, and (II) Granting Debtors Authority to Establish Procedures for Notifying Creditors of Commencement of Chapter 11 Cases. Case 18-23538. [112.pdf](#).

creditors on that list.¹⁵⁶ This notice of commencement was to be published in The New York Times and on the website that Prime Clerk established.¹⁵⁷

5. CASH MANAGEMENT MOTION

On October 15, 2018, Sears filed a motion that requested authorization to continue its existing cash management system (including the continued maintenance of their existing bank accounts and business forms) and to open new or close existing bank accounts, among other administrative functions.¹⁵⁸ Prepetition, Sears used an integrated, centralized cash management system composed of 154 bank accounts that saw an average cash flow of \$186 million per day, maintained at various banks.¹⁵⁹ These funds were used to accommodate the diverse array of business divisions it supported.¹⁶⁰

Sears insisted that if it were not allowed to maintain and use its current cash management system as requested, the resulting harm would include “(1) severe and likely irreparable disruption of the debtor’s ordinary financial affairs and business operations, (2) delay in the administration of the debtors’ estates, and (3) cost to the estates to set up new systems, open new accounts, and order new Business forms.”¹⁶¹

There were no objections to the motion and on October 16, 2018, Judge Drain granted the cash management motion on an interim basis.¹⁶²

¹⁵⁶ *Id.* [112.pdf](#) at 3.

¹⁵⁷ *Id.* at 4.

¹⁵⁸ Motion of Debtors for Authority to (I) Continue Using Existing Cash Management System, Bank Accounts, and Business Forms, (II) Implement Ordinary Course Changes to Cash Management System, (III) Continue Intercompany Transactions, and (IV) Provide Administrative Expense Priority for Postpetition Intercompany Claims and Related Relief. Case 18-23538. [5.pdf](#).

¹⁵⁹ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 51.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Interim Order Authorizing Debtors to (I) Continue Using Existing Cash Management System, Bank Accounts, and Business Forms, (II) Implement Ordinary Course Changes to Cash Management System, (III) Continue Intercompany Transactions, and (IV) Provide Administrative Expense Priority for Post-petition Intercompany Claims and Related Relief. Case 18-23538. [102.pdf](#).

Almost a month later, on November 14, 2018, the Official Committee of Unsecured Creditors filed an objection to the cash management motion.¹⁶³ The objection argued that Sears was seeking to implement protections that granted administrative expense priority to postpetition intercompany claims, but that these protections were insufficient because they were junior to administrative expense priority claims granted in the Debtor-In-Possession orders.¹⁶⁴ Thus, the OCC argued that modifications needed to be made to limit the subordination of postpetition intercompany obligations by: (1) providing that the OCC reserves all rights with respect to cost allocations, (2) requiring Sears to provide the OCC with a weekly summary of intercompany transactions, and (3) providing the OCC with five business days' advance notice before transferring any value in excess of \$1 million.¹⁶⁵

The cash management motion would ultimately be authorized by a final order from Judge Drain on December 21, 2018.¹⁶⁶ However, Judge Drain specified procedural requirements that Sears had to comply with as part of the order.¹⁶⁷ Sears was required to: (1) keep records of any postpetition intercompany transactions that occurred during the Chapter 11 case and (2) implement accounting procedures to distinguish between prepetition and postpetition intercompany transactions.¹⁶⁸

¹⁶³ Omnibus Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, *et al.* to the Debtors' DIP Financing Motion and Cash Management Motion. Case 18-23538. [740.pdf](#).

¹⁶⁴ *Id.* at 25; *See Infra* for a discussion on Debtor-In-Possession orders.

¹⁶⁵ Omnibus Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, *et al.* to the Debtors' DIP Financing Motion and Cash Management Motion. Case 18-23538.

¹⁶⁶ Final Order Authorizing Debtors to (I) Continue Using Existing Cash Management System, Bank Accounts, and Business Forms, (II) Implement Ordinary Course Changes to Cash Management System, (III) Continue Intercompany Transactions, and (IV) Provide Administrative Expense Priority for Post-petition Intercompany Claims and Related Relief. Case 18-23538. [1394.pdf](#).

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.*

B. ORDERS THAT SMOOTH DAY-TO-DAY OPERATIONS

Sears sought immediate relief on the following issues and also presented these motions at the first day hearing.¹⁶⁹

I. WAGES & BENEFITS MOTION

Using Rules 105(a), 363, and 507(a) of the Bankruptcy Code, Sears requested authority, but not direction, to pay certain prepetition amounts, and maintain and continue to honor and pay all amounts with respect to Sears's business practices, programs and policies for their employees including (a) unpaid compensation, (b) deductions and payroll taxes, (c) obligations owed to the supplemental workforce, (d) reimbursable expenses, (e) the corporate card program, (f) the employee benefit program, and other employee plans.¹⁷⁰ Sears insisted that this motion's approval was necessary because its employees relied on the compensation and benefits they received to pay their daily living expenses and support their families.¹⁷¹ Sears urged further that failure to pay their obligations to employees "likely would result in attrition at a time when the debtors need their workforce to perform at peak efficiency."¹⁷² While aspects of the motion make sense, it does appear that the former employees have no bearing on the workforce performing at peak efficiency, because they are no longer there and that the payment of the former employee benefit programs should not have been a part of this argument.

¹⁶⁹ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 50.

¹⁷⁰ Motion of Debtors for Entry of Order (I) Authorizing but not Directing the Debtors to (A) Pay Certain Prepetition Wages and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Other Benefits, and (C) Continue Employee Benefits Programs, and (II) Granting Related Relief. Case 18-23538. [31.pdf](#).

¹⁷¹ *Id.* at 4.

¹⁷² *Id.*

The Debtor’s “Workforce Obligations” were as follows:¹⁷³

Compensation and Benefits Program	Interim Amount	Final Amount
Unpaid Compensation	\$39,200,000	\$39,200,000
Deductions and Payroll Taxes	\$36,000,000	\$36,000,000
Supplemental Workforce Obligations	\$5,500,000	\$8,300,000
Reimbursable Expenses	\$1,200,000	\$1,200,000
Corporate Card Program	\$6,900,000	\$6,900,000
Employee Benefit Programs	\$17,200,000	\$17,200,000
Severance Program	—	—
Former Employee Benefit Programs	\$1,500,000	\$1,500,000
Other Employee Programs	\$110,000	\$110,000
Workforce Obligations	\$107,600,000	\$110,400,000

On October 16, 2018, Judge Drain granted an interim order authorizing but not directing Sears to pay and honor all prepetition obligations associated with the Workforce Obligations set out in the chart above.¹⁷⁴ On November 15, 2018, a certificate of no objection pursuant to 28 U.S.C. § 1746 was submitted by Sears, because the objection deadline had passed.¹⁷⁵ Then on November 16, 2018, a final order authorizing the wages and benefits motion was entered.¹⁷⁶

¹⁷³ *Id.* at 5.

¹⁷⁴ Interim Order (I) Authorizing but not Directing the Debtors to (A) Pay Certain Prepetition Wages and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Other Benefits, and (C) Continue Employee Benefits Programs, and (II) Granting Related Relief. Case 18-23538. [114.pdf](#).

¹⁷⁵ Certificate of No Objection Regarding Motion of Debtors for Entry of Order (I) Authorizing but not Directing the Debtors to (A) Pay Certain Prepetition Wages and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Other Benefits, and (C) Continue Employee Benefits Programs, and (II) Granting Related Relief. Case 18-23538. [749.pdf](#).

¹⁷⁶ Final Order (I) Authorizing but not Directing the Debtors to (A) Pay Certain Prepetition Wages and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Other Benefits, and (C) Continue Employee Benefits Programs, and (II) Granting Related Relief. Case 18-23538. [798.pdf](#).

2. *TAXES & FEES MOTION*

Under this motion Sears requested authority to pay certain taxes, assessments, fees, and charges in the ordinary course of business.¹⁷⁷ The reason offered for seeking authority to pay these taxes and fees was that in the ordinary course of Sears's business, it collected, withheld, and incurred an assortment of taxes and fees, and paying these obligations would "forestall the authorities from taking actions that may interfere with the operation of the debtor's business or the administration of this Chapter 11 case."¹⁷⁸ These interferences could include personal liability actions against top employees and directors of Sears which could seriously impede the Chapter 11 process.¹⁷⁹

On October 16, 2018, Judge Drain approved an interim order approving the taxes and fees motion.¹⁸⁰ There were no objections from Sears's creditors, and a final order authorizing the payment of taxes and fees was approved on November 16, 2018.¹⁸¹

3. *THE INSURANCE MOTION*

Sears also made a motion requesting that it be allowed to (1) continue, maintain, and renew their insurance policies and worker's compensation programs, (2) honor their insurance obligations and workers' compensation obligations in the ordinary course of business during the Chapter 11 case, (3) pay prepetition insurance obligations and workers' compensation obligations, and (4) modify the automatic stay if needed to allow employees to proceed with claims they may have against Sears.¹⁸² Sears urged that these insurance policies were essential to the value of the business and that the various regulations, laws, and contracts require these insurance policies.¹⁸³

¹⁷⁷ Motion of Debtors for Authority to Pay Certain Prepetition Taxes and Fees. Case 18-23538. [19.pdf](#).

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.*

¹⁸⁰ Interim Order Authorizing Debtors to Pay Certain Prepetition Taxes and Fees. Case 18-23538. [116.pdf](#).

¹⁸¹ Final Order Authorizing Debtors to Pay Certain Prepetition Taxes and Fees. Case 18-23538. [797.pdf](#).

¹⁸² Motion of Debtors for Authorization to (I) Continue, Maintain, and Renew Their Insurance Policies and Workers' Compensation Programs; (II) Honor All Obligations with Respect Thereto; and (III) Modify the Automatic Stay with Respect to the Workers' Compensation Programs. Case 18-23538. [17.pdf](#).

¹⁸³ *Id.* at 4.

“Additionally, the guidelines of the Office of the United States Trustee . . . require debtors to maintain insurance coverage throughout their Chapter 11 case.”¹⁸⁴ The annual cost of the insurance was approximately \$27 million, and Sears would pay approximately \$850,000 on insurance premiums within the first thirty days of the Chapter 11 case, as well as \$200,000 more within the first thirty days for service provider fees.¹⁸⁵

Bankruptcy Rule 6003(b) provides that, “to the extent relief is necessary to avoid immediate and irreparable harm, a Bankruptcy Court may issue an order granting a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate.”¹⁸⁶ Sears urged that the requirements of 6003(b) were met because of the potential harm that could result from a failure to comply with these insurance obligations.¹⁸⁷

There was no objection to this motion by Sears, and an interim order followed by a final order authorizing the insurance motion was entered on November 16, 2018, in accordance with Rules 105(a) and 363(b).¹⁸⁸

C. *SUBSTANTIVE MOTIONS*

I. *CRITICAL VENDORS MOTION*

Sears relied on Sections 105(a), 363(b), and 503(b)(9) of the Bankruptcy Code and argued that its business relied heavily on the longstanding network of “vendors and suppliers,” when it requested leeway in honoring certain contracts.¹⁸⁹ In fact, the company requested court authorization to:

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* [17.pdf](#) at 5.

¹⁸⁶ *Id.* at 15-16; *see also* 18 U.S.C. §6003(b).

¹⁸⁷ Debtor’s Insurance Motion.

¹⁸⁸ Final Order Authorizing Debtors to (I) Continue, Maintain, and Renew Their Insurance Policies and Workers’ Compensation Programs; (II) Honor All Obligations with Respect Thereto; and (III) Modify the Automatic Stay with Respect to the Workers’ Compensation Programs. Case 18-23538. [792.pdf](#).

¹⁸⁹ Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors, (II) approving Procedures to Address Vendors who Repudiate and Refuse to Honor Their Contractual Obligations to The Debtors, and (III) Granting Related Relief. (“Critical Vendors Motion”). Case 18-23538. [18.pdf](#) at 5.

Pay up to \$70 million on an interim basis . . . and \$90 million on a final basis . . . in aggregate prepetition Critical Vendor Claims; (ii) approving procedures to address those vendors who repudiate and refuse to honor their contractual obligations to the Debtors; and (iii) granting related relief.¹⁹⁰

Remembering that a key component of their business involved in-store sales, Sears reiterated the importance of keeping supplies and inventories at a level that would foster growth in areas they sought to improve. Sears described these relationships as an “invoice-by-invoice” relationship with few “long-term contracts.”¹⁹¹ Accordingly, Sears noted the fact that the vendors, typically entering into contracts based off of experience, recently “impos[ed] new and onerous trade terms or outright refusal to ship merchandise, all of which further impaired the Debtors’ liquidity position and their ability to remain competitive with peer retailers.”¹⁹²

Because Sears and its suppliers did not enter into long-term agreements, the company sought critical vendor relief from the court to compel its suppliers to offer commercially reasonable terms.¹⁹³ Due to the interconnected network of suppliers, Sears’s rationale behind the request was that the “failure to pay one Critical Vendor could have a ripple effect”¹⁹⁴ The company noted the fact that it was “not seeking to pay all prepetition claims of the Critical Vendors, but rather to pay such undisputed amounts in the ordinary course of the Debtors’ businesses and on terms consistent with the Debtors’ prepetition practices.”¹⁹⁵

¹⁹⁰ *Id.* [18.pdf](#).

¹⁹¹ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 55.

¹⁹² Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors, (II) Approving Procedures to Address Vendors who Repudiate and Refuse to Honor Their Contractual Obligations to The Debtors, and (III) Granting Related Relief at 5. (“Critical Vendors Motion”). Case 18-23538. Sears added that 200 of its vendors stopped shipping merchandise two weeks prior to its filing. *Id.* at 5.

¹⁹³ *Id.* at 8.

¹⁹⁴ *Id.* at 8.

¹⁹⁵ *Id.* at 4.

In its Critical Vendors Motion, Sears explained the generalities of the procedures used to identify and select Critical Vendors.¹⁹⁶ It began so by describing actions taken prior to the Commencement Date in preparation of this Chapter 11 case.¹⁹⁷ Sears had “engaged in a comprehensive” pre-screening process to identify vendors, suppliers, and other parties that the company may deem “critical” to the business.¹⁹⁸ While considering a variety of factors, along with the potential that some vendors identified may be entitled to administrative priority under Section 503(b)(9), the Debtors identified a group of Critical Vendors that supply flagship brands, “do not have a long term contractual relationship with the Debtors, and . . . are either (a) sole-source providers or (b) cannot be replaced in a cost-efficient manner or without causing irreparable harm to the Debtors’ operations.”¹⁹⁹

Immediately after describing these procedures apparently used to determine a party’s status, Sears added that critical vendor status is not afforded “unless absolutely necessary for the preservation of the Debtors’ business and otherwise consistent with business judgment.”²⁰⁰ Among the companies identified as possibly having critical vendor status pursuant to the pre-screening process, a significant portion of these vendors would either be entitled to administrative expense status under Section 503(b)(9)²⁰¹ or were “located overseas with little or no contact with the United States.”²⁰² To those overseas potential critical vendors, “the Debtors believ[ed] that there [was] a serious risk that [they would] consider themselves beyond the jurisdiction of the Court, disregard

¹⁹⁶ *Id.* at 9–19.

¹⁹⁷ *Id.* [18.pdf](#) at 9–11.

¹⁹⁸ *Id.* at 9.

¹⁹⁹ *Id.* at 10.

²⁰⁰ *Id.* at 10–11.

²⁰¹ *Id.* at 11. “Debtors estimate[d] that approximately 48% of their outstanding trade payables may be entitled to administrative expense status pursuant to section 503(b)(9) of the Bankruptcy Code. Accordingly, a significant amount of the Potential Critical Vendors [were] likely entitled to administrative expense status regardless of whether they are treated as a Critical Vendor.” *Id.* at 11.

²⁰² *Id.* at 11.

the automatic stay provisions of the Bankruptcy Code and engage in conduct that would disrupt the Debtors' . . . operations.”²⁰³

Sears further requested approval of the “Critical Vendor Payment Protocol” ensuring that the company would only make payments necessary to “preserve business stability . . . and maintain liquidity or access to essential goods or services.”²⁰⁴ This protocol provided that Sears establish a Vendor Contingency Team (all requests for critical vendor status were to be emailed to this team), the potential critical vendor’s status was determined based on the pre-screening process, and that if this status is granted, payments be documented pursuant to a Vendor Agreement.²⁰⁵ This team was to be composed of executives and other employees of Sears and professionals from M-III Partners, and Weil Gotshal & Manges, counsel to the Debtors.²⁰⁶ This effectively made Sears the sole decider of critical vendor status, as the vendor contingency team was comprised of Sears itself, its advisor, and its law firm.

The Vendor Agreement obligated Critical Vendors to conduct business with Sears on “trade terms at least as favorable to the Debtors as those terms governing practices and programs . . . within the twelve months prior to the Commencement Date, or such other trade terms that are acceptable to the Debtors in their sole discretion.”²⁰⁷ Upon entering into a Vendor Agreement, and at the sole expense of the Critical Vendor, the Critical Vendor was obligated to take all action to remove any liens it asserted against Sears’s property or the inventory and supplies provided by the Critical Vendor.²⁰⁸

²⁰³ *Id.*

²⁰⁴ *Id.* [18.pdf](#) at 12.

²⁰⁵ *Id.* at 12–13. Sears acknowledged the fact that in rare circumstances a Vendor Agreement may not be necessary and sought authority to make payments without such an agreement. *Id.* at 15.

²⁰⁶ *Id.* at 12. M-III is an advisory firm that provides among other things, professional services on restructuring <https://perma.cc/XV73-ZS2S>. Weil Gotshal & Manges was one of the law firms representing Sears as counsel through the chapter 11 process.

²⁰⁷ Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors, (II) Approving Procedures to Address Vendors who Repudiate and Refuse to Honor Their Contractual Obligations to The Debtors, and (III) Granting Related Relief. (“Critical Vendors Motion”). Case 18-23538. [18.pdf](#) at 14–15. The initial Critical Vendors Motion and Final Order both provided that the Debtors may agree to implement modifications of the Vendor Agreement as Sears deemed necessary.

²⁰⁸ *Id.* at 15.

Noting that Section 365 requires parties “perform . . . postpetition obligations,”²⁰⁹ Sears added Repudiating Vendor Procedures providing for provisional payment of any claim of a Critical Vendor who refuse[d] to perform its obligations followed by notice and a hearing wherein the vendor must “show cause . . . why it should not be found to have willfully violated sections 362 and 365 . . . and why it should not be required [to] return any payments made to it.”²¹⁰

On October 17, 2018, this Critical Vendors Motion was approved on an interim basis, allowing the Debtors to pay up to \$70 million to “certain vendors, suppliers, service providers, and similar entities that the Debtors determine[d], in their reasonable business judgment and according to the procedures [described above], [were] essential to their ongoing business operations and maximization of the value of the enterprise.”²¹¹ Almost one month after the Commencement Date, on November 12, 2018, Sears filed a certificate of no objection regarding the entry of this interim order and the future final order.²¹²

Apparently in place of any objections, responses, and request for hearings was a redline of the Final Order that was exchanged between the Debtors, the OCC, and the DIP Lenders.²¹³ This redline was attached to the certificate of no objection.²¹⁴ This redline provided for notice to the Vendor Contingency Team as well as the OCC of any payment exceeding \$2 million, the identity of the recipient, the amount of the claim, and any such information as either party would request.²¹⁵ Furthermore, the Vendor Contingency Team and the OCC were to get updates of the identity of

²⁰⁹ *Id.* at 16.

²¹⁰ *Id.* [18.pdf](#) at 17–18. *See also* 11 U.S.C. §§ 362, 365.

²¹¹ Interim Order (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approving Procedures to Address Vendors Who Repudiate and Refuse to Honor Their Contractual Obligations to the Debtors; and (III) Granting Related Relief (“Interim Order”). Case 18-23538. [137.pdf](#) at 1–2.

²¹² Certificate of No Objection Regarding Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approving Procedures to Address Vendors Who Repudiate and Refuse to Honor Their Contractual Obligations to the Debtors; and (III) Granting Related Relief (“Certificate of No Objection”). Case 18-23538. [657.pdf](#).

²¹³ *Id.* at 3.

²¹⁴ *Id.* at 16–26.

²¹⁵ *Id.* at 18–19.

parties seeking Critical Vendor status, timing and amount of any payments, and a “summary of material payment terms”²¹⁶ on a weekly and monthly basis.²¹⁷

After a final hearing, on November 15, 2018, Judge Drain entered the Final Order implementing the redline’s terms.²¹⁸

2. LIENHOLDERS’ MOTION

Sears also requested the court’s authorization “to pay (a) Shipping and Warehousing Charges, (b) Non-Merchandise Lien Claims, and (c) [certain claims resulting from delivery of perishable agricultural goods] . . . , and (ii) granting administrative priority status to all undisputed obligations . . . arising from the postpetition delivery of goods ordered prior to the Commencement Date”²¹⁹ In order to “prevent any disruption to the Debtors’ retail operations,”²²⁰ Sears concluded that it needed to make payments, in addition to those made pursuant to the Critical Vendors Motion. The claimants here were essential to the Debtors’ continued operations, as Sears stores were “continuously replenished with a supply of goods and merchandise that [had] been advertised for sale and that their customers expect[ed] for purchase.”²²¹

²¹⁶ Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors, (II) Approving Procedures to Address Vendors who Repudiate and Refuse to Honor Their Contractual Obligations to The Debtors, and (III) Granting Related Relief. (“Critical Vendors Motion”). Case 18-23538. (referred to by the parties as the “Critical Vendors Matrix.”) [18.pdf](#) at 13.

²¹⁷ Certificate of No Objection Regarding Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approving Procedures to Address Vendors Who Repudiate and Refuse to Honor Their Contractual Obligations to the Debtors; and (III) Granting Related Relief (“Certificate of No Objection”). Case 18-23538. [657.pdf](#). at 20.

²¹⁸ Final Order (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approving Procedures to Address Vendors Who Repudiate and Refuse to Honor Their Contractual Obligations to the Debtors; and (III) Granting Related Relief. Case 18-23538. [793.pdf](#) at 1. This Final Order was entered with the caveat that in the event that “there is any inconsistency between the terms of any of the DIP Orders, the Interim Order, or this Order, the terms of the DIP Order (or DIP Orders, as applicable) shall control. *Id.* at 8.

²¹⁹ Motion of Debtors for Interim and Final Authority to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandise Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. (“Lienholders Motion”). Case 18-23538. [14.pdf](#) at 3.

²²⁰ *Id.* at 10.

²²¹ *Id.* at 4.

For the most part, the beneficiaries of this motion had the ability to assert liens against inventory, property, and merchandise in the amount owed to the claimant.²²² If the company was going to keep select stores open and effectively execute its reorganization plan, it needed to pay these claimants to prevent the interference that a lien inevitably causes.²²³ Therefore, in order to: (1) prevent shippers and warehousemen from taking adverse action on its inventory and merchandise, (2) avoid the assertion of liens by non-merchandise claimants, and (3) to maintain goodwill in the perishable agricultural commodities market, Sears sought to satisfy these outstanding obligations.²²⁴

Also, in this motion, Sears requested an order “confirming administrative expense priority status under Section 503(b) of the Bankruptcy Code to all undisputed prepetition orders and authorizing the Debtors to satisfy such obligations in the ordinary course of business.”²²⁵ Given that merchandise not delivered until the commencement date would ordinarily be treated as general unsecured claims,²²⁶ some of these suppliers and vendors refused to deliver the goods unless “Debtors issue[d] substitute purchase orders postpetition or obtain[ed] an order of the Court providing that all undisputed obligations . . . arising from the postpetition delivery of goods . . . are afforded administrative expense priority status under section 503(b).”²²⁷ In so asking, Sears highlighted the fact that its outstanding obligations derived from such merchandise exceeded \$160 million.²²⁸

²²² *Id.* [14.pdf](#) at 5–10.

²²³ *Id.* at 3–4. The Debtors also noted that some of these potential claimants had already begun taking action, filing liens, making threats, and “retriev[ing] merchandise already delivered.” *Id.* at 5.

²²⁴ *Id.* at 1–10.

²²⁵ *Id.* at 10.

²²⁶ *See* 11 U.S.C. § 503(b).

²²⁷ Motion of Debtors for Interim and Final Authority to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandize Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. (“Lienholders Motion”). Case 18-23538. [14.pdf](#) at 9.

²²⁸ *Id.* at 9.

On October 16, 2018, an interim order approving this motion was granted.²²⁹ Less than a month later, DART Warehouse Corporation submitted a statement of position alleging that the lack of specificity in the Shippers and Warehouse Motion, together with the Critical Vendors Motion, left it “troubled” as to what percentage of payment it would receive.²³⁰ Apex Tool Group, LLC filed a response and limited objection to the Lienholders Motion, also alleging a lack of clarity on behalf of Sears’s use of the word “delivery” in place of “received” as the term is used in Section 503(b)(9) when discussing the Prepetition Orders.²³¹ Sears, responded on purely procedural grounds, contending:

Apex, which has not yet filed any proof of claim, seeks an advisory ruling as to the priority to which its claims may be entitled. A request for declaratory relief of this nature through an objection to standard “first day” relief clearly is improper. Fed. R. Bank. P. 7001. Accordingly, Apex’s limited objection should be overruled.²³²

Sears brought the court’s attention to the fact that no other objection had been filed, and on November 20, 2018, the court granted a final order.²³³ The final order complied with the Debtors’

²²⁹ Interim Order Authorizing Debtors to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandize Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. (“Interim Order”). Case 18-23538. [115.pdf](#).

²³⁰ Statement of Position of DART Warehouse Corporation to the Motion of Debtors for Motion of Debtors for Interim and Final Authority to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandize Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. Case 18-23538. [554.pdf](#) at 2.

²³¹ Response and Limited Objection of Apex Tool Group, LLC to the Motion of Debtors for Interim and Final Authority to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandize Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. Case 18-23538. [558.pdf](#) at 3–8.

²³² Debtors’ Reply to Objections to Debtors’ Motion for Authority to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandize Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. Case 18-23538. [672.pdf](#) at 3.

²³³ *Id.* at 2; *see* Final Order Authorizing Debtors to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandize Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. (“Final Order”). Case 18-23538. [843.pdf](#) at 3.

wishes in every respect.²³⁴ Sears was granted authority to “cause Lien Claimants to acknowledge in writing that payment of their respective Lien Claims is conditioned upon such Lien Claimant continuing to supply services to the Debtors on terms that, at a minimum, such Lien Claimant provided to the Debtors on a historical basis.”²³⁵ Furthermore, Debtors were permitted “in their sole discretion” to condition payment to these Lien Claimants on their agreement “to continue supplying goods and services . . . on the same trade terms given to them prior to the commencement date or upon” newly negotiated terms.²³⁶ Additionally, Sears was authorized, but not directed, to pay agriculture goods suppliers, and “[a]ll undisputed obligations arising from the postpetition delivery or shipment of goods under the Prepetition Orders [were] granted administrative priority status pursuant to section 503(b)(1)(A)”²³⁷

3. CUSTOMER PROGRAMS MOTION

Additionally, Sears requested authority to “(a) maintain and administer prepetition customer programs, promotions, and practices, and (b) to pay and otherwise honor their obligations to or for the benefit of customers relating thereto, whether arising prior to or after the Commencement Date.”²³⁸ Sears openly acknowledged the fact that customer loyalty was a large part of their success, and various programs, practices, and incentives were necessary to continue facilitating this relationship.²³⁹ There were no objections and this motion was granted on October 17, 2018.²⁴⁰

²³⁴ Final Order Authorizing Debtors to (I) Pay Prepetition Claims of (A) Shippers, Warehousemen, and Other Non-Merchandise Lien Claimants and (B) Holders of PACA/PASA Claims, and (II) Confirm Administrative Expense Priority for Prepetition Orders Delivered to the Debtors Postpetition, and Satisfy Such Obligations in the Ordinary Course of Business. (“Final Order”). Case 18-23538. [843.pdf](#) at 3.

²³⁵ *Id.* at 3.

²³⁶ *Id.* at 3.

²³⁷ *Id.* at 4.

²³⁸ Motion of Debtors for Authority to (I) Maintain and Administer Prepetition Customer Programs, Promotions, and Practices, and (II) Pay and Honor Related Prepetition Obligations. (“Customer Programs Motion”). Case 18-23538. [16.pdf](#) at 3.

²³⁹ *Id.* at 3–11.

²⁴⁰ Order Authorizing Debtors to (I) Maintain and Administer Prepetition Customer Programs, Promotions, and Practices, and (II) Pay and Honor Related Prepetition Obligations. (“Customer Programs Motion”). Case 18-23538. [135.pdf](#) at 2–4.

4. TRUST FUNDS MOTION

To supplement the Customer Programs Motion described above, Sears requested authority to administer the programs with funds held in trust for non-Debtor third parties.²⁴¹ Sears alleged its “selling [of] lottery tickets, franchises, third-party retail gift cards, onsite money transfer services, and coin and bottle depository,”²⁴² was necessary and essential to the “reputational integrity” of the company.²⁴³ In its initial declaration, Sears also added that these programs were an indispensable aspect of new customer attraction, without which the company would drive customers to competitors.²⁴⁴ There were no objections and an order approving this motion was entered on October 18, 2018.²⁴⁵

5. CONSOLIDATED NET OPERATING LOSS CARRYFORWARDS MOTION

Demonstrating a forward-thinking approach to the reorganization, Sears also sought to protect consolidated net operating loss carryforwards and other tax benefits for future use in connection with the reorganization.²⁴⁶ Sears argued that the automatic stay provisions of the Bankruptcy Code barred any transfer of equity that would diminish the Debtors’ interest in tax attributes (including Sears’s exceedingly high net operating losses) as these were assets that belonged to the estate.²⁴⁷ More specifically, with an estimated net operating loss in excess of \$5 billion and tax credits amounting to \$900 million, the company sought authority to implement procedures designed to protect and restrict trading of its stock and any claim of worthless stock

²⁴¹ Motion of Debtors for Authority to (I) Maintain Certain Trust Fund Programs, (II) Release Certain Funds Held in Trust, and (III) Continue to Perform and Honor Related Obligations. (“Trust Funds Motion”). Case 18-23538. [15.pdf](#) at 3.

²⁴² Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 58.

²⁴³ *Id.* [3.pdf](#) at 58.

²⁴⁴ *Id.* at 58.

²⁴⁵ Order Authorizing the Debtors to (I) Maintain Certain Trust Fund Programs, (II) Release Certain Funds Held in Trust, and (III) Continue to Perform and Honor Related Obligations. Case 18-23538. [167.pdf](#) at 2–4.

²⁴⁶ Motion of Debtors for Interim and Final Orders Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests In, and Claims Against, the Debtors and Claiming A Worthless Stock Deduction. (“Consolidated Net Operating Loss Carryforwards Motion”). Case 18-23538. [20.pdf](#) at 21.

²⁴⁷ *Id.* at 12–13 (citing Official Comm. of Unsecured Creditors v. PSS S.S. Co. (In re Prudential Lines Inc.), 928 F.2d 565, 574 (2d Cir. 1991)).

deduction that may “result in an ownership change occurring *before* the effective date of a Chapter 11 plan or any applicable bankruptcy court order. Such a restriction,”²⁴⁸ the company claimed, “would protect the Debtors’ ability to use the [tax benefits] during the pendency of these Chapter 11 cases.”²⁴⁹

The procedures, in a large part, offered the Debtors notice of a variety of circumstances, including notice of any person owning an amount sufficient to qualify such person as a substantial securityholder,²⁵⁰ any person undertaking a transaction to become a substantial securityholder, any disposition of Sears’s securities by a substantial securityholder, as well as notice of any majority securityholder,²⁵¹ and last, notice of intent to claim a worthless stock deduction.²⁵² Without more, the Debtors established procedures by which they would have fifteen days to object to any proposed transaction it was aware of by virtue of the procedures detailed above.²⁵³

Also proposed in this motion were claims procedures to resolve issues of:

[C]ertain future circumstances under which any person, group of persons, or entity holding, or which as a result . . . may hold, a substantial amount of certain claims against the Debtors[, and requiring them] to file notice of its holdings of such claims and of proposed transactions, which transactions may be restricted, and . . . certain limited circumstances thereafter under which such person(s) may be required to sell, by a specified date following the confirmation of a Chapter 11 plan of the Debtors, all or a portion of any such claims acquired during the Chapter 11 Cases.²⁵⁴

²⁴⁸ Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York. Case 18-23538. [3.pdf](#) at 59.

²⁴⁹ *Id.* at 59.

²⁵⁰ The Debtors defined a substantial securityholder as any entity or person owning 4.75% of all issued and outstanding shares of common stock or any entity or 5,177,155 shares. Motion of Debtors for Interim and Final Orders Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests In, and Claims Against, the Debtors and Claiming A Worthless Stock Deduction. (“Consolidated Net Operating Loss Carryforwards Motion”). Case 18-23538. [20.pdf](#) at 7.

²⁵¹ A “majority securityholder” was defined as an entity or person owning 47.5% of all issued and outstanding shares of common stock or 51,771,556 shares. *Id.* at 7–8.

²⁵² *Id.* at 8–10.

²⁵³ *Id.* at 9.

²⁵⁴ *Id.* at 56.

These claims procedures were designed to “permit the full trading of Claims until the Debtors . . . decide[d] to pursue a plan of reorganization contemplating the potential utilization of section 382(l)(5) of the Tax Code, at which point, if necessary . . . a purchaser . . . may be required to resell some or all of such Claims”²⁵⁵

Section 382 of the Tax Code allows the taxable income of a new corporation to be offset by losses of old corporations but not in excess of the value of the old loss corporation multiplied by the long-term tax-exempt rate.²⁵⁶ Section 382(l)(5) of the Tax Code provides an exception to the general rule in subsection (a), stating that the subsection shall not apply to any ownership change if the old loss corporation is under the jurisdiction of the court in a Title 11 case and the shareholders and creditors of the old loss corporation own fifty percent of the stock of the new corporation as an affiliated group.²⁵⁷ The procedures Debtors proposed in this motion required disclosure if the Debtors thought section 382(l)(5) would inure to their benefit, in which case the Debtors were to offer additional information and a timeline in regard to the 382(l)(5) plan.²⁵⁸ Any violation of these claims procedures were to preclude a person or entity from receiving “any consideration consisting of a beneficial ownership of New Sears Holdings stock that is attributed to the ‘Excess Amount of Claims.’”²⁵⁹

The Interim Order was granted on October 16, 2018,²⁶⁰ and after nearly a month, on November 12, 2018, Sears filed a certificate of no objection.²⁶¹ Four days later, on November 11,

²⁵⁵ *Id.* at 10.

²⁵⁶ I.R.C. § 382(a).

²⁵⁷ I.R.C. § 382(l)(5); *see* I.R.C. § 1504.

²⁵⁸ Motion of Debtors for Interim and Final Orders Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests In, and Claims Against, the Debtors and Claiming A Worthless Stock Deduction. (“Consolidated Net Operating Loss Carryforwards Motion”). Case 18-23538. [20.pdf](#) at 10–11.

²⁵⁹ *Id.* at 12.

²⁶⁰ Interim Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests In, and Claims Against, the Debtors and Claiming A Worthless Stock Deduction. (“Interim Order”). Case 18-23538. [109.pdf](#) at 2–5.

²⁶¹ Certificate of No Objection Regarding Motion of Debtors for Interim and Final Orders Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests In, and Claims Against, the Debtors and Claiming A Worthless Stock Deduction. (“Certificate of No Objection”). Case 18-23538. [665.pdf](#) at 2–3.

2018, the court entered the final order²⁶² along with an exhibit attached thereto, which detailed the same procedures described in the initial motion as to notice of actual and potential substantial or majority interests, transfer of claims against the Debtors, and restrictions on claims for worthless stock deductions.²⁶³

6. *THE STORE CLOSING PROCEDURES MOTION*

Even though they were authorized to continue to operate their business and manage their properties as debtors in possession under the Bankruptcy Code, Sears thought it was too costly to maintain all of its stores. On October 15, 2018, Sears moved for the court's approval of "procedures to close any stores that they determine, in their business judgment, should be closed in order to preserve liquidity and maximize the value of their estates (the 'Closing Stores')," and the authority to "assume their liquidation consulting agreement" with Abacus Advisors Group L.L.C., a liquidation consulting firm that Sears had retained.²⁶⁴

By this motion, Sears was seeking the court's approval to apply what it coined "Store Closing Procedures" to the assets in the Closing Stores.²⁶⁵ Sears defined the "Store Closing Procedures" as "streamlined procedures to sell the inventory, furniture, fixtures, and equipment . . . and other assets in the Closing Stores . . . in each case free and clear of liens, claims, or encumbrances . . ." ²⁶⁶ The details of the Store Closing Procedures were attached to the motion as exhibit 2.²⁶⁷ The main points of the Store Closing Procedures are: (1) the Store Closing Sales would generally be conducted "during normal business hours at the applicable Closing Stores or such hours as otherwise permitted by the applicable unexpired lease;"²⁶⁸ (2) subject to the entry

²⁶² Final Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests In, and Claims Against, the Debtors and Claiming A Worthless Stock Deduction. ("Final Order"). Case 18-23538. [795.pdf](#) at 1-6.

²⁶³ Notices, Restrictions, and Other Procedures Regarding Ownership and Transfers of Interest In, and Claims Against, the Debtors, and Claiming A Worthless Stock Deduction. ("Final Order Exhibits"). Case 18-23538. [795-1.pdf](#).

²⁶⁴ Motion of Debtors for Approval of (I) Procedures for Store closing Sale and (II) Assumption of The Liquidation Consulting Agreement. [23.pdf](#) at 3-4. Case 18-23538.

²⁶⁵ *Id.* at 4.

²⁶⁶ *Id.* at 2.

²⁶⁷ *Id.* at 58.

²⁶⁸ *Id.* at 59.

of the Proposed Order, Sears can sell or transfer the furniture, fixtures, and equipment, inventory, and any other assets in the Closing Stores (together, the “Store Closing Assets”), and “any such transactions shall be free and clear of all liens, claims, interests, and other encumbrances;”²⁶⁹ (3) Sears may “abandon any Store Closing Assets not sold in the Store Closing Sales at the Closing Stores at the conclusion of the Store Closing Sales” after the removal of personal or confidential information about the Debtors’ employees or customers;²⁷⁰ and (4) Landlords will have the ability to negotiate with Sears to make modifications to the Store Closing Procedures without further order of the court.²⁷¹

Sears insisted that the closing of unprofitable stores would eliminate the “significant cash burn [and] position [itself] for a restructuring transaction or sale to maximize value and preserve as many jobs as possible.” Further, the company claimed the motion would improve their “financial outlook and liquidity profile,” and allow them to “focus their efforts around the restructuring or sale of a smaller footprint of stores in target markets with the potential for sustainable growth.”²⁷² They believed that “[t]he remaining stores [would] constitute a leaner enterprise, offering greater strategic value and potential for sustainable growth.”²⁷³

In this motion, Sears identified 142 unprofitable stores that required “prompt closure” and sought an interim approval to close these stores.²⁷⁴ The Debtors were to continue the evaluation of their existing stores and stated they would “provide notice of their intent to apply the Store Closing Procedures to any additional Closing Stores.”²⁷⁵

²⁶⁹ *Id.* at 60.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 61.

²⁷² *Id.* at 2.

²⁷³ *Id.* at 3.

²⁷⁴ *Id.* [23.pdf](#) at 4.

²⁷⁵ *Id.*

On October 26, 2018, Judge Drain granted the Store Closing Procedure Motion on an interim basis.²⁷⁶ According to the interim order, Sears was authorized, but not directed, to commence, close, and sell the assets of the 142 initially identified stores. In addition, the order authorized Sears to add or withdraw stores from the list of closing stores with notice of intent to relevant parties.²⁷⁷ The court also approved Sears's assumption of the Liquidation Consulting Agreement.²⁷⁸ On November 19, 2018, a final order authorizing the Store Closing Procedures Motion was entered.²⁷⁹

7. *THE LEASE REJECTION PROCEDURES MOTION*

Section 365(a) of the Bankruptcy Code provides that a debtor in possession “subject to the court’s approval, may assume or reject any . . . executory contract or unexpired lease of the debtor.”²⁸⁰ Under Section 554(a) of the Bankruptcy Code, a debtor, after notice and a hearing, is authorized to “abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”²⁸¹ According to these authorities, on October 15, 2018, Sears filed the Lease Rejection Procedures Motion²⁸² and the Omnibus Lease Rejection Motion.²⁸³

In the Lease Rejection Procedures Motion, Sears requested approval to reject unexpired leases effective as of the date the Debtors surrendered the premises, provide notice that the landlord

²⁷⁶ Interim Order Approving (I) Procedures for Store Closing Sales And (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [337.pdf](#).

²⁷⁷ *Id.* at 3-4.

²⁷⁸ *Id.* at 13.

²⁷⁹ Final Order Approving (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. This final order was minimally modified on November 26, 2018. [876.pdf](#).

²⁸⁰ 11 U.S.C. § 365(a).

²⁸¹ 11 U.S.C. § 554(a).

²⁸² Motion of Debtors for Entry of an Order Establishing Procedures for Rejection of Unexpired Leases of Nonresidential Real Property and Abandonment of Property in Connection therewith. Case 18-23538. [24.pdf](#).

²⁸³ See the next first-day motion [Omnibus Motion of Debtors to Reject Certain Unexpired Leases and Related Subleases of Nonresidential Real Property and Abandonment of Property in Connection therewith] for details. [25.pdf](#).

may re-let the premises, and abandonment of certain property connected therewith.²⁸⁴ Sears stated that they were involved in 1,800 leases, therefore, “obtaining separate [c]ourt approval of each rejection would impose unnecessary administrative burdens on [Sears] and the Court and result in costs to [Sears’s] estate that would decrease the economic benefits of rejection.”²⁸⁵ The adoption of the Rejection Procedures, according to Sears, would reduce administrative expenses and legal expenses that would otherwise have occurred.²⁸⁶

On November 16, 2018, the court granted the requested relief.²⁸⁷

8. *THE OMNIBUS LEASE REJECTION MOTION*

Along with the last motion, Sears filed the Omnibus Lease Rejection Motion, seeking to reject 217 leases for stores and other non-retail locations that had already closed or “gone dark.”²⁸⁸ The company said those leases were an unnecessary burden on its estates, because in almost all instances Sears had already physically vacated the properties, and, as of the commencement date, had sent the keys or codes to the premises and had given notice of surrender to the landlords.²⁸⁹ Sears maintained that the rejection of the leases would “eliminate further financial burden and postpetition administrative costs to the estates.”²⁹⁰

Furthermore, Sears insisted that the abandonment of any property remaining at the leased premises it determined was “too difficult to remove or expensive to store” should be allowed because “the economic benefits of removing or storing such remaining property would be

²⁸⁴ Motion of Debtors for Entry of an Order Establishing Procedures for Rejection of Unexpired Leases of Nonresidential Real Property and Abandonment of Property in Connection Therewith. Case 18-23538. [24.pdf](#) at 3.

²⁸⁵ *Id.* at 7.

²⁸⁶ *Id.*

²⁸⁷ Order Authorizing Debtors to Establish Procedures for Rejection of Unexpired Leases of Nonresidential Real Property and Abandon Property in Connection therewith. Case 18-23538. [800.pdf](#).

²⁸⁸ Omnibus Motion of Debtors to Reject Certain Unexpired Leases and Related Subleases of Nonresidential Real Property and Abandonment of Property in Connection therewith. Case 18-23538. [25.pdf](#).

²⁸⁹ *Id.* at 4.

²⁹⁰ *Id.*

outweighed by the attendant costs under Section 554(a) of the Bankruptcy Code.”²⁹¹ Sears urged that these de minimis assets would consist of miscellaneous fixtures, furniture, inventory, and other store equipment which, to the best of their knowledge, was not in violation of any statutes or regulations designed to protect the public health or safety.²⁹² Rule 6007-1 of the Local Bankruptcy Rules for the Southern District of New York, require notice for any “proposed abandonment describ[ing] the property abandoned, stat[ing] the reason for the proposed abandonment, and identifying the entity to whom the property is proposed to be abandoned.”²⁹³ Sears submitted that given the description of the de minimis assets it provided in the motion, and the nature of the property, the requirements of the rule were satisfied.²⁹⁴

On October 24, 2018, Sears filed a notice of amended schedule of Rejected Leases, in which twenty-two additional leases to be rejected had been added to the Revised Schedule and five leases have been removed from the Revised Schedule, making the number of leases to reject 234.²⁹⁵ On November 15, 2018, Sears filed a revised proposed order, eliminating seven other leases (store 1040, 3459, 4939, 7341, 7388, 7683 and 1253) from the rejection list.²⁹⁶

On November 19, 2018, Judge Drain authorized rejection of the leases set forth in the motion, but specifically excluded from its order were leases associated with the six of the seven most recently added stores (store 1040, 3459, 4939, 7341, 7388, 7683), pending review by the

²⁹¹ *Id.* at 7.

²⁹² *Id.* at 7–8.

²⁹³ *Id.* at 8.

²⁹⁴ *Id.*

²⁹⁵ Notice of Filing of Revised Schedule to Omnibus Motion of Debtors to Reject Certain Unexpired Leases and Related Subleases of Nonresidential Real Property and Abandonment of Property in Connection Therewith. Case 18-23538. [290.pdf](#) at 2.

²⁹⁶ Notice of Filing Revised Proposed Order Approving Rejection of Certain Unexpired Leases and Related Subleases of Nonresidential Real Property. Case 18-23538. [745.pdf](#) at 2.

OCC.²⁹⁷ The order also authorized Sears to abandon the De Minimis Assets as requested.²⁹⁸ On November 30th, the motion for rejection of the remaining six leases was granted.²⁹⁹

²⁹⁷ Order Approving Rejection of Certain Unexpired Leases and Related Subleases of Nonresidential Real Property. Case 18-23538. [810.pdf](#).

²⁹⁸ *Id.* at 2.

²⁹⁹ Supplemental Order Approving Rejection of Certain Unexpired Leases and Related Subleases of Nonresidential Real Property. Case 18-23538. [953.pdf](#).

V. APPLICATIONS FOR EMPLOYMENT

Below is a list of the professionals employed by the Debtors and the Official Committee of Unsecured Creditors throughout the bankruptcy case³⁰⁰

Moving Party	Date	Employer(s)	Hourly Rate(s)	Objective Response(s)	Final Order
M-III Advisory Partners, LP	October 25, 2018	Debtors (Restructuring Officer & Others)	\$975 (Managing Partner)	Certificate of No Objection	Approved on November 19, 2018
Weil, Gotshal & Manges, LLP	October 26, 2018	Debtors (Attorneys)	\$10.15 million paid before the commencement date	Certificate of No Objection	Approved on November 9, 2018
Wachtell, Lipton, Rosen, & Katz	October 29, 2018	Debtors (Special Counsel)	\$950 - \$1,400 (Partners and Of Counsel)	Certificate of No Objection	Approved on November 19, 2018
Alvarez, Marsal North America, LLC	November 1, 2018	Debtors (Financial Advisor)	\$850 - \$1,050. (Managing Director for Restructuring)	Certificate of No Objection	Approved on November 13, 2018
Evercore Group, LLC	November 1, 2018	Debtors (Financial Advisor)	\$200,000 (Monthly Fee) \$3,000,000 (Additional "Minimal" Fee).	The OCC filed an objection on grounds that Evercore Group, LLC's fee was extensive and the company's scope so broad that it may result in a duplication of services. Sears' response claimed, among other things, that the services were necessary and their fees reasonable.	Modified order approved on December 7, 2018
Paul, Weiss, Rifkind, Wharton & Garrison, LLP	November 1, 2018	Debtors (Attorneys)	\$1,485 - \$1,560 (Partner)	Certificate of No Objection	Approved on November 13, 2018
Young, Conaway, Stargatt & Taylor, LLP	November 1, 2018	Debtors (Conflicts Counsel)	\$565 - \$920 (Partner)	Certificate of No Objection	Approved on November 13, 2018
McAndrews, Held & Malloy Ltd.	November 21, 2018	Debtors (IP Counsel)	\$43,750 (Monthly Fixed Fee)	The United States Trustee files an objection claiming, among other things, that McAndrews failed to fully disclose their fees, seeks to subcontract work to foreign associates not retained by the Court, and improperly seeks post-petition retainers to be replenished as they are drawn.	Approved on December 21, 2018
Akin, Gump, Strauss, Hauer, & Feld, LLP	November 28, 2018	Official Committee of Unsecured Creditors (Counsel)	2018: \$840 - \$1,695 2019: \$925 - \$1,755 (Partners)	Certificate of No Objection	Approved on December 10, 2018
FTI Consulting, Inc.	December 6, 2018	Official Committee of Unsecured Creditors (Financial Advisor)	\$875 - \$1,075 (Senior Managing Directors)	Certificate of No Objection	Approved on December 19, 2018
Stout, Risius, Ross, LLC	December 6, 2018	Debtors (Real Estate Consultant and Advisor)	\$505 - \$490 (Managing Director)	Certificate of No Objection	Approved on December 26, 2018
Deloitte & Touche, LLP	January 1, 2019	Debtors (Audit and Advisory Services)	\$550 - \$600. (Partner, etc)	Certificate of No Objection	Approved on January 22, 2019
Deloitte Tax, LLP	January 4, 2019	Debtors (Tax Services Provider)	\$975 (National tax specialist Partner, etc. for restructuring)	Certificate of No Objection	Approved on January 22, 2019
Deloitte Transactions & Business Analytics, LLP	January 4, 2019	Debtors (Bankruptcy Advisory Services)	\$775 - \$925 (Partner/Principal)	Certificate of No Objection	Approved on January 22, 2019
Houlihan Lokey Capital, Inc.	December 6, 2019	Official Committee of Unsecured Creditors (Investment Banker)	\$250,000 (Monthly Fee) \$7,500,000 (Deferred Fee)	Certificate of No Objection	Approved on December 19, 2018

³⁰⁰ The information in this chart was all accumulated through the Pacer Case Locator by researching each moving party's Application for employment, objections filed to those applications, and the final orders granted approving the application.

Pursuant to Section 327(a) of the Bankruptcy Code, a debtor is authorized to employ professional persons “that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist. . . in carrying out their duties.”³⁰¹ Also, pursuant to Section 328(a) of the Bankruptcy Code, “with the court’s approval, [Sears] may employ or authorize the employment of a professional under section 327. . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.”³⁰² These two bankruptcy statutes permit the compensation of professionals such as, investment bankers and law firms on flexible terms that reflect both the value of their services and market conditions.³⁰³

VI. CREDITORS COMMITTEE

The United States Trustee appointed the Official Committee of Unsecured Creditors (“OCC”) pursuant to Section 1102(a)(1) of Title 11 on October 24, 2018.³⁰⁴ The OCC consisted of nine members:

- Pension Benefit Guaranty Corporation
- Oswaldo Cruz
- Winiadaewoo Electronics America, Inc.
- Apex Tool Group, LLC
- Computershare Trust Company, NA
- The Bank of New York Mellon Trust Company
- Basil Vasiliou
- Simon Property Group, LP

³⁰¹ 11 U.S.C. § 327(a).

³⁰² 11 U.S.C. § 328(a)

³⁰³ Notice of Hearing on Application of Debtors for Entry of Order (A) Authorizing the Employment and Retention of Lazard Freres & Co. LLC as Investment Banker to the Debtors and Debtors in Possession, Effective Nunc Pro Tunc to the Commencement Date, (B) Modifying Certain Time-Keeping Requirements and (C) Granting Related Relief. Case 18-23538. [345.pdf](#).

³⁰⁴ Notice of Appointment of Committee of Unsecured Creditors. Case 18-23538. [276.pdf](#) at 1.

- Brixmor Operating Partnership, LP³⁰⁵

The PBGC was the largest unsecured creditor, with a claim estimated in the total amount of \$1,737,500,000. Additionally, the PBGC had obtained interests in the Kenmore and DieHard trademarks before Sears filed bankruptcy.³⁰⁶

The OCC filed several objections in Sears's Chapter 11 process, including objections to the DIP financing and the 363 sales. Most notably, the OCC objected to the global sale of substantially all of Sears's assets as a going concern, believing that a going-concern sale would leave Sears administratively insolvent and a going-out-of-business sale would maximize Sears's value.³⁰⁷ Even though the court eventually approved the global going-concern sale of Sears,³⁰⁸ the OCC might have been right about Sears's post-sale financial situation, as discussed in depth *infra*.

VII. DIP FINANCING

Providing financing to an entity in bankruptcy may sound odd, however, lending to the debtor in possession (DIP) can be a good deal for the lender.³⁰⁹ There is an entire industry of lenders that provide post-petition financing in large part because it comes with court protection and priority under the Bankruptcy Code.³¹⁰ If the lenders did not receive these protections they would likely not enter into these agreements to provide financing.

On the other side, DIP financing is important to the debtor in possession for multiple reasons. Sears requested relief pursuant to Sections 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) of the Bankruptcy Code for an entry of (1) an interim order with respect to the DIP Asset

³⁰⁵ *Id.* [276.pdf](#).

³⁰⁶ Objection and Reservation of Rights of Pension Benefit Guaranty Corporation to Debtors' Sale Motion. Case 18-23538. [2002.pdf](#) at 2–3.

³⁰⁷ Preliminary Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. to Debtors' Motion for Approval of Global Bidding Procedures. Case 18-23538. [640.pdf](#) at 5.

³⁰⁸ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#).

³⁰⁹ BERNSTEIN & KUNEY, *supra* note 111, at 260.

³¹⁰ *Id.*

Based Lending Facility (ABL), (2) following the second interim hearing, entry of an interim order with respect to the Junior DIP financing, and (3) following the final hearing, entry of final orders approving the DIP financing.³¹¹ Sears urged that DIP financing was critical because it would provide the capital essential to (1) operate in Chapter 11, (2) avoid irreparable harm to the Debtor's estates, and (3) provide them with the possibility of its planned going-concern exit.³¹²

The DIP financing was in the form of a \$1.83 billion senior secured superpriority priming DIP asset-based credit facility (the "DIP ABL Facility").³¹³

A. *THE DIP ASSET BASED LENDING FACILITY*

1. *364(C)*

"Sears concluded that approaching the Prepetition First Lien Lenders about a consensual, first-lien priming debtor-in-possession financing would be the most efficient and cost-effective way to proceed on an interim basis."³¹⁴ The Prepetition First Lien Lenders were lenders that already had an ABL Facility outstanding with Sears prepetition and were agreeing to extend further credit in return for certain protections.³¹⁵ The post-petition \$1.83 billion senior secured superpriority priming DIP asset-based credit facility consisted of: (1) \$300 million in new incremental capacity with a revolving asset-based credit facility with aggregate commitments of \$189 million and (2) an asset-based term loan in an aggregate principal amount of \$111 million.³¹⁶

³¹¹ Debtor's Motion for Authority to (A) Obtain Post-Petition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties, and (D) Schedule Second Interim Hearing and Final Hearing. Case 18-23538. ("Debtor's DIP Motion"). [7.pdf](#) at 4.

³¹² *Id.*

³¹³ *Id.* at 3.

³¹⁴ *Id.* at 27. As discussed below, the DIP was structured as a roll up of prepetition debt and an extension of new credit. See, *infra* C. Roll Up.

³¹⁵ *Id.* at 25–26.

³¹⁶ *Id.* at 3.

The First Lien Lenders included Bank of America, Wells Fargo Bank, and Citibank (collectively, the “DIP ABL Lenders”).³¹⁷ Sears proposed to obtain this DIP financing by providing security interests and liens to the proposed lenders.³¹⁸ This gave the lenders a super priority administrative claim and would be secured by a first lien on unencumbered assets and a junior lien on encumbered assets.³¹⁹ However, Sears had to satisfy the requirements of Section 364 of the Bankruptcy Code to incur the secured or super priority debt that the lenders demanded in return for their financing.³²⁰

Under 364(c) a debtor must demonstrate “by a good faith effort that credit was not available” on an unsecured or administrative basis.³²¹ Brandon Aebersold, Sears’s investment banker, stated:

Due to the Company’s financial position and the complexity of its prepetition capital structure, the Debtor found limited options to secure an adequate amount of financing on an expedited basis. Based on my experience, unsecured financing would not be a viable option due to the amount of existing debt relative to the Company’s financial position. Similarly, it would be extremely difficult to obtain committed stand-alone junior secured financing in an amount necessary.³²²

Aebersold further stressed that the DIP ABL Facility was the best currently available option on an interim basis.³²³ For these reasons Sears urged that the requirements of Section 364(c) had been met.³²⁴

³¹⁷ Declaration of Brandon Aebersold In Support of Debtor’s Motion for Authority to (A) Obtain Post-Petition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties, and (D) Schedule Second Interim Hearing and Final Hearing. Case 18-23538. [9.pdf](#) at 5.

³¹⁸ Debtor’s DIP Motion. [7.pdf](#) at 37.

³¹⁹ BERNSTEIN & KUNEY, *supra* note 111, at 261–62; *see also* 11 U.S.C. §364.

³²⁰ Debtor’s DIP Motion at 37; *see also* 11 U.S.C. §364.

³²¹ Debtor’s DIP Motion, at 37.

³²² Declaration of Brandon. at 4.

³²³ *Id.* at 7.

³²⁴ Debtor’s DIP Motion. at 39.

2. 364(d)

Sears sought to provide the protections of § 364(d) as well.³²⁵ The 364(d) “priming lien” offers the highest level of protection available to a DIP lender.³²⁶ The priming lien allows the DIP lender to obtain a lien senior in priority to those of the pre-petition lenders.³²⁷ The debtor must make a showing that it can adequately protect the interest of the lender who is being “primed” under 364(d), which can be a very high burden when assets are fully or almost fully encumbered already.³²⁸

Sears urged that support by the required lenders obviated the need to show adequate protection because the creditors being primed supported the priming in exchange for an adequate protection package of secured and superpriority interests in Sears’[s] assets.³²⁹ This was Sears’[s] argument that the prepetition secured interests had adequate protection under Section 364(d)(1)(B).³³⁰

Sears also insisted that it required the use of cash collateral for working capital and to fund the Chapter 11 case.³³¹ Under 363(c) a debtor may not use, sell, or lease cash collateral except in certain exceptions, one being if each entity that has an interest in such cash collateral gives its consent to the debtor.³³² Sears urged that it satisfied the 363(c) requirements because all parties with an interest in cash collateral had consented to their use on terms and conditions set forth in proposed orders.³³³

³²⁵ *Id.* [7.pdf](#).

³²⁶ BERNSTEIN & KUNEY, *supra* note 111, at 262.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Debtor’s DIP Motion. at 39–40.

³³⁰ *Id.*

³³¹ *Id.* at 41.

³³² *Id.*; *see also* 11 U.S.C. §363(c).

³³³ Debtor’s DIP Motion at 41.

B. ROLL UP

If the DIP lender was a pre-petition lender to the debtor, it may require, as part of agreeing to a post-petition loan agreement, a “roll-up” of its prepetition loan.³³⁴ A roll-up occurs where a pre-petition lender extends post-petition financing to the debtor and, in the process, converts its pre-petition debt into post-petition debt with the liens, administrative expenses, and other protections afforded to post-petition financing under Section 364.³³⁵ “Typically the DIP loan is in an amount equal to the pre-petition debt plus the amount that the debtor needs to borrow post-petition, and the loan proceeds are used, in part, to refinance the pre-petition debt.”³³⁶ This can allow the lender to convert a pre-petition loan into post-petition financing with the protections of 364 by only advancing a modest amount of financing to the debtor compared to the large pre-petition loan. Further, the new loan terms, including interest rates and fees apply to the entire balance of the loan, not just the new extension of credit.³³⁷

Sears and the First Lien Lenders negotiated that all extensions of credit and term loans outstanding under the prepetition ABL Facility held by the lenders who agreed to participate in the new DIP financing would be rolled-up and become obligations under the DIP ABL Facility.³³⁸ Sears urged that the First Lien Lenders were already over secured and repaying the First Lien Lenders in full on all outstanding amounts of prepetition debt would not harm the bankruptcy estate.³³⁹ The prepetition aggregate principal amount outstanding under the facilities was \$1,530,378,380 while the proposed DIP ABL Facility was for an extension of \$1,830,378,380.³⁴⁰ The DIP ABL Facility was authorized to be used to pay the prepetition aggregate amount of the

³³⁴ BERNSTEIN & KUNEY, *supra* note 111, at 263.

³³⁵ *Id.* at 264.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Debtor’s DIP Motion. [7.pdf](#) at 42–43.

³³⁹ *Id.*

³⁴⁰ Final Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Modyfying the Automatic Stay; and (IV) Granting Related Relief. Case 18-23538. [955.pdf](#).

First Lien Lenders, including the fees and expenses of professionals, and the entire amount of interest that accrued under the DIP ABL Facility which was eight percent.³⁴¹ Thus, in reality only \$300 million of new credit was extended by the First Lien Lenders under the DIP ABL Facility and in return they received a conversion of their prepetition debt into post-petition debt with super priority administrative claims status, the protections of Section 364, and accrual of interest on the entire \$1,830,378,380 at eight percent interest.

This ABL roll-up was a material component for the structure of the DIP ABL Facility because it was required by the lenders as it offered “adequate protection” to them for their commitment to engage in the DIP ABL Facility.³⁴² However, if the First Lien Lenders were already over secured on their prepetition extensions of credit, it is difficult to see how the measures taken were necessary for adequate protection. The First Lien Lenders could have extended \$300 million of credit without the roll-up of prepetition debt in exchange for post-petition protections, and Sears would have received the same benefit without the burdens of an eight percent interest rate on the aggregate amount of the facilities.

C. CARVE OUT

There is often an issue as to whether a Section 364(c)(1) superpriority primes professional fees.³⁴³ This is typically dealt with by an express carve out for professionals that essentially subordinates the lender’s priority to allowed professional fees.³⁴⁴ Sears’s DIP financing plan included a carve out provision that granted liens, replacement liens, and superpriority claims, subject to a carve-out created for professional fees to ensure that Sears’s estate could retain assistance from counsel.³⁴⁵ Sears urged that without the carve out, its estate would be deprived of the services that professionals provide and that its rights and expectations would be prejudiced.³⁴⁶

³⁴¹ *Id.* [955.pdf](#) at 8, 59.

³⁴² Debtor’s DIP Motion. [7.pdf](#) at 42–43.

³⁴³ BERNSTEIN & KUNEY, *supra* note 111, at 261.

³⁴⁴ *Id.* at 261–62.

³⁴⁵ Debtor’s DIP Motion at 44.

³⁴⁶ *Id.* at 45.

All amounts included in the carve-out were senior to the liens and superpriority claims.³⁴⁷ The carve out did not provide a limitation on the amount of professional fees payable by Sears, or as to what hourly rates the professionals may charge.³⁴⁸

D. JUNIOR DIP FINANCING

In addition to the DIP ABL Facility, Sears solicited a \$300 million junior DIP term loan from ESL Investments, Inc. and certain other related entities.³⁴⁹ The financing was proposed to be secured by a junior lien on encumbered property, which included the ABL collateral, a senior lien on certain unencumbered assets and a junior lien on other previously unencumbered assets.³⁵⁰

Sears urged that the junior DIP financing would allow the operation of a larger number of stores and additional time to evaluate their “bubble stores,” both of which it considered necessary to effectuate its going-concern exit and to secure a buyer for a substantial part of the business.³⁵¹ The Junior DIP financing was not considered necessary for Sears to operate during the first two weeks of the Chapter 11 case.³⁵² It was instead considered necessary thereafter, so Sears sought to schedule a second interim hearing at which they would seek the court’s approval for the Junior DIP financing on an interim basis.³⁵³

In the meantime, Sears intended to continue to negotiate and try to finalize terms for the junior DIP financing and test the market for whether there was another lender that might offer more favorable terms.³⁵⁴

³⁴⁷ *Id.* at 30.

³⁴⁸ *Id.* at 105.

³⁴⁹ *Id.* at 4.

³⁵⁰ *Id.* [7.pdf](#) at 5.

³⁵¹ *Id.* Bubble Stores were those stores that Sears deemed as “possible valuable” or possibly not valuable to Sears as part of its ongoing operations. *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

E. *OBJECTIONS TO SEARS'S DIP MOTION*

The first opposition to Sears's DIP motion was filed on October 15, 2018, when American Greetings Corporation filed a limited objection.³⁵⁵ Sears and American Greetings had an agreement governing the distribution and retail sales of greeting cards and related products on a scan-based trading method.³⁵⁶ Under the scan-based trading method, Sears "receive[d] and accept[ed] merchandise on a consignment basis, under which title to all [m]erchandise [was] reserved with American Greetings until the register scan and sale of the merchandise to retail customers."³⁵⁷

American Greetings argued that Sears's motion indicated that Bank of America was a first lien holder, and this was inaccurate because American Greetings held a senior interest in Sears's merchandise.³⁵⁸ American Greetings objected to the motion to the extent that the motion sought to grant a priming lien on the merchandise it had consigned to Sears for sale or the proceeds of that merchandise, because Sears did not own the merchandise and failed to offer any form of adequate protection to American Greetings.³⁵⁹

Eventually thirty-one objections such as the American Greetings motion were filed with the bankruptcy court for Sears's failure to address the inventory belonging to consignment vendors, in addition to its failure to provide any protections whatsoever for the consignor vendors in connection with the proposed DIP Financing.³⁶⁰

³⁵⁵ Limited Objection of American Greetings Corporation to Debtors' Motion for Authority to (A) Obtain Post-Petition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties and (D) Schedule Second Interim Hearing and Final Hearing. Case 18-23538. [51.pdf](#).

³⁵⁶ *Id.* at 2.

³⁵⁷ *Id.* A consignment is an arrangement in which goods are left in the possession of an authorized third party to sell (Sears in this Case). Typically, the consignor (Sears) receives a percentage of the revenue from the sale in the form of a commission. Mitchell Grant & Will Kenton, Consignment, Investopedia, (2019). <https://perma.cc/T5SB-3GZV>.

³⁵⁸ Limited Objection of American Greetings Corporation to Debtors' Motion for Authority to (A) Obtain Post-Petition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties and (D) Schedule Second Interim Hearing and Final Hearing. Case 18-23538. [51.pdf](#) at 2.

³⁵⁹ *Id.* at 3.

³⁶⁰ Debtors' Omnibus Reply to Objections to Debtors' Motion for Authority to (A) Obtain Post-Petition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties and (D) Grant Related Relief. Case 18-23538. [864.pdf](#) at 7; *see also* Limited Objection of Clover Technologies Group, LLC to Debtors' Motion for

On November 14, 2018 the Official Committee of Unsecured Creditors filed an omnibus objection to Sears’s DIP Financing motion.³⁶¹ The OCC argued that the requisite standards to approve the DIP ABL Facility had not been met.³⁶² The OCC insisted that bankruptcy courts have not approved financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the primary benefit of a single lender.³⁶³ The OCC argued, among other things, that the DIP ABL Facility proposed by Sears was overbroad in favor of the First Lien Lenders in respects to both the roll-up and the protection they would receive.³⁶⁴

Sears responded to these objections on November 23, 2018, in its omnibus reply.³⁶⁵ First, Sears argued that the roll-up was appropriate because: (1) without it they would have been unable to secure reasonable financing and (2) there was no material impact on unsecured creditors because Sears believed it could satisfy the DIP ABL Facility from the proceeds of the original prepetition ABL collateral without resorting to the proceeds of previously unencumbered collateral.³⁶⁶ Sears also insisted at length that it negotiated at arms-length and in a commercially reasonable manner with the creditors in formulating the roll-up; however, Sears itself conceded that it was not in a strong position to negotiate, which seems to undercut its stated position.³⁶⁷

Next, Sears argued that the terms of adequate protection extended to the lenders was warranted.³⁶⁸ Sears said, “contrary to the committee’s arguments, expanding adequate protection

Authority to (A) Obtain Postpetition Financing (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties (D) Schedule Second Interim Hearing and Final Hearing. Case 18-23538. [212.pdf](#).

³⁶¹ Omnibus Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, *et al.* to the Debtors’ DIP Financing Motion and Cash Management Motion. Case 18-23538. [740.pdf](#).

³⁶² *Id.* at 16.

³⁶³ *Id.*; *see also In re Tenney Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (holding that the terms of a postpetition financing facility must not “pervert the reorganizational process from one designed to accommodate all classes of creditors. . . to one specifically crafted for the benefit” of one creditor).

³⁶⁴ Omnibus Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, *et al.* to the Debtors’ DIP Financing Motion and Cash Management Motion. Case 18-23538. [740.pdf](#) at 12.

³⁶⁵ Debtors’ Omnibus Reply to Objections. [864.pdf](#) at 10.

³⁶⁶ *Id.* at 9–11.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 13.

liens to previously unencumbered collateral is not prohibited, but instead is an accepted mechanic to compensate prepetition lenders for the increased risk against their collateral that they bear in a Chapter 11 case.”³⁶⁹

The omnibus reply to objections by Sears also addressed the concerns voiced by a number of other creditors.³⁷⁰ The objections Sears responded to included: (1) objections from a community school board claiming Sears failed to retain a required number of full time jobs in the village of Hoffman Estates, Illinois, (2) several landlords objecting to the ability to grant the DIP ABL Lenders Liens on Sears’s leases, (3) vendors that objected to priming liens on proceeds of consignment merchandise and alleging setoff and recoupment rights against Sears on the basis that such rights were being primed by the liens under the DIP ABL order, and (4) the State of Texas opposing priming liens on their tax liens and seeking adequate protection.³⁷¹

Sears’s also urged that the junior DIP financing was critical to send a clear message to their vendors, customers, employees, and other parties that it would be sufficiently capitalized during the Chapter 11 case.³⁷² Robert Riecker insisted that, without the Junior DIP Financing, the Debtors would be unable to continue operating the business as a going concern, which would result in a deterioration of the value of Sears’s estate.³⁷³ Alternatively, Robert Riecker stated that if Sears did not receive a value maximizing bid for a going-concern sale, Sears would still need the \$350 million of Junior DIP Financing to see itself through liquidation, fund going-out-of-business sales, and send a message to the market that it had sufficient capital to instill confidence.³⁷⁴

F. FIRST INTERIM ORDER

³⁶⁹ *Id.* at 18.

³⁷⁰ *Id.* [864.pdf](#) at 22.

³⁷¹ *Id.* at 22–30.

³⁷² Declaration of Robert A. Riecker in Support of Debtors’ Omnibus Reply to Objections to Debtors’ Motion for Authority to (A) Obtain Post-Petition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Pre-Petition Secured Parties and (D) Grant Related Relief and In Support of Debtors’ Supplemental Motion for Authority to (I) Obtain Junior Post-Petition Financing, and (II) Schedule Final Hearing. Case 18-23538. [866.pdf](#) at 7.

³⁷³ *Id.*

³⁷⁴ *Id.*

On October 16, 2018, Judge Drain approved the DIP ABL Facility on an interim basis in an aggregate amount up to \$1,830,378,380 and approved all other aspects of Sears's DIP motion.³⁷⁵ Immediately upon entry by interim order, the terms and conditions of the order, including the liens granted, became valid and binding on the parties to the order.³⁷⁶ Judge Drain also set the date for the final hearing to approve the DIP ABL Facility on a final basis, and to consider the Junior DIP Financing, for November 15, 2018.³⁷⁷

G. INTERIM JUNIOR DIP ORDER

Although the first interim DIP order filed on October 16, 2018 set the final hearing date for November 15, 2018, it was not until November 30th when an interim order regarding the junior DIP financing was entered.³⁷⁸ The final hearing to consider entry of the final junior DIP order and final approval of the DIP ABL Facility was readjusted to December 20, 2018.³⁷⁹

³⁷⁵ Interim Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims, and (Utilize Cash Collateral); (II) Granting Adequate Protection to the Pre-Petition Secured Parties; (III) Modifying the Automatic Stay; (IV) Scheduling the Final Hearing; and (V) Granting Related Relief. Case 18-23538. [101.pdf](#).

³⁷⁶ *Id.* at 83.

³⁷⁷ *Id.* at 87.

³⁷⁸ Interim Junior DIP Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing and (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims; (II) Modifying the Automatic Stay; (III) Scheduling Final Hearing; and (IV) Granting Related Relief. Case 18-23538. [951.pdf](#).

³⁷⁹ *Id.* at 69.

H. FINAL DIP ABL FACILITY ORDER

Concurrent with the interim junior DIP order, on November 30, 2018, the court entered a final order authorizing Sears's DIP ABL Facility.³⁸⁰ The final order did not impair American Greetings' or other consignment vendors' rights to proceeds of their products or claims against Sears for recovery of proceeds.³⁸¹ This was a win for the consignment vendors that allowed them to hold Sears responsible for the assets they had entrusted Sears with as a consignor.

Otherwise, the DIP ABL Facility was approved in the full proposed principal amount of up to \$1,830,378,380.³⁸² The court also granted the DIP ABL credit parties proposed liens on collateral under Sections 364(c) and (d) as security for post-petition lending.³⁸³ This was made subject to the carve-out which gave first priority to certain professional fees for services in conducting the Chapter 11 case.³⁸⁴

The bankruptcy court also approved the roll-up of all pre-petition extensions of credit into the obligations under the DIP ABL Facility.³⁸⁵ The ABL roll-up was made subject to an unwind upon a showing that the roll-up resulted in the conversion of any pre-petition obligations consisting of an unsecured claim or other amount not allowable under Section 502 of the Bankruptcy Code into a DIP ABL secured obligation and if such conversion unduly advantaged the applicable pre-petition ABL credit party.³⁸⁶

The post-petition lien creditors agreed to a reverse-marshaling concept whereby the collateral and all other proceeds, received by the senior and junior DIP agents in connection with

³⁸⁰ Final Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Pre-Petition Secured Parties; (III) Modifying the Automatic Stay; and (IV) Granting Related Relief. Case 18-23538. [955.pdf](#).

³⁸¹ *Id.* at 112.

³⁸² *Id.* at 2.

³⁸³ *Id.* at 4–5.

³⁸⁴ *Id.* at 43.

³⁸⁵ *Id.*

³⁸⁶ *Id.*; *see also* 11 U.S.C. § 502.

secured creditor remedies shall be applied, with respect to the collateral or any sale, transfer or other disposition of any collateral pursuant to Section 364 or any similar provision, in all cases subject to the above mentioned carve-out.³⁸⁷

The reverse-marshaling concept was set out in the following way:

First, with respect to collateral consisting of prepetition ABL the proceeds were to be applied as follows: (1) First, to payment of costs and expenses of the senior DIP creditors, (2) second, to the payment of senior DIP obligations, (3) third, to the payment of pre-petition ABL obligations, (4) fourth, to the payment of any other obligations secured by liens junior to the lien securing senior DIP obligations and the pre-petition ABL obligations but senior to the liens securing Junior DIP obligations, (5) fifth, to the payment of junior DIP obligations, and (6) sixth, the balance set forth in the financing orders.³⁸⁸

Second, with respect to pre-petition encumbered collateral, the proceeds were to be applied as follows: (1) first, to the payment of any obligations secured by liens senior to the liens securing the senior DIP obligations, (2) second, to the payment of costs and expenses of the senior DIP creditors, (3) third, to the payment of the senior DIP obligations until the discharge of senior DIP obligations shall have occurred, (4) fourth, to the payment of the junior DIP obligations until the discharge of junior DIP obligations shall have occurred, and (5) fifth, the balance set forth in the financing orders.³⁸⁹

Third, with respect to collateral consisting of pre-petition unencumbered collateral, the proceeds were to be applied as follows: (1) first, to the wind down account until \$200,000,000, but no more than that had been funded into that account from proceeds of collateral consisting of pre-petition unencumbered collateral and specified collateral, (2) second, to a cash collateral account maintained with Bank of America to secure first the payment of the senior DIP obligations until the discharge of senior DIP obligations shall have occurred, and second to secure the payment of the junior DIP obligations until the discharge of junior DIP obligations shall have occurred, and (3) the balance as set forth in the financing orders.³⁹⁰

³⁸⁷ DIP Intercreditor Agreement. [892.pdf](#) at 29.

³⁸⁸ *Id.* at 30.

³⁸⁹ *Id.* at 30–31.

³⁹⁰ *Id.*

Fourth, with respect to the specified collateral, the proceeds were to be applied as follows: (1) first, to the winddown account until \$200,000,000, but no more than that has been funded into that account from proceeds of collateral consisting of pre-petition unencumbered collateral and specified collateral, (2) second, to the senior DIP cash collateral account and to the payment of the junior DIP obligations until either the discharge of the senior DIP obligations or the discharge of the junior DIP obligations shall have occurred, after which all such proceeds shall be applied to either the senior or junior dip obligations whichever is remaining respectively, and (5) fifth, the balance set forth in the financing orders.³⁹¹

I. FINAL JUNIOR DIP ORDER

On December 28, 2018, the bankruptcy court entered a final order approving Sears's motion to obtain junior DIP financing.³⁹² The junior DIP financing had a credit facility with aggregate commitments of up to \$350 million and were made subject to the carve-out and the senior permitted liens.³⁹³

VIII. THE 363 SALE

Under Bankruptcy Code Section 363, the trustee or the debtor in possession can “use, sell, or lease” property of the estate.³⁹⁴ “Today, many business reorganization cases are effectively processed via a quick ‘363’ sale of all assets early in the case to a third party, with the sale proceeds then distributed among creditors under a subsequently confirmed plan.”³⁹⁵ Sears followed that model in a series of Section 363 sales.

³⁹¹ *Id.*

³⁹² Final Junior DIP Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing and (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims; (II) Modifying the Automatic Stay; and (III) Granting Related Relief. Case 18-23538. [1436.pdf](#).

³⁹³ *Id.* at 2.

³⁹⁴ 11 U.S.C. § 363.

³⁹⁵ BERNSTEIN & KUNEY, *supra* note 111, at 9.

A. *SEARS HOME IMPROVEMENT BUSINESS SALE*

The Sears Home Improvement Product business was a home improvement business, which provided services of “flooring, kitchen remodeling, exteriors replacement services for entry doors, siding, roofing, windows, and garage doors, HVAC systems, . . . and repair services.”³⁹⁶ Even though Sears had filed a separate motion for the approval of the global bidding and sale procedures for the “marketing, auction and sale of a substantial portion of their retail business as a going concern,” Sears believed that it was critical to sell the SHIP business separately and faster.³⁹⁷ This belief was founded on the idea that a “prompt” sale of the SHIP business would allow it to “maximize the value of the SHIP business, which ha[d] begun to deteriorate as a result of the commencement of the Chapter 11 cases.”³⁹⁸

Sears marketed the SHIP business in January of 2018, and it received indications of interest from many potential purchasers during the summer of 2018.³⁹⁹ Service.com, a business operating a website that helps consumers find local professionals for home-improvement services, made a \$60 million offer.⁴⁰⁰ Sears had determined at that time that Service.com’s offer was the best offer it could obtain and had made “substantial progress” in the negotiation with Service.com of a possible transaction before the Chapter 11 case started.⁴⁰¹

³⁹⁶ Motion of Debtors For Entry of Order (I)(A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sale of Sears Home Improvement Business, (D) Approving Form and Manner of Notice of Sale, Auction, And Sale Hearing, (E) Approving Assumption and Assignment Procedures, (II) Approving the Sale of Sears Home Improvement Business in Accordance with the Stalking Horse Agreement and (III) Granting Related Relief. Case 18-23538. [450.pdf](#) at 2.

³⁹⁷ *Id.* [450.pdf](#) at 6.

³⁹⁸ *Id.* at 7.

³⁹⁹ *Id.* at 6.

⁴⁰⁰ Lillian Rizzo, *Service.com offers \$60 million for Sears’ Home Improvement business*, MarketWatch (Nov. 5, 2018), <https://perma.cc/5DYH-6RQ8>.

⁴⁰¹ Motion of Debtors For Entry of Order (I)(A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sale of Sears Home Improvement Business, (D) Approving Form and Manner of Notice of Sale, Auction, And Sale Hearing, (E) Approving Assumption and Assignment Procedures, (II) Approving the Sale of Sears Home Improvement Business in Accordance with the Stalking Horse Agreement and (III) Granting Related Relief. Case 18-23538. [450.pdf](#) at 6.

On November 2, 2018, Sears and Service.com, the Stalking Horse Bidder, entered into an Asset Purchase Agreement (the “APA”) for the sale of all assets, properties and rights (the “Assets”) of the Sears Home Improvement Products business.⁴⁰² The APA provided that Service.com agreed to pay \$60 million in cash and was to assume certain associated liabilities, subject to subsequent offers and court approval. Moreover, in the event that the Debtors accepted a subsequent offer, the Debtors agreed to pay a break-up fee for of one and one-half percent of the cash price.⁴⁰³

On November 3, 2018, Sears filed a motion to: (1) approve bidding procedures for sale of SHIP business; (2) approve Stalking Horse bid protections; (3) schedule an auction for and hearing to approve the sale of the SHIP business; (3) approve the form and manner of notice for the sale, auction, and sale hearing; (4) approve assumption and assignment procedures; (5) approve the sale through the Stalking Horse Agreement; and (6) grant related relief.⁴⁰⁴ Filed contemporaneously was a motion to shorten the notice period of the previous motion to twelve days as Sears believed a “prompt” sale would “maximize the value of the SHIP business.”⁴⁰⁵

I. OBJECTIONS

(1) UNITED STATES TRUSTEE

The United States Trustee filed a limited objection, requesting an appointment of an ombudsman in connection with the sale since the proposed sale includes the sale of customers’ personally identifiable information.⁴⁰⁶ The U.S. Trustee maintained that the Stalking Horse

⁴⁰² *Id.* [450.pdf](#) at 3.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 5–6.

⁴⁰⁵ Motion of Debtors Pursuant to Fed. R. Bankr. P. 9006(C) For Order Shortening Notice With Respect To Motion Of Debtors For Entry of An Order (I)(A) Approving Bidding Procedures For Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction For And Hearing To Approve Sale of Sears Home Improvement Business, (D) Approving Form And Manner of Notice Of Sale, Auction, And Sale Hearing, (E) Approving Assumption And Assignment Procedures, (Ii) Approving The Sale of Sears Home Improvement Business In Accordance With The Stalking Horse Agreement And (iii) Granting Related Relief. Case 18-23538. [451.pdf](#) at 6.

⁴⁰⁶ Limited Objection of the United States Trustee to Motion of Debtors for Entry of Order (I)(A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction For And Hearing To Approve Sale Of Sears Home Improvement Business, (D) Approving Form And Manner Of Notice Of Sale, Auction , And Sale Hearing, (E) Approving Assumption And Assignment Procedures, (II) Approving The Sale Of Sears Home Improvement Business in Accordance With The Stalking Horse Agreement, And (III) Granting Related Relief. Case 18-23538. [523.pdf](#) at 2.

Agreement listed “Customer Data” as an asset to be sold, and the Customer Data was defined in the Agreement as including personal identifiable information; however, the motion did not disclose whether Sears had privacy policies that applied to the Customer Data and did not propose the appointment of a consumer privacy ombudsman.⁴⁰⁷ According to Section 363(b)(1) and Section 332(a), the U.S. Trustee argued that no bidding procedures should be approved until a consumer privacy ombudsman was appointed.⁴⁰⁸

(2) *PERSONAL PROPERTY LENDER*

Automotive Rentals, Inc. and ARI Fleet LT (collectively “ARI”) submitted their limited objection to the motion.⁴⁰⁹ ARI provided “vehicle leasing and management services” and other related services to Sears pursuant to an agreement dated December 1, 2009.⁴¹⁰

First, ARI worried that it would not receive the notice provided for in the SHIP Bidding Order because Sears’s proposed SHIP Bidding Order only mentioned notice of assumption and assignment related to “non-residential real property leases” but omitted personal property leases.⁴¹¹ Second, ARI asserted that Sears should not be allowed to sell or transfer the agreement without notice to ARI according to Section 365 of the Bankruptcy Code, which articulates the procedures for assumption and assignment of executory contracts and unexpired leases of personal property.⁴¹² Third, the drafted SHIP bidding order failed to specifically preserve ARI’s right to setoff and recoupment.⁴¹³ As a result, ARI requested that changes should be made to address these concerns.⁴¹⁴

⁴⁰⁷ *Id.* [523.pdf](#) at 3.

⁴⁰⁸ *Id.* at 4–5.

⁴⁰⁹ Limited Objection of Automotive Rentals, Inc. and ARI Fleet LT to Motion of Debtors for Entry of Order (I)(A) Approving Bidding Procedures For Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approval Sale of Sears Home Improvement Business, (D) Approving form and Manner of Notice Improvement Business, (E) Approving Assumption and Assignment Procedures, (ii) Approving the Sale of Sears Home Improvement Business In Accordance With The Stalking Horse Agreement, And (Iii) Granting Related Relief. Case 18-23538. [544.pdf](#).

⁴¹⁰ *Id.* at 2–3.

⁴¹¹ *Id.* at 3–4.

⁴¹² *Id.* at 4.

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 5.

2. SEAR'S RESPONSE

Sears filed a response to these objections on November 13, 2018.⁴¹⁵ As to the U.S. Trustee's objection, Sears stated that it had been working with the U.S. Trustee to resolve its objection, "including providing [Sears's] privacy policies to the U.S. Trustee."⁴¹⁶ In addition, Sears pointed out that paragraph 37 in the Bidding Procedures Order provided that:

For purposes of Section 363(b)(1) of the Bankruptcy Code, if the Debtors seek to transfer any personally identifiable information about individuals through or in connection with the Sale Transaction, other than pursuant to Company privacy policies, the Debtors will promptly alert the US Trustee, who will determine whether appointment of a consumer privacy ombudsman is required.⁴¹⁷

Sears maintained that it intended to comply fully with this language, and it would "continue to work to resolve" the U.S. Trustee's objection. Sears added that "if the parties agree to an appointment of a privacy ombudsman in connection with the sale of the SHIP business, [Sears] [would] promptly notify the Court."⁴¹⁸

Sears also addressed ARI's concern.⁴¹⁹ Sears attached a revised draft of the Bidding Procedures Order to the Response and stated that this revised version reflected changes made to resolve the ARI objection.⁴²⁰ The revised version included "unexpired personal property leases" into the proposed procedures, and included non-Debtor parties of "unexpired personal property

⁴¹⁵ Debtors' Response in Support of Motion of Debtors for Entry of Order (I)(A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sale of Sears Home Improvement Business, (D) Approving Form and Manner of Notice Of Sale, Auction, and Sale Hearing, (E) Approving Assumption and Assignment Procedures, (II) Approving the Sale of Sears Home Improvement Business in Accordance with the Stalking Horse Agreement and (III) Granting Related Relief. Case 18-23538. [673.pdf](#).

⁴¹⁶ *Id.* at 4.

⁴¹⁷ *Id.* at 5.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 4.

⁴²⁰ *Id.*

leases” into the list of notice parties related to the sale of the SHIP business and the assumption and assignment of unexpired personal property leases.⁴²¹

3. *ORDERS*

On November 16, 2018, Robert D. Drain granted Sear’s motion.⁴²²

After the November 16th order approving the bidding procedure, no qualified bids had been received in accordance with the bidding procedures approved by the court.⁴²³ Therefore, Service.com, having been designated as the Successful Bidder (as defined in the Bidding Procedures), became the buyer for the SHIP business.⁴²⁴

Shortly after a hearing on December 18th, the court delivered its final order approving the sale of the SHIP business to Service.com.⁴²⁵

4. *FAILURE OF THE SHIP TRANSACTION*

On January 18, 2019, after two extensions of the closing date, Sears terminated the SHIP Purchase Agreement, citing purported issues relating to Service.com’s financing, and alleged that Service.com had forfeited its \$6 million security deposit.⁴²⁶ The termination happened one day after Sears entered into an Asset Purchase Agreement with Transform Holdco, LLC for the sale of substantially all the assets of Sears in the Global Sale transaction discussed below.⁴²⁷

⁴²¹ See Exhibit A or Exhibit B, Debtors’ Response in Support of Motion of Debtors for Entry of Order (I)(A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sale of Sears Home Improvement Business, (D) Approving Form and Manner of Notice Of Sale, Auction, and Sale Hearing, (E) Approving Assumption and Assignment Procedures, (II) Approving the Sale of Sears Home Improvement Business in Accordance with the Stalking Horse Agreement and (III) Granting Related Relief. Case 18-23538. [673.pdf](#).

⁴²² Order (A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sale of Sears Home Improvement Business, (D) Approving Form and Manner of Notice of Sale, Auction, And Sale Hearing, (E) Approving Assumption and Assignment Procedures and (F) Granting Related Relief. Case 18-23538. [775.pdf](#) at 5.

⁴²³ Order (I) Approving the Sale of the Sears Home Improvement Business and (II) Granting Related Relief. Case 18-23538. [1417.pdf](#) at 2.

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 3–4.

⁴²⁶ Limited Objection of Service.com to Global Asset Sale Transaction and Statement of Continued Interest in Purchase of Sears Home Improvement Business. Case 18-23538. [2130.pdf](#) at 5.

⁴²⁷ *Id.*

Service.com blamed Sears for the failure of the transaction, alleging that “although [third-party financing sources] intended to invest, the lack of quality financial data being provided by [Sears] throughout the bankruptcy process made an investment or loan not feasible.”⁴²⁸

Sears responded that:

Before the Debtors terminated the SHIP APA pursuant to sections 10.01(d) and 10.09 on January 18, 2019, Service.com approached the Debtors acknowledging insufficient financing for closing and proposing various “workarounds,” ranging from a request for a purchase price reduction to an additional deposit to be held in escrow. None of the proposed “workarounds” provided the Debtors within any certainty that Service.com would ever be able to consummate the SHIP transaction. 429

As a result, the SHIP business was included in the assets sold in the Global Sale transaction and was thus approved by the court to be sold to ESL’s affiliate, Transform Holdco, LLC as discussed below.⁴³⁰

5. DISPUTE & RESOLUTION

By a letter dated January 18, 2019, Sears notified Service.com that because Service.com failed to timely close the transaction in accordance with the terms of the APA, Sears had exercised its right to terminate the APA and demanded that, pursuant to the terms of the agreement, Service.com execute and deliver a joint written instruction to the escrow agent directing that the deposit escrow amount be disbursed to Sears.⁴³¹ Service.com refused to deliver the joint written instruction to the escrow agent and subsequently filed an objection to Sears’s Global Sale.⁴³²

⁴²⁸ *Id.*

⁴²⁹ Debtors’ Omnibus Reply in Support of the Going Concern Sale Transaction. Case 18-23538. [2328.pdf](#) at 79.

⁴³⁰ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#).

⁴³¹ Notice of Presentment of Stipulation, Agreement, and Order Approving Settlement of Dispute with Service.Com, Inc. Case 18-23538. [2675.pdf](#) at 7.

⁴³² *Id.* at 8.

Considering the expense of litigation, Sears and Service.com chose to negotiate their respective entitlements to the deposit escrow amount.⁴³³

On February 22, 2019, Sears filed a stipulation agreement and order approving settlement of the dispute with Service.com.⁴³⁴ According to the stipulation, the parties agreed that the APA with the sale of SHIP business was terminated.⁴³⁵ In addition, Service.com and Sears issued a joint written instruction to the Escrow Agent, directing that \$4,750,000 of the escrow deposit amount be disbursed to Sears, and that the remainder of the escrow deposit amount be disbursed to Service.com.⁴³⁶ The stipulation was later approved by the bankruptcy court on March 4, 2019.⁴³⁷

B. STORE CLOSING SALES

On October 15, 2018, Sears made a motion requesting authority to (1) implement store closing procedures and sell store closing assets at the closing stores free and clear of liens, claims, or encumbrances, and (2) assume a liquidation consulting agreement.⁴³⁸

Sears urged that a large part of their Chapter 11 strategy was to close certain unprofitable stores to eliminate cash burn because such closures would improve its potential for sustainable growth.⁴³⁹ Sears's plan included liquidating inventory that remained at closing stores, and determined that the liquidation of their inventory would yield approximately \$42 million in net proceeds that would be used to pay down the DIP ABL Facility and fund the Chapter 11 case.⁴⁴⁰ When considering which stores needed to be sold, Sears considered the store's profitability, the

⁴³³ *Id.*

⁴³⁴ *Id.* at 1.

⁴³⁵ *Id.* at 9.

⁴³⁶ *Id.* [2675.pdf](#).

⁴³⁷ Stipulation, Agreement, and Order Approving Settlement of Dispute with Service.Com. Case 18-23538. [2739.pdf](#).

⁴³⁸ Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. ("Store Closing Motion"). Case 18-23538. [23.pdf](#).

⁴³⁹ *Id.* at 2.

⁴⁴⁰ *Id.* at 3–4.

store's ability to be sold during a sales process, and whether the store had a negative leasehold value.⁴⁴¹

Under Section 363(f) Sears urged that it should be allowed to sell property of the estate free and clear of any interest in the property.⁴⁴² Sears insisted that the vast majority of the store closing assets were inventory, and that the liens and other interests on that inventory would attach to the proceeds of the sales.⁴⁴³ In Sears's eyes, this would adequately protect lienholders because those parties would receive notice and be given an opportunity to object to the relief requested.⁴⁴⁴

Also, part of the store closing motion was Sears's request that the court invalidate contractual restrictions that impaired their ability to conduct store closing sales.⁴⁴⁵ Their argument, among other points, was that "courts in the Southern District of New York had entered orders deeming restrictive contractual provisions unenforceable in the context of store closing or liquidation sales."⁴⁴⁶

Sears also sought a waiver of the need to comply with any liquidation sale laws that restricted store closing sales.⁴⁴⁷ The burden to be avoided under the liquidation sale laws were licenses considered burdensome, waiting periods, time limits, and other procedures for store

⁴⁴¹ *Id.* [23.pdf](#) at 16; *see also* Nathan Bomey and Kelly Tyko, *Sears Store Closing List: 142 More Sears, Kmart Locations Closing in Chapter 11 Bankruptcy*, USA TODAY (Oct. 15, 2018), <http://perma.cc/MNL2-MHKP>; A negative leasehold value means the rent reserved in the lease exceeded the economic rent (fair market value) of the property at the time of condemnation. Stephen Markstein, *Condemnation, Compensation, and "Negative" Leaseholds*, *Fordham Law Review* (1975). [Negative Leaseholds.pdf](#) at 2.

⁴⁴² Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. ("Store Closing Motion"). Case 18-23538. [23.pdf](#) at 18; *see also* 11 U.S.C. §363(f).

⁴⁴³ Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. ("Store Closing Motion"). Case 18-23538. [23.pdf](#).

⁴⁴⁴ *Id.* [23.pdf](#).

⁴⁴⁵ *Id.* at 20.

⁴⁴⁶ *Id.*; *see also In Re Tops Holding II Corp.*, (Bankr. S.D.N.Y. May 10, 2018) (deeming unenforceable any restriction in any lease agreement, restrictive covenant, or similar document that would limit, condition, or impair the Debtor's ability to conduct store closing sales).

⁴⁴⁷ Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. ("Store Closing Motion"). Case 18-23538. [23.pdf](#) at 21.

closing, liquidation, or similar sales.⁴⁴⁸ “Consumers generally regard a closing out or a going out of business sale as an opportunity to acquire a special bargain, because they know or infer that the retailer is seeking to dispose of a large volume of merchandise in a manner outside the ordinary conduct of his business.”⁴⁴⁹ Generally, the law and regulations require businesses to conduct these going out of business sales honestly and in good faith.⁴⁵⁰ One example of bad faith is selling an item of inventory in the going out of business sale that was not a part of inventory before the sale (i.e., restocking the store with fresh merchandise rather than just selling what was originally on hand).⁴⁵¹ Going out of business sales provide an opportunity for business to take advantage of consumers.⁴⁵² For example, a business can continually operate a going out of business sale which has the appearance of offering consumers a good deal on goods, however, the business could simply keep restocking inventory in the ordinary course and thus operate a phony liquidation. As it applied to Sears’s case, it can be seen that Sears basically requested that it be exempt from laws and regulations that prevent these deceptive practices and not be held accountable for its business practices.

A liquidation consulting agreement was proposed with Abacus Advisors Group, LLC due to the large number of closing stores.⁴⁵³ Sears made reference to the liquidation consultant’s “extensive experience” and insisted that Abacus Advisors would maximize the value of the store closing assets.⁴⁵⁴ Under 365(a) of the Bankruptcy Code, “a debtor may assume or reject any executory contract. . . provided that such assumption satisfies the business judgment test.”⁴⁵⁵ To

⁴⁴⁸ *Id.* [23.pdf](#).

⁴⁴⁹ DTPA § 2.17. Closing out sales—§ 17.46(b)(17), 27 Tex. Prac., Consumer Rights And Remedies § 2.17 (3d ed.)

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. (“Store Closing Motion”). Case 18-23538. [23.pdf](#) at 26.

⁴⁵⁴ *Id.*; Abacus Advisors is a group of 6 professionals that is led by Alan Cohen who has more than 30 years’ experience working with distressed businesses. Abacus or its professionals have been an active participant in virtually every major retail chapter 11 case in the past 20 years. <http://perma.cc/7K3F-STZF>.

⁴⁵⁵ Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. (“Store Closing Motion”). Case 18-23538. [23.pdf](#); *see also* 11 U.S.C. §365(a).

track the language of Section 365(a), Sears argued that its proposed hiring of the liquidation consultant was a sound exercise of its business judgment.⁴⁵⁶ It is most definitely possible to see why a stakeholder in Sears would oppose the assumption of this contract because the proposed fees per month were fixed between \$100,000 and \$140,000, depending on the number of closings, and included payment of a commission of an extra ten percent of all gross proceeds from the sale of furniture, fixtures, and equipment.⁴⁵⁷

I. OBJECTIONS TO STORE CLOSING SALES PROCEDURES AND ASSUMPTION OF LIQUIDATION CONSULTING AGREEMENT

(1) LANDLORDS

Among additional similar objections, the NW Properties Landlords⁴⁵⁸ relied on Section 365 of the Bankruptcy Code to file a limited objection in response to the Debtors' store closing motion and requested certain modifications to the relief requested.⁴⁵⁹ While recognizing that the bankruptcy courts have discretion to condition store closing sales on the Debtors implementation of adequate safeguards to protect landlords and tenants alike, NW Properties Landlords requested that the court "balance . . . the legal and contractual rights of the landlords" with the Debtors' interests.⁴⁶⁰

Specifically, the NW Properties Landlords requested that the Debtors: (1) comply with the terms of the leases, including those regarding full and timely payment; (2) be barred from removing any fixtures necessary for the operation of mechanical systems existing on the premises; (3) pay

⁴⁵⁶ Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. ("Store Closing Motion"). Case 18-23538. [23.pdf](#).

⁴⁵⁷ *Id.* [23.pdf](#) at 4, 26.

⁴⁵⁸ The "NW Properties Landlords" consisted of NW Cambridge Property Owner LLC, NW Centennial LLC, NW 51st Street LLC, NW Springs LLC, NW Northgate II LLC, NW Duluth LLC, and NW Gaithersburg LLC. These entities held property that they leased to Sears in seven different locations, from Cambridge, Massachusetts to Colorado Springs, Colorado. Limited Objection of the NW Properties Landlords to the Motion of Debtors for Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. ("NW Properties Landlords Objection") Case 18-23538. [223.pdf](#) at 1–2.

⁴⁵⁹ *Id.* at 3–4.

⁴⁶⁰ *Id.*

costs associated with the store closing and allowing these costs administrative expense status; (4) comply largely with the leases' terms as to advertising and marketing; (5) provide five days' notice prior to the abandonment of the store; (6) allow the lessor to enter premises if there is a potential threat of imminent damage to the premises; (7) provide contact information the landlords may share with customers regarding returns, exchanges, and defective merchandise; and (8) allow carve-outs under the applicable leases for the prohibition, restriction, or interference with store closing sales.⁴⁶¹

On October 22, 2018, the Western Landlords⁴⁶² filed an objection to the “Store Closing Motion’s request for a blanket invalidation of lease terms and local laws that restrict such sales.”⁴⁶³ The Western Landlords largely sought Sears’s compliance with lease terms on restrictions for store-closing activities.⁴⁶⁴ They relied on Sections 363 and 365 for the proposition that bankruptcy courts cannot invalidate *all* lease provisions, but may condition the time, place, and manner of such sales in an order to balance the interests of the Debtors and the landlords.⁴⁶⁵ The Western Landlords argued that *Ames Department Stores, Inc.*⁴⁶⁶ “does not hold that all lease provisions restricting store closing sales are unenforceable, . . . rather, it holds that a court has discretion to

⁴⁶¹ *Id.* at 4–7.

⁴⁶² The Western Landlords consisted of the Macerich Company, Centennial Real Estate Co., C.E. Johns Company, Inc., Brixmor Operating Partnership, L.P., and S-Tract LLC. Hereinafter (“Western Landlords”). Each of these landlords owned property it leased to Sears in a variety of locations primarily in the western states. Objection of the Macerich Company, Centennial Real Estate Co., C.E. Johns Company, Inc., Brixmor Operating Partnership, L.P., and S-Tract LLC to Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. (“Western Landlords Objection”). Case 18-23538. [228.pdf](#) at 1–2.

⁴⁶³ Objection of the Macerich Company, Centennial Real Estate Co., C.E. Johns Company, Inc., Brixmor Operating Partnership, L.P., and S-Tract LLC to Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. (“Western Landlords Objection”). Case 18-23538. [228.pdf](#) at 3.

⁴⁶⁴ *Id.* [228.pdf](#).

⁴⁶⁵ *Id.* at 4. The Western Landlords quoted *Ames Department Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) in support of their contention that *all* lease provisions and statutes may not be disregarded. Objection of the Macerich Company, Centennial Real Estate Co., C.E. Johns Company, Inc., Brixmor Operating Partnership, L.P., and S-Tract LLC to Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. (“Western Landlords Objection”). Case 18-23538. at 4.

⁴⁶⁶ 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992).

fashion an order to adequately protect the interests of all parties under Section 363(e).”⁴⁶⁷ Without the ability to negotiate new terms and reach separate agreements, the Western Landlords objected to the Debtors’ Store Closing Motion.⁴⁶⁸

The Western Landlords then sought approval of a court order requiring the Debtors to comply with the terms of applicable leases, except to the extent that they enter into a separate agreement.⁴⁶⁹ The Western Landlords wanted the Debtors to comply with new signage, marketing, and advertising limitations, provide seven days written notice of the conclusion of store closing sales for each store, indemnify and hold applicable landlords harmless from damages as a result of any violation of local laws or ordinances, and other “modifications necessary and appropriate to protect [the Western] Landlords’ interests.”⁴⁷⁰

On October 23, 2018, Philips Edison & Company and Levin Management Corporation filed an objection to the Store Closing Motion due to the fact that no side communications had been conducted in an effort to resolve the issues as to the store closing sales procedures.⁴⁷¹ Namely, the two highlighted their expectations that off the record communications would resolve the issues with regard to consignment sales, but the Debtors had failed to reach out.⁴⁷² Similarly, Philips Edison & Company and Levin Management Corporation provided modified terms for the store closing notice.⁴⁷³

⁴⁶⁷ Objection of the Macerich Company, Centennial Real Estate Co., C.E. Johns Company, Inc., Brixmor Operating Partnership, L.P., and S-Tract LLC to Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. (“Western Landlords Objection”). Case 18-23538. [228.pdf](#) at 4.

⁴⁶⁸ *Id.* at 5.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 10.

⁴⁷¹ Limited Objection of Phillips Edison & Company and Levin Management Corporation to Debtors’ Motion for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [247.pdf](#) at 2.

⁴⁷² *Id.*

⁴⁷³ *Id.* at 3.

Much like the remaining landlords' objections, Kimco Realty Corporation filed a limited objection seeking protection with regards to access to the stores, safety issues, potential impacts on other tenants, parking, and marketing and advertising, among other issues.⁴⁷⁴

(2) *CONSIGNMENT MERCHANDISE LENDERS*

Clover Technologies Group, LLC ("Clover"), a manufacturer and distributor of printing materials such as ink and toner, filed a limited objection to the Debtors' Store Closing Motion and argued that according to the Debtors' motion Clover was forced "to sell goods on credit to the Debtor, post-petition, without its consent and without any adequate protection."⁴⁷⁵ Clover noted that the Debtors' motion "fail[ed] to address the inventory belonging to consignor vendors like Clover . . . and fail[ed] to provide for any protections whatsoever for such consignor vendors in connection with the Store Closing Sale."⁴⁷⁶

Clover claimed that any order granting this motion necessitated that any proceeds from the sale of consignment goods were subject to the consignment agreement between it and Kmart Corporation, and the proceeds from such sale needed to be held in trust for Clover pursuant to the Trust Funds Motion.⁴⁷⁷ "Nonetheless," Clover stated, "the Debtor intends to use the proceeds from the sale of the [consignment] merchandise for liquidity and to pay down the DIP financing, [and] the Motion fails . . . to even mention, let alone address, the rights of consignment vendors"⁴⁷⁸ Without such protection, Clover objected to the liquidation of this consignment merchandise.⁴⁷⁹

⁴⁷⁴ Joinder of Kimco Realty Corporation to Objections to Debtors' Motion for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. 270.pdf at 2; *see e.g.*, Joinder of CAPREF Burbank LLC to Objections to Debtors' Motion for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [289.pdf](#) at 2.

⁴⁷⁵ Limited Objection of Clover Technologies Group, LLC to Debtors' Motion for Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [211.pdf](#) at 4.

⁴⁷⁶ *Id.* at 2.

⁴⁷⁷ *Id.* Clover also asserted that the proper notice and filing was made to perfect its interest in the consignment merchandise in accordance with the Uniform Commercial Code. *Id.* at 3–4.

⁴⁷⁸ *Id.* at 4.

⁴⁷⁹ *Id.*

Parallel with Clover’s argument were the objections filed by Vijay Gold, Rosy Blue, Inc., Sakar International, Inc., and S&J Diamond Corp.⁴⁸⁰ on grounds that the motion sought to “liquidate all of the inventory at the [closing stores], whether they owned [the merchandise] or not.”⁴⁸¹ Citing the Debtors’ failure to provide adequate protections to consignment vendors and the need for proceeds from the sale of consignment merchandise to be held in trust in accordance with the Trust Funds Motion, the above listed parties objected.⁴⁸²

(3) *UNITED STATES TRUSTEE*

On October 25, 2018, the United States Trustee objected to the Debtors’ Store Closing Motion “to the extent the Debtors s[ought] to employ and compensate Abacus Advisory Group, LLC (“Abacus”) for professional services as a liquidation consultant without complying with Section 327 of the Bankruptcy Code . . . and Federal Rule of Bankruptcy Procedure 2014.”⁴⁸³ Noting that the Debtors moved to have Abacus provide a full-time on-site supervisor for each store to plan the “marketing and sales promotion for liquidation sales, arrange the stock in the store for liquidation, determine and effect price reductions, arrange for and supervise all personnel and merchandise preparation, and conduct the sales,”⁴⁸⁴ the United States Trustee stated that the Debtors’ motion failed to seek authority to employ Abacus under either Section 327 or Bankruptcy Rule 2014.⁴⁸⁵

⁴⁸⁰ Limited Objection of Shanti Corporation D/B/A Vijay Gold Designs to Motion of Debtors for Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [242.pdf](#) at 2; Limited Objection of Rosy Blue, Inc. to Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [243.pdf](#) at 2–3; Objection and Joinder of Sakar International, Inc. in the Limited Objections of (I) Clover Technologies Group, LLC; (II) Shanti Corporation d/b/a Vijay Gold Designs; and (III) Rosy Blue, Inc. to Debtors’ Motion [f]or Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [260.pdf](#) at 2–4; Limited Objection of S & J Diamond Corp. to Debtors’ Motion for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of the Liquidation Consulting Agreement. Case 18-23538. [281.pdf](#) at 2–3.

⁴⁸¹ Limited Objection of Shanti Corporation D/B/A Vijay Gold Designs to Motion of Debtors for Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [242.pdf](#) at 2.

⁴⁸² *See, e.g., id.* at 2–3.

⁴⁸³ Limited Objection of the United States Trustee to Motion of Debtors for Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [225.pdf](#) at 1.

⁴⁸⁴ *Id.* at 3.

⁴⁸⁵ *Id.* at 4.

Section 327 provides that the debtor-in-possession may employ professional persons that do not hold an adverse interest to the estate “to represent or assist the trustee in carrying out the trustee’s duties under this title.”⁴⁸⁶ Sears, presumably relying on the court’s decisions in *In re Brookstone Holdings Corp.*⁴⁸⁷ and *Heritage Home Corp., LLC*⁴⁸⁸ in which the Southern District of New York held that “liquidation consultants” did not qualify as auctioneers or other professional persons within the meaning of Section 327, failed to offer argument as to how Abacus does not fall within the Rule given the level of control Abacus would have if the motion was accepted as stated.⁴⁸⁹ Therefore, absent additional safeguards, the United States Trustee objected to the motion.⁴⁹⁰

Moreover, the United States Trustee objected to the Debtors’ requested waiver of compliance with state and local laws, rules, and regulations.⁴⁹¹ The Trustee argued that the Debtors failed to provide adequate notice in compliance with Bankruptcy Rule 9014 and Local Bankruptcy Rule 9013-1 to parties affected by the waiver from compliance of these laws, rules, and regulations.⁴⁹² As the Debtors failed to comply with the “fundamental due process requirements as articulated by the Supreme Court,” the Trustee objected.⁴⁹³

(4) *MARICOPA COUNTY, ARIZONA TREASURER*

On November 8, 2018, the Maricopa County Treasurer filed an objection to the Debtors’ Store Closing Motion to the extent that the motion failed to provide for the payment of prepetition

⁴⁸⁶ 11 U.S.C. § 327.

⁴⁸⁷ Case No. 18-11780 (BLS), 2018 WL 4801890 (Bankr. D. Del. Oct. 1, 2018).

⁴⁸⁸ Case No. 18-11736 (KG), Mem. Op. dated September 27, 2018 [Docket No. 330].

⁴⁸⁹ Limited Objection of the United States Trustee to Motion of Debtors for Approval of (I) Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [225.pdf](#) at 6–8.

⁴⁹⁰ *Id.* at 8.

⁴⁹¹ *Id.* at 9.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 10.

personal property taxes from the sale proceeds of any furniture, fixtures, and other personal property located in Maricopa County stores.⁴⁹⁴

2. *DEBTORS' RESPONSE IN SUPPORT OF MOTION*

On October 24, 2018, and prior to the objection filed by the Maricopa County Treasurer, the Debtors entered a response and claimed none of the objections impeded the entry of the interim order and that the motion should be approved.⁴⁹⁵ The Debtors addressed each category of the objections individually.⁴⁹⁶ First, Sears assured the court that it and the objecting landlords and other landlords who have not filed an objection would resolve their disputes and execute separate agreements prior to the hearing scheduled for the issue.⁴⁹⁷ Any issues not resolved by this time would “continue to be negotiated as contemplated by the interim order.”⁴⁹⁸

Second, Sears brushed off the Consignment Merchandise Lenders’ objections, assuring the court that it understands their objections and had been “consulting with counsel” to resolve the issue.⁴⁹⁹ “To the extent that the parties reach resolution, the Debtors would file a revised proposed interim order.”⁵⁰⁰

Third, the Debtors stated that the United States Trustee’s objection was resolved, as additional language was added to the Interim Order allowing certain amounts to be paid to Abacus under the liquidation consulting agreement without need for application, provided that Abacus file a final fee application and allow a short fifteen day period for objections.⁵⁰¹ Moreover, Sears stated

⁴⁹⁴ Objection to Motion for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [562.pdf](#) at 3–5.

⁴⁹⁵ Debtors’ Response in Support of Motion for Approval of (I) Procedures for Store Closing Sales and (II) Entry into the Liquidation Consulting Agreement. Case 18-23538. [293.pdf](#) at 3.

⁴⁹⁶ *Id.* at 3–5.

⁴⁹⁷ *Id.* at 3.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at 3–4.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

that further notice would be served on any known government entities having jurisdiction over the operations of closing stores.⁵⁰²

3. INTERIM ORDER APPROVING STORE CLOSING SALES

On October 26, 2018 the bankruptcy court granted an interim order approving the store closing procedures as requested in the motion by Sears.⁵⁰³ The interim order also authorized Sears to commence the store closings at the initial 142 stores listed in its motion pursuant to the store closing procedures.⁵⁰⁴ Moving forward, the interim order also allowed Sears to designate or withdraw any additional store as a closing store by filing a notice of intent to conduct a store closing sale.⁵⁰⁵ Parties wishing to object to the notice of intent were given ten calendar days to do so.⁵⁰⁶

The bankruptcy court also ruled that the store closing assets being sold could be done so free and clear of any mortgages, security interests, liens, judgements, encumbrances, or claims of any kind under Section 101(5).⁵⁰⁷ The liens and claims, if any, would attach to the proceeds with the same enforceability and priority they had before the closing sale.⁵⁰⁸ Upon entry of the order no

⁵⁰² *Id.* at 4. The Debtors also mentioned objections filed by Cardtronics, Inc. and Lake Plaza Shopping Center LLC. *Id.* at 5; *see* Lake Plaza Shopping Center LLC's Limited Objection to Motion of Debtors for Approval of (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [255.pdf](#) at 2-7; Limited Response and Reservation of Rights of Cardtronics USA, Inc. to the Debtors' Motion for Interim Approval of (I) Procedures for Store Closing Sales and (II) Assumption of the Liquidation Consulting Agreement. Case 18-23538. [254.pdf](#) at 2-4. As to the Cardtronics, Inc. objection, Sears noted that it incorporated certain comments as requested by Cardtronics, Inc. and that this adequately resolved their objection. Debtors' Response in Support of Motion for Approval of (I) Procedures for Store Closing Sales and (II) Entry into the Liquidation Consulting Agreement. Case 18-23538. [293.pdf](#) at 5. In discussing the Lake Plaza Shopping Center LLC objection, the Debtors resolved the issue of whether or not they had insurance at the store in question by highlighting the fact that the shopping center it rented from the LLC did in fact have insurance. *Id.* [293.pdf](#) at 5.

⁵⁰³ Interim Order Approving (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [337.pdf](#) at 3.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at 4.

⁵⁰⁷ *Id.* at 6; *see also* 11 U.S.C. § 101(5).

⁵⁰⁸ Interim Order Approving (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 18-23538. [337.pdf](#) at 6.

entity, landlords, or creditors could interfere with the store closing sales, or institute any action against Sears other than in the bankruptcy court of the Southern District of New York.⁵⁰⁹

The interim order also approved the liquidation consulting agreement.⁵¹⁰ Abacus and any other liquidation consultants hired were authorized to take any and all actions desirable in conducting the store closing sales at the closing stores and all other actions necessary to perform the liquidation consulting agreement.⁵¹¹

4. *FINAL ORDER APPROVING STORE CLOSINGS*

On November 26, 2018 the bankruptcy court granted a final motion as to the store closing procedures, the commencement of store closings at the closing stores, and the liquidation consulting agreement.⁵¹²

5. *INTENT TO CONDUCT MORE SALES*

On November 8, 2018 and December 28, 2018, pursuant to the store closing order, Sears filed a notice of intent for authority to commence store closing sales at forty and eighty-six additional locations, respectively.⁵¹³ Affected parties wishing to object were given ten calendar days to object to the terms of the store closings.⁵¹⁴

(1) *OBJECTION TO INTENT TO CONDUCT MORE SALES*

On January 7, 2019, within ten days of the December 28, 2018 notice of intent filed by Sears, Libby Dial Enterprises, LLC one of the store landlords involved filed a limited objection to the motion.⁵¹⁵ Libby Dial Enterprises only asked for authority to give the Debtors notice of

⁵⁰⁹ *Id.* [337.pdf](#).

⁵¹⁰ *Id.* at 13.

⁵¹¹ *Id.* at 14.

⁵¹² Final Order Approving (I) Procedures for Store Closing Sales and (II) Assumption of Liquidation Consulting Agreement. Case 19-23538. [876.pdf](#).

⁵¹³ Notice of Intent to Conduct Store Closing Sales. Case 18-23538. [576.pdf](#). Notice of Intent to Conduct Store Closing Sales. Case 18-23538. [1444.pdf](#).

⁵¹⁴ Notice of Intent to Conduct Store Closing Sales. Case 18-23538. [576.pdf](#) at 2.

⁵¹⁵ Limited Objection of Libby Dial Enterprises, LLC to Store Closing Procedures. Case 18-23538. [1503.pdf](#).

termination of the lease, so that no additional time would be wasted upon the completion of the liquidation sale.⁵¹⁶ Libby Dial Enterprises wanted to be able to replace the current tenant with a new one as soon as possible so that they did not lose this stream of income. The current Kmart store that was sitting “dark” in their building was a waste of space that could hopefully be replaced by a new tenant who could provide rent payments, new jobs, and a store for the local economy.⁵¹⁷

There was some question as to whether the store closing procedures could be read to prohibit a landlord from invoking its option to terminate a lease even when Sears “discontinued the operation of its store.”⁵¹⁸ If this were so, it could lead to a period of uncertainty where a landlord would be deprived of replacing the current “dark” tenant.”⁵¹⁹

(2) *DEBTOR’S REPLY TO THE LIMITED OBJECTION*

On January 16, 2019, Sears filed a reply to the limited objection of Libby Dial Enterprises.⁵²⁰ Sears argued that under the approved store closing procedures, any restrictions in any lease agreement purporting to impair Sears’s ability to conduct store closing sales were not enforceable.⁵²¹ The store closing procedures also specifically provided that, “closing stores may go dark during store closing sales despite any lease restriction . . . and going dark under such leases shall not be a basis to cancel or terminate the leases.”⁵²² Thus, Sears insisted that under these store closing procedures, the provision the landlord sought to enforce had already been ruled unenforceable.⁵²³ In addition, Sears argued that the automatic stay prohibited Libby Dial Enterprises from exercising its termination provision absent a showing of cause and that the objection filed did not make any reference to the factors considered by the Bankruptcy Court in

⁵¹⁶ *Id.* [1503.pdf](#).

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 2.

⁵¹⁹ *Id.*

⁵²⁰ Debtors’ Reply to Limited Objection of Libby Dial Enterprises, LLC to Store Closing Procedures. Case 18-23538. [1582.pdf](#).

⁵²¹ *Id.* at 4.

⁵²² *Id.* at 4–5.

⁵²³ *Id.* at 6.

determining whether to lift the automatic stay under Section 362(d).⁵²⁴ Thus, Sears urged that its bankruptcy petition operated as a stay of any act to obtain possession of the unexpired lease under Section 362.⁵²⁵

(3) *RESOLUTION OF LIBBY DIAL ENTERPRISES LIMITED OBJECTION*

On January 18, 2019, Sears and Libby Dial Enterprises made an agreement on how to resolve their conflict.⁵²⁶ The parties agreed that Sears could conduct a store closing sale without any delay and that Libby Dial Enterprises would withdraw their objection including the portion concerning its rights to terminate the lease.⁵²⁷

C. *NON-RESIDENTIAL PROPERTY SALES*

On November 29, 2018, Sears made a motion to sell thirteen parcels of non-residential property, requesting authority for assumption and assignment of certain unexpired leases of the property, and related relief.⁵²⁸ The property proposed was twelve parcels that were being operated or had been operated as Kmart stores and one parcel that was currently operating as a Sears store.⁵²⁹ The stores were to be sold with all improvements and personal property included for an aggregate purchase price of \$62 million.⁵³⁰ Also included in this package were six unexpired non-residential real property leases, all of which were leases under which Sears was the lessor.⁵³¹

Pursuant to Section 363(b), Sears urged that the relief requested was merited.⁵³² Under Section 363(b) of the Bankruptcy Code, “the debtor, after notice and a hearing, may use, sell, or

⁵²⁴ *Id.*

⁵²⁵ *Id.* at 8; *see also* 11 U.S.C. §362(a)(3).

⁵²⁶ Stipulation, Agreement, and Order Resolving Limited Objection of Libby Dial Enterprises, LLC to Store Closing Procedures. Case 18-23538. [1724.pdf](#).

⁵²⁷ *Id.* at 3.

⁵²⁸ Motion of Debtors for Entry of an Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief. Case 18-23538. [938.pdf](#).

⁵²⁹ *Id.* at 7.

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.* at 5.

lease, other than in the ordinary course of business, property of the estate.”⁵³³ In order for the Bankruptcy Court to approve the relief, evidence had to be presented that there was a good business reason to grant such relief.⁵³⁴ The standard governing whether to approve Sears’s assumption of an unexpired lease is also referred to as the “business judgment rule.”⁵³⁵

Sears urged that the decision to sell the assets and to assume and assign the leases represented sound business judgement because Sears had been engaged in “good faith, arms’ length negotiations with the purchaser since July 2018.”⁵³⁶ Sears stated that each of the acquired assets were non-essential to the ongoing operations of the business because three of the locations were already closed, six locations had negative EBITDA,⁵³⁷ and the remaining four sites received an offering price that warranted their sale even though they were EBITDA positive.⁵³⁸ Sears also provided that the transaction would allow them to generate cash proceeds that they would be able to use for the benefit of their cash estates and creditors.⁵³⁹

⁵³³ *Id.*; see also 11 U.S.C. § 363(b)(1).

⁵³⁴ Motion of Debtors for Entry of an Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief. Case 18-23538. [938.pdf](#) at 6; see also *In re MF Glob. Ltd.*, 535 B.R. 596, 605 (Bankr. S.D.N.Y. 2015) (“The business judgment of a trustee is entitled to great deference.”).

⁵³⁵ Motion of Debtors for Entry of an Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief. Case 18-23538. [938.pdf](#) at 6.

⁵³⁶ *Id.* at 7.

⁵³⁷ Earnings Before Interest, Tax, Depreciation, and Amortization is a performance indicator that looks at the business’ profitability from its core operations before the impact of capital structure, leverage and non-cash items like depreciation. CORPORATEFINANCEINSTITUTE.COM, <http://perma.cc/K7WP-KY2X>.

⁵³⁸ Motion of Debtors for Entry of an Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief. Case 18-23538. [938.pdf](#) at 4.

⁵³⁹ *Id.* at 10.

1. OBJECTIONS TO SALE OF NON-RESIDENTIAL PROPERTY

On December 20, 2018, SL Agent, LLC, filed a limited objection to Sears's motion to seek non-residential property and authorization to assume and assign leases.⁵⁴⁰ SL Agent was the agent under an agreement between JPP, LLC, JPP II, and Cascade Investment, LLC, as lenders, and the Debtors, with certain of its subsidiaries, as obligors (the "Cascade Real Estate Loan").⁵⁴¹ Approximately \$831.4 million was outstanding under this loan agreement, secured by, among other things, real estate assets subject to mortgages in favor of SL Agent for the benefit of the SL lenders.⁵⁴²

SL Agent did not object to the sale of the collateral pursuant to the sale motion or the proposed price for the collateral, rather SL Agent opposed Sears's contemplated use of the collateral proceeds.⁵⁴³ Basically, SL Agent was urging that its interest was not adequately protected by the proposed use by Sears of the proceeds because Sears sought to use the proceeds as part of its DIP financing facilities.⁵⁴⁴ The relief requested by SL Agent sought for the proceeds to either be used to repay their loan agreement or to be held in a segregated account pending further order of the court.⁵⁴⁵

2. ORDER APPROVING SALE OF NON-RESIDENTIAL REAL ESTATE

On December 21, 2018, the court approved the sale of the non-residential real estate and authorized the assumption and assignment of certain leases.⁵⁴⁶ Upon the order, Sears was authorized to sell the properties free and clear of all liens, claims, interests, and encumbrances, as well as assume or assign certain unexpired leases of non-residential property as described in the

⁵⁴⁰ Limited Objection of SL Agent, LLC to the Debtors' Motion for Entry of an Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief. Case 18-23538. [1357.pdf](#).

⁵⁴¹ *Id.* at 2.

⁵⁴² *Id.* at 2–3.

⁵⁴³ *Id.* at 3.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ Order (I) Approving the Sale of Certain Real Property, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases in Connection Therewith, and (III) Granting Related Relief. Case 18-23538. [1393.pdf](#).

motion.⁵⁴⁷ However, according to the terms of the order, SL Agent did partially succeed in its objection and all of the proceeds from the sale of properties securing the Cascade Real Estate Loan were to be held in a segregated account by Sears pending a further order.⁵⁴⁸

D. DE MINIMIS ASSET SALES

On November 21, 2018, Sears obtained authority from the court to establish procedures to sell or transfer De Minimis Assets (the “De Minimis Asset Sales”); pay fees and expenses incurred in connection with the De Minimis Asset Sales; and abandon De Minimis Assets for which the Debtors are unable to find purchasers (the “De Minimis Asset Procedures”).⁵⁴⁹ According to Sears, the purpose of this sale was “to continue conducting periodic sales of assets, including any rights or interests therein, that were of relatively de minimis value compared to the Debtors’ total asset base, including certain of the Debtors’ real estate assets (the “De Minimis Assets”) in the ordinary course.”⁵⁵⁰

Until Sears filed its reorganization plan, Sears had only filed eight notices of De Minimis Assets Sales according to the De Minimis Asset Procedures.⁵⁵¹ Six of the eight transactions were closed by the date they filed their reorganization plan, generating approximately \$11 million for

⁵⁴⁷ *Id.* at 1–2.

⁵⁴⁸ *Id.* at 21.

⁵⁴⁹ Order Authorizing and Establishing Procedures for De Minimis Asset Sales and De Minimis Asset Abandonments. Case 18-23538. [856.pdf](#) at 5.

⁵⁵⁰ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 55.

⁵⁵¹ (1) Notice of De Minimis Asset Sale for Sears Store # 6233 (Covina, CA). Case 18-23538. [2652.pdf](#). (2) Notice of De Minimis Asset Sale for Sears Store # 1310 (Elyria, OH) And Kmart Store # 9676 (Streetsboro, OH). Case 18-23538. [2360.pdf](#). (3) Notice of De Minimis Asset Sale for Sears Store #1251 (Lithonia, GA). Case 18-23538. [1785.pdf](#). (4) Notice of De Minimis Asset Sale for Sears Store #3628 (Tolleson, AZ). Case 18-23538. [1784.pdf](#). (5) Notice of De Minimis Asset Sale for Sears Store #1150 (Westland, OH). Case 18-23538. [1516.pdf](#). (6) Notice of De Minimis Asset Sale for Sears Auto Center # 7505 (Henrico County, VA). Case 18-23538. [2946.pdf](#). (7) Notice of De Minimis Asset Sale for Kmart Store # 4721 (Coalinga, CA). Case 18-23538. [3086.pdf](#). (8) Notice of De Minimis Asset Sale for Sears Warehouse # 6858 (San Luis Obispo, CA). Case 18-23538. [3216.pdf](#).

the Debtors' estate.⁵⁵² The next De Minimis Asset Sale is anticipated to close by May 10, 2019, and to generate an additional \$120,000 for the Debtors' estates.⁵⁵³

Sears also filed three stipulations, agreements, and orders pursuant to the De Minimis Asset Procedures.⁵⁵⁴ Two of the Stipulations were for the assumption and assignment of certain leases for nonresidential real property to third parties in exchange for monetary consideration.⁵⁵⁵ The third Stipulation was for the assumption of a lease termination agreement by a third party in exchange for cash.⁵⁵⁶ These three transactions have closed, generating an aggregate amount of \$1.2 million for Sears's estate.⁵⁵⁷

E. SRAC MEDIUM TERM NOTES SALE

On November 9, 2018, Sears filed an emergency motion seeking approval for the sale of the Medium Term Notes, and seeking emergency authorization from the court to sell their interest in the SRAC Medium Term Notes.⁵⁵⁸ By this motion, Sears sought to sell certain SRAC Medium Term Notes Series B (the "MTNs") issued by Debtor, Sears Roebuck Acceptance Corp. ("SRAC"), and currently owned by other Sears debtors.⁵⁵⁹ Sears believed that it "had a unique opportunity to

⁵⁵² Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 55.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* Specifically, see (1) Stipulation, Agreement, and Order to Assume and Assign Unexpired Nonresidential Real Property Lease (655 Sunland Park Drive, El Paso, Texas). Case 18-23538. [2659.pdf](#). (2) Stipulation, Agreement, And Order Regarding Property At 2300 Madison Street, Clarksville, Tennessee. Case 18-23538. [2702.pdf](#). (3) Stipulation, Agreement, and Order Assuming Lease Termination Agreement (24800 W. Valley Highway, Kent, Washington). Case 18-23538. [2435.pdf](#).

⁵⁵⁵ (1) Stipulation, Agreement, and Order to Assume and Assign Unexpired Nonresidential Real Property Lease (655 Sunland Park Drive, El Paso, Texas). Case 18-23538. [2659.pdf](#). (2) Stipulation, Agreement, And Order Regarding Property At 2300 Madison Street, Clarksville, Tennessee. Case 18-23538. [2702.pdf](#) .

⁵⁵⁶ Stipulation, Agreement, and Order Assuming Lease Termination Agreement (24800 W. Valley Highway, Kent, Washington). Case 18-23538. [2435.pdf](#).

⁵⁵⁷ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 55.

⁵⁵⁸ Emergency Motion of Debtors for Order Approving Sale of Medium Term Notes. Case 18-23538. [642.pdf](#).

⁵⁵⁹ *Id.* [642.pdf](#) at 5.

sell the MTNs and maximize their value for the benefit of all creditors, but only if a sale [could] be accomplished expeditiously.”⁵⁶⁰ Sears explained the “emergency nature” of the motion as follows:

The emergency nature of the MTN Motion stemmed from the little amount of time the Debtors had to maximize the value of the SRAC Medium Term Notes by selling the notes prior to the date on which an auction held by the International Swaps and Derivatives Association (“ISDA,” such auction, the “ISDA Auction”) was scheduled. The Debtors wanted to sell the SRAC Medium Term Notes prior to the ISDA Auction so that the Debtors could take advantage of the increase in the marketability of the MTNs as a result of the upcoming ISDA Auction.⁵⁶¹

On November 19, 2018, the court authorized the auction and sale procedures for the SRAC Medium Term Notes.⁵⁶² On November 20, 2018, an auction for the sale of the MNTs was held, and nine bids were received.⁵⁶³ On November 28, 2018, Sears filed a notice, declaring Cyrus Capital Partners, LP as the winning bidder for the sale of MTNs in the aggregate principal amount of \$880,696,000 for the price of \$82,500,000.⁵⁶⁴ Some commentators speculated that Cyrus Capital Partners purchased the note because they had initially extended junior DIP financing and “needed to [collect something] in order to be paid in the event of a Sears default.”⁵⁶⁵ The court later confirmed the sale to Cyrus Capital Partners, LP.⁵⁶⁶

⁵⁶⁰ *Id.*

⁵⁶¹ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 55.

⁵⁶² Order Authorizing Debtors to Sell Medium Term Notes. Case 18-23538. [826.pdf](#).

⁵⁶³ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 55.

⁵⁶⁴ Notice of Results of Auction of Medium Term Notes. Case 18-23538. [1019.pdf](#) at 2.

⁵⁶⁵ *Sears’ Bankruptcy: Breaking It Down, In Five Parts (Part 4)*, SEEKING ALPHA (Dec. 24, 2018, 7:00 PM), <https://perma.cc/85CT-3FMP>. As a side note, this article reasons that the SRAC Medium Term Notes were probably valued high, because Cyrus Capital Partners, like the other bidders, already possessed claims and were attempting to collect whatever value remained. At this time, December 2018, many thought Sears’s default was imminent.

⁵⁶⁶ Order Denying Motion to Invalidate the Sale and Lockup of Medium-Term Intercompany Notes and Granting Retroactive Approval of Lockup Provision. Case 18-23538. [1481.pdf](#).

IX. GLOBAL SALE OF SEARS

Sears maintained that “there is a viable path forward for a reorganization around a smaller footprint of profitable stores and this path is extremely limited.”⁵⁶⁷ Sears stated that “approximately 400 of the Debtors’ stores were four-wall EBITDA positive,”⁵⁶⁸ which means that those retail stores had positive earnings before interest, taxes, depreciation, and amortization. Sears intended to “utilize every reasonable effort to sell these and other viable stores, or a substantial portion thereof, as a going concern pursuant to Section 363 of the Bankruptcy Code.”⁵⁶⁹ Sears believed that “a successful sale of these viable stores as a going concern not only will save Sears and Kmart, but also the jobs of tens of thousands of employees that depend on the continued operation of the Debtors’ stores.”⁵⁷⁰ Although these were the alleged reasons behind the Global Sale, people have different views as to the true intentions behind the curtain, as discussed later in “*What’s Behind the Global Sale,*” *infra*.

In addition, Sears intended to market and sell certain other “non-core assets,” such as “intellectual property and specialty businesses in order to help finance these Chapter 11 cases, maximize value, and, importantly, fund their hard-fought wind-down reserve.”⁵⁷¹

On November 1, 2018, Sears filed the motion for approval of the Global Bidding Procedures “for the efficient marketing, auction and sale” of the above assets “in an orderly and value maximizing manner.”⁵⁷²

A. SUMMARY OF GLOBAL BIDDING PROCEDURES

The proposed Global Bidding Procedures described the details of the sale’s notice, the designation of a Stalking Horse Bidder, bid deadline, requirements of a qualified bid, selection of

⁵⁶⁷ Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [429.pdf](#) at 2.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Id.* at 2–3.

qualified bid, and the auction.⁵⁷³ Sears also sought to retain the right to change the global bidding procedure with respect to the sale of an asset.⁵⁷⁴

The procedures provided that if Sears was permitted to hold an auction it would file and serve a Sale Notice to certain Sale Notice Parties defined in the procedure and would “schedule an auction on a date that is not less than twenty-five days following service of the Sale Notice.”⁵⁷⁵ Moreover, Sears would designate a “Stalking Horse Bidder” and require the deadline for the submission of bids to be “not earlier than twenty days following the service of the Sale Notice.”⁵⁷⁶ Forms of consideration for a bid included: credit bid, which could be submitted by persons or entities holding a perfected security interest in Assets; landlord bid, which could be submitted by a landlord for the purchase of one or more of such landlord’s own leases; other non-cash considerations and cash requirements.⁵⁷⁷ Except for the bids that include a credit bid, a “good faith deposit” equal to at least ten percent of the proposed purchase price was required for a bid to be “qualified.”⁵⁷⁸

Additionally, the Global Sale Procedures required adequate assurance information to comply with Section 365(f)(2) and, if applicable, Section 365(b)(3),⁵⁷⁹ and required proposed terms for employees if the bid was for a going-concern sale.⁵⁸⁰ Any objection to the adequate assurance information “must (i) be in writing; (ii) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules; (iii) state, with specificity, the legal and factual bases thereof; and (iv) include any appropriate documentation in support thereof” and must be filed “no later than eight calendar days after receiving service of the applicable adequate assurance information.”⁵⁸¹

⁵⁷³ *Id.* at 9–12.

⁵⁷⁴ *Id.* at 9.

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at 10.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.* at 11.

⁵⁸⁰ *Id.* at 10.

⁵⁸¹ *Id.* at 21.

If qualified bids were received and an auction was conducted, the procedure provided that Sears “would use commercially reasonable efforts to, within two business days after the conclusion of the auction, or as soon as reasonably practicable thereafter, file, serve, and publish on the Prime Clerk website, the ‘Notice of Auction Results.’”⁵⁸²

Below is a depiction of the proposed Global Bidding Procedures key dates and deadlines:⁵⁸³

Within ten (10) days of service of the Sale Notice	Deadline to object to proposed Sale Transaction(s) with a Stalking Horse Bidder that is not an insider or affiliate of the Debtors, including with respect to designation of such Stalking Horse Bidder and any provision of applicable Stalking Horse Agreement (including any Credit Bid or Termination Payment)
Within ten (10) days of service of the Assumption and Assignment Notice and Adequate Assurance Information for Stalking Horse Bidder, as applicable	Deadline to object to (i) Debtors’ proposed Cure Costs for Proposed Assumed Contracts in an applicable Stalking Horse Package and (iii) the assumption of and assignment to a Stalking Horse Bidder(s) of any Proposed Assumed Contracts or any Contracts or Leases that may later be designated by a Stalking Horse Bidder for assumption and assignment
Within fourteen (14) days of service of the Sale Notice	Deadline to object to proposed Sale Transaction(s) with Stalking Horse Bidder that is an insider or affiliate of the Debtors, including with respect to designation of Stalking Horse Bidder and any provision of applicable Stalking Horse Agreement (including any Credit Bid or Termination Payment)
No earlier than twenty (20) days following service of the Sale Notice	Bid Deadline
Within five (5) days of the Bid Deadline	Deadline for Debtors to notify Prospective Bidders of their status as Qualified Bidders and announcement of Auction Packages
Not less than twenty-five (25) days following service of the Sale Notice	Auction
Within two (2) days of the conclusion of the Auction	Target date for Debtors to file with the Bankruptcy Court the Notice of Auction Results and to provide applicable Counterparties with Adequate Assurance Information for the Successful Bidders if different than Stalking Horse Bidders

⁵⁸² *Id.* at 11.

⁵⁸³ *Id.* at 15–16.

Eight (8) days following the filing of Notice of Auction Results and service of the Adequate Assurance Information	Deadline to object to (i) proposed Sale Transaction(s) for Successful Bidders that are not Stalking Horse Bidders, (ii) Debtors' proposed Cure Costs for Proposed Assumed Contracts not included in any Stalking Horse Bid, (iii) the assumption of and assignment to a Successful Bidder(s) that is not a Stalking Horse Bidder of any Proposed Assumed Contracts or any Contracts or Leases that may later be designated by such Successful Bidder(s) for assumption and assignment, and (iv) the conduct of the Auction
Within five (5) days of the deadline to file Sale Objections	Proposed date of Sale Hearing (subject to the availability of the Court)

For the sale of Go Forward Stores, Sears set out the key dates and deadlines separately as follows:⁵⁸⁴

November 15, 2018 at 10:00 a.m. (ET)	Hearing to consider approval of Global Bidding Procedures and entry of Bidding Procedures Order
November 21, 2018	Deadline to Submit Non-Binding Indication of Interest
December 15, 2018	Deadline for Debtors to designate Stalking Horse Bidder for Go Forward Stores
December 28, 2018 at 4:00 p.m. (ET)	Bid Deadline for Go Forward Stores; Deadline to object to Stalking Horse Bid for Go Forward Stores
January 4, 2019 at 4:00 p.m. (ET)	Deadline for Debtors to notify Prospective Bidders of their status as Qualified Bidders and announcement of Auction Packages
January 10, 2019 at 10:00 a.m. (ET)	Proposed date of hearing on Stalking Horse Objections, if necessary (subject to the availability of the Court)
January 14, 2019 at 10:00 a.m. (ET)	Auction for Go Forward Stores to be conducted at the offices of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153
January 16, 2019	Target date for Debtors to file with the Bankruptcy Court the Notice of Auction Results and to provide the applicable Counterparty with Adequate Assurance Information for the Successful Bidder if different than the Stalking Horse Bidder

⁵⁸⁴ *Id.* at 16–17.

January 24, 2019 at 4:00 p.m. (ET)	Deadline to object to (i) proposed Sale Transaction for a Successful Bidder that is not a Stalking Horse Bidder, (ii) Debtors' proposed Cure Costs for Proposed Assumed Contracts not included in any Stalking Horse Bid, (iii) the assumption of and assignment to a Successful Bidder that is not a Stalking Horse Bidder of any (a) Proposed Assumed Contracts or any Contracts or Leases that may later be designated by such Successful Bidder for assumption and assignment, and (iv) conduct of the Auction
January 29, 2019 at 4:00 p.m. (ET)	Debtors' Deadline to Reply to Sale Objections
January 31, 2019 at 10:00 a.m. (ET)	Proposed date of Sale Hearing (subject to the availability of the Court)

In connection with a sale transaction, the proposed procedures provided that Sears “may seek to assume and assign to the successful bidders (or their designated assignees) certain contracts and leases.”⁵⁸⁵ In addition, Sears “shall use commercially reasonable efforts to, as soon as reasonably practicable after the Debtors’ designation of a Stalking Horse Bidder, file with the court, serve on the Sale Notice Parties, including each relevant counterparty, and cause to be published on the Prime Clerk Website, the assumption and assignment notice.”⁵⁸⁶

Counterparties to the contracts or leases could file “cure objections” to the assumption and assignment, and the proposed procedures required those objections to “(i) be in writing; (ii) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules; (iii) state, with specificity, the legal and factual bases thereof, including the cure amount the counterparty believes is required to cure defaults under the relevant contract or lease; and (iv) include any appropriate documentation in support thereof.” Likewise, the objections were to be filed “within eight calendar days of service of the Debtors’ proposed Cure Costs.”⁵⁸⁷ If a counterparty failed to file a cure objection, it “shall be forever barred from asserting any such objection with regard to the cost to cure any defaults under the relevant contract or lease.”⁵⁸⁸

⁵⁸⁵ *Id.* at 18.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* at 19.

⁵⁸⁸ *Id.* at 20.

B. OBJECTIONS

1. LANDLORDS

Of the seventeen objections filed, landlords made thirteen of the objections.⁵⁸⁹

(1) THE EXPEDITED TIMELINE

Many landlords opposed Sears's proposed expedited schedules, arguing that they were inadequate for landlords to "make informed decision as to the ability of any successful bidder to perform under the lease (much less to file any meaningful objection or conduct discovery)."⁵⁹⁰ Westfield, LLC, Benenson Capital Company, LLC, and certain of their respective affiliates requested that the deadline for parties to object to proposed Cure Costs and the assumption and assignment of leases to non-Stalking Horse Bidders be ten days, rather than the eight days Sears requested.⁵⁹¹

Greensboro Lease Management, LLC requested that the deadlines for objections be extended to fourteen days after prompt service.⁵⁹² Likewise, WPG requested that Sears be required to file notice and allow ten days to file objections.⁵⁹³

Other landlords requested that "(i) Sears provide the Adequate Assurance Information to the landlords when the Debtors received the Adequate Assurance Information from bidders and, in any event, no later than twenty-four hours after than bid deadline, and (ii) that the Landlords have at least ten days to assess that information before the sale hearing."⁵⁹⁴ They also requested the proposed cure objection deadline to be extended to fourteen days in order to allow landlords to review and object to Sears's proposed cure costs; and they requested Sears to "furnish auction

⁵⁸⁹ Debtors' Omnibus Reply in Support of Motion for Approval of Global Bidding Procedures, at 12. Case 18-23538. [683.pdf](#).

⁵⁹⁰ Objection of Greensboro Lease Management, L.L.C. to the Debtors' Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 7.

⁵⁹¹ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors' Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 2.

⁵⁹² Objection of Greensboro Lease Management, L.L.C. to the Debtors' Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 9.

⁵⁹³ Limited Objection of Washington Prime Group Inc. to Debtors' Motion for Approval of Global Bidding Procedures. Case 18-23538. [613.pdf](#) at 6.

⁵⁹⁴ *Id.*

results (and proposed cure costs and adequate assurance information, to the extent not already provided) to all affected parties, including the Landlords and their counsel, if known, within twenty-four (24) hours of conclusion of the Auction.”⁵⁹⁵

(2) “GO FORWARD STORES”

Many landlords required Sears to provide more information about the proposed Go Forward Stores sale. Westfield wanted more information about which stores were included in the “four-wall EBITDA positive” list and thus were a part of the “Go Forward Stores.”⁵⁹⁶ Some landlords maintained that Sears should promptly file a list of “Go Forward Stores” and clarify whether warehouse spaces were within the definition of “Go Forward Stores.”⁵⁹⁷

Simon Property Group was concerned that “the proposed global bidding procedures appear[ed] to exclude bids other than going concern bids for the Go Forward Stores,” but “[t]he duty to obtain the highest available price demand[ed] that the Debtors actively solicit (and be open to considering) any and all bids that will maximize value.”⁵⁹⁸ Therefore, it requested that Sears’s proposed global bidding procedures and procedures for the sale of the Go Forward Stores “must be modified to allow for submission and fair consideration of bids involving the Go Forward Stores of any structure, whether going-concern bids or otherwise.”⁵⁹⁹

Moreover, Simon Property Group stated that “it is vital that all forms of bids involving the Go Forward Stores be subject to the same timeline.”⁶⁰⁰ Simon argued that Sears’s proposed process was focused on “an immediate disposition of the Go Forward Stores,” and coupled with “a delayed marketing and sale of their other assets in their discretion,” therefore, Sears would exclude bidders

⁵⁹⁵ *Id.* at 7.

⁵⁹⁶ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 3–4.

⁵⁹⁷ Limited Objection of Aviation Mall Newco, LLC, Holyoke Mall Company, L.P., JPMG Manassas Mall Owner LLC, Poughkeepsie Galleria LLC, Salmon Run Shopping Center, L.L.C., S&R Company of West Seneca Newco, LLC and DGI LS, LLC to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [628.pdf](#) at 4; Objection of Greensboro Lease Management, L.L.C. to the Debtors’ Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 2.

⁵⁹⁸ Limited Objection and Reservation of Rights of Simon Property Group, L.P. to the Debtors’ Motions for Approval of Bidding Procedures and Lease Rejection Procedures. Case 18-23538. [627.pdf](#) at 7.

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.* at 8.

“that may provide greater value than a bid from insider ESL or another bidder for the Go Forward Stores.”⁶⁰¹

(3) *DESIGNATION RIGHTS*

Designation right is “[t]he right to determine which of the debtor’s unexpired leases and executory contracts will be assumed, to whom assumed leases and contracts will be assigned, and the consideration for the assignment of the leases and contracts.”⁶⁰² It was not clear from the proposed procedure that designation rights were involved in the sale and that raised concerns among landlords. Westfield objected to the sale of lease designation rights because they “ha[d] not had an opportunity to review any designation rights agreement (whether contained as part of any sale-related agreement or as a stand-alone document, a ‘Designation Rights Agreement’).”⁶⁰³

Some landlords requested that the proposed order be modified to clarify that any “(1) proposed sale or lease assumptions and assignments by a bidder to any proposed assignee of that bidder, or (2) exercise of lease designation rights” will not be considered at the sale hearing, and “only the sale and assumption and assignment to the successful bidder should be considered at the sale hearing.”⁶⁰⁴ If designation rights procedures were included in the proposed order, the landlords required the proposed order to be modified to clarify “that the Landlords’ right to object to the proposed designation of a lease to be assumed and assigned to a proposed assignee of the successful bidder remains the subject of court approval, upon notice required by the Amended Case Management Procedures Order and an opportunity to object on any grounds, including to adequate assurance of future performance and cure amounts,” and “that the Debtors remain liable for all obligations due and owing under the Leases during any designation rights period.”⁶⁰⁵

⁶⁰¹ *Id.*

⁶⁰² *Designation Rights*, The Devil’s Dictionary of Bankruptcy Terms for Commercial Lenders, <https://devilsdictionary.polsinelli.com/term/designation-rights/> (last visited April 2, 2019). <https://perma.cc/G57F-NMJ8>.

⁶⁰³ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 4–5.

⁶⁰⁴ Limited Objection of Aviation Mall Newco, LLC, Holyoke Mall Company, L.P., JPMG Manassas Mall Owner LLC, Poughkeepsie Galleria LLC, Salmon Run Shopping Center, L.L.C., S&R Company of West Seneca Newco, LLC and DGI LS, LLC to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [628.pdf](#) at 9.

⁶⁰⁵ *Id.* at 12.

Other landlords were concerned that the proposed Global Bidding Procedures lacked an outside cutoff date on the designation rights period (for affording a going-concern bidder the opportunity to defer their assumption and assignment decisions on leases).⁶⁰⁶ It requested a clarification that “any designation rights period must not go beyond [Sears’s] deadline to assume or reject leases under section 365(d)(4) of the Bankruptcy Code.”⁶⁰⁷

(4) *ASSUMPTION AND ASSIGNMENT*

Landlords requested that any possible assumption and assignment be conditioned upon “full compliance with section 365 of Bankruptcy Code,”⁶⁰⁸ and be without modification.⁶⁰⁹ With respect to any non-consensual request to assume and assign any leases, Westfield asked the court to “use the preliminary hearing as a status conference to establish a discovery schedule and an appropriate date for a final evidentiary hearing on such contested assignments of Leases.”⁶¹⁰

The Taubman Landlords were parties to leases and other real estate arrangements with Sears for certain premises, and those premises were subject to an express easement granted by

⁶⁰⁶ Objection of Benderson Development Company LLC, Brookfield Properties Retail Group, Gregory Greenfield & Associates, Ltd., LBA Realty LLC, Nassimi Realty LLC, Radiant Partners LLC, Realty Income Corp., Regency Centers Corp., Shopcore Properties, L.P., Site Centers Corp., Sun Valley, Ltd., TLM Realty Corp., and Weingarten Realty Investors to Debtor’s Motion for Approval of Global Bidding Procedures. Case 18-23538. [617.pdf](#) at 9.

⁶⁰⁷ *Id.*

⁶⁰⁸ Limited Objection of Washington Prime Group Inc. to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [613.pdf](#) at 6.

⁶⁰⁹ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 5; Objection of Greensboro Lease Management, L.L.C. to the Debtors’ Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 14–15; Limited Objection of Aviation Mall Newco, LLC, Holyoke Mall Company, L.P., JPMG Manassas Mall Owner LLC, Poughkeepsie Galleria LLC, Salmon Run Shopping Center, L.L.C., S&R Company of West Seneca Newco, LLC and DGI LS, LLC to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [628.pdf](#) at 16; Federal Realty Investment Trust, Acadia Realty Limited Partnership, PGIM Real Estate, Pacific Retail Group, WBCMT 2007-C33 Independence Center LLC, Starwood Retail Partners LLC, Kravco Company, Brixmor Operating Partnership, L.P., Weitzman, Helios IV, LLC, Passco Hanford Mall, LLC, Centennial Real Estate Co., C. E. Johns Company, Inc., GEM Realty Capital, Inc., GS Pacific ER, LLC, The Macerich Company, Vintage Real Estate, LLC, White Plains Galleria Limited Partnership, C.J. Segerstrom & Sons, Heidenberg Properties, S-Tract LLC, and FBA Holdings, Inc. to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [638.pdf](#) at 8–10.

⁶¹⁰ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 7.

Taubman Landlords.⁶¹¹ The Taubman Landlords argued that “[e]asements and similar interests and rights that ‘run with the land’ are generally non-executory, and are not subject to rejection.”⁶¹² Therefore, they requested that the court make clear in any order that “the Leases and the Premises cannot be sold free and clear of the easements or similar interests and rights related to that real estate.”⁶¹³

(5) *ADEQUATE ASSURANCE INFORMATION*

Landlords requested to receive adequate assurance of future performance. WPG maintained that “the Proposed Bid Procedures do not provide Counterparties with sufficient adequate assurance information.”⁶¹⁴

Greensboro stated that “adequate” information should have at least include the following:

[T]he name of the proposed bidder, and the name or entity under which the potential assignee intends to operate the Premises; (ii) the potential assignee’s intended use for the space (if at any variance from current use); (iii) audited financial statements and annual reports for the past three (3) years, including all supplements or amendments thereto; and (iv) a contact person for the proposed assignee that Landlord may directly contact in connection with the adequate assurance of future performance.⁶¹⁵

Some requested that in order to be considered “qualified,” a bid must include the following information:

The exact name of the successful bidder and the exact name of the entity which is going to be designated as the proposed assignee of each Lease; (ii) The proposed assignee’s and/or any guarantor’s audited statements (or un-audited, if audited financials are not available) and any supplemental schedules for the calendar or

⁶¹¹ Limited Objection of the Taubman Landlords to: (A) The Motion of the Debtors for Entry of an Order Authorizing and Establishing Procedures for De Minimis Asset Sales and De Minimis Asset Abandonments [D.N. 427] and (B) The Motion of the Debtors for Approval of Global Bidding Procedures [D.N. 429]. Case 18-23538. [623.pdf](#) at 2.

⁶¹² *Id.* at 3.

⁶¹³ *Id.* at 4; Limited Objection and Reservation of Rights of Simon Property Group, L.P. to the Debtors’ Motions for Approval of Bidding Procedures and Lease Rejection Procedures. Case 18-23538. [627.pdf](#) at 12.

⁶¹⁴ Limited Objection of Washington Prime Group Inc. to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [613.pdf](#) at 4.

⁶¹⁵ Objection of Greensboro Lease Management, L.L.C. to the Debtors’ Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 13.

fiscal years ending 2016, 2017, and 2018; (iii) The number of stores the proposed assignee operates and all trade names that the proposed assignee uses; (iv) A statement setting forth the proposed assignee's intended use of the Leased Premises; (v) The proposed assignee's retail experience and experience operating in-line and/or anchor stores in a shopping center; (vi) The proposed assignee's 2019 and 2020 business plans, including sales and cash flow projections; (vii) Any financial projections, calculations, and/or financial pro-formas prepared in contemplation of purchasing the Leases; and (viii) Evidence that the proposed assignee has obtained authorization or approval from its board of directors (or other comparable governing body).⁶¹⁶

Further, as to the adequate assurance information, Simon requested "any non-current landlord stalking horse or successful bidder for any Go Forward Stores that intends to operate a Sears, Kmart, or similar business as a continued going concern" to be required to deliver the following information:

[H]istorical financial statements for the buyer's previous three fiscal years and any available subsequent financials; (b) a five-year business plan for the Go Forward Stores to be acquired, including expressly addressing how the buyer's projected overhead and selling, general, and administrative costs will be reduced; (c) five years of pro forma financial statements; (d) a description of the buyer's experience operating a retail business; and (e) evidence of committed financing sufficient to fund the business plan.⁶¹⁷

For "stalking horses or buyers of any other stores," Simon insisted that the buyer should be required to deliver the following information: "(x) two years of historical financial statements; (y) three years of pro forma financial statements; and (z) a description of the buyer's intended use for the store and the buyer's experience operating the type of business to be run in the store."⁶¹⁸

⁶¹⁶ Objection of Benderson Development Company LLC, Brookfield Properties Retail Group, Gregory Greenfield & Associates, Ltd., LBA Realty LLC, Nassimi Realty LLC, Radiant Partners LLC, Realty Income Corp., Regency Centers Corp., Shopcore Properties, L.P., Site Centers Corp., Sun Valley, Ltd., TLM Realty Corp., and Weingarten Realty Investors to Debtor's Motion for Approval of Global Bidding Procedures. Case 18-23538. [617.pdf](#) at 5.

⁶¹⁷ Limited Objection and Reservation of Rights of Simon Property Group, L.P. to the Debtors' Motions for Approval of Bidding Procedures and Lease Rejection Procedures. Case 18-23538. [627.pdf](#) at 11.

⁶¹⁸ *Id.*

In the event the successful bidder dropped out after the sale hearing and failed to close the sale, the landlords requested some extra time to “make a determination as to ability of the Back-Up Bidder to provide adequate assurance of future performance, and object, if necessary.”⁶¹⁹

Moreover, Greensboro was concerned about when the affected landlord would receive the general information about the “financial wherewithal” of the Stalking Horse Bidder or the other potential bidder.⁶²⁰ Greensboro asked the court to ensure that “Greensboro and other landlords would receive, on a timely basis, a bidder’s financial data, with sufficient time to review it and assess its adequacy.”⁶²¹ If any successful bidder requested keeping its financial information confidential, Greensboro insisted that the order should ensure that “issues about confidentiality [would] be addressed by the Debtors as early as possible.”⁶²²

Lastly, Greensboro objected to Sears’s request for prospective authority to file under seal adequate assurance objections that contained confidential non-public information, without further order of the court because this request was overbroad.⁶²³ Greensboro requested that “[o]nly those portions of the documents that comport with the requirements of section 107(b) should be redacted and sealed.”⁶²⁴

(6) *LANDLORDS’ BID*

Landlords insisted on their ability to bid on their own leases without the discretion of Sears, and to credit bid without limitation and without providing any cash deposit.⁶²⁵

⁶¹⁹ Federal Realty Investment Trust, Acadia Realty Limited Partnership, PGIM Real Estate, Pacific Retail Group, WBCMT 2007-C33 Independence Center LLC, Starwood Retail Partners LLC, Kravco Company, Brixmor Operating Partnership, L.P., Weitzman, Helios IV, LLC, Passco Hanford Mall, LLC, Centennial Real Estate Co., C. E. Johns Company, Inc., GEM Realty Capital, Inc., GS Pacific ER, LLC, The Macerich Company, Vintage Real Estate, LLC, White Plains Galleria Limited Partnership, C.J. Segerstrom & Sons, Heidenberg Properties, S-Tract LLC, and FBA Holdings, Inc. to Debtors’ Motion for Approval of Global Bidding Procedures. [638.pdf](#) at 11.

⁶²⁰ Objection of Greensboro Lease Management, L.L.C. to the Debtors’ Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 12.

⁶²¹ *Id.*

⁶²² *Id.* at 13.

⁶²³ *Id.* at 16.

⁶²⁴ *Id.* at 17.

⁶²⁵ Objection of Benderson Development Company LLC, Brookfield Properties Retail Group, Gregory Greenfield & Associates, Ltd., LBA Realty LLC, Nassimi Realty LLC, Radiant Partners LLC, Realty Income Corp., Regency Centers Corp., Shopcore Properties, L.P., Site Centers Corp., Sun Valley, Ltd., TLM Realty Corp., and Weingarten Realty Investors to Debtor’s Motion for Approval of Global Bidding Procedures. Case 18-23538. [617.pdf](#) at 8; Federal

Westfield’s objection wanted Sears to clarify whether landlords who were contemplating a landlord bid on Go Forward Stores should deliver non-binding indication of interest by the non-binding indication of interest date.⁶²⁶

(7) *CLARIFICATIONS*

Westfield wanted clarification about whether Sears was going to sell the “Sears” brand as part of any Go Forward Sale.⁶²⁷

WPG was concerned with “the separation of the 400 Go Forward Stores from the Global Bidding Procedures.”⁶²⁸ WPG stated that “it is not clear if bids submitted by Counterparties [including WPG] [would] be evaluated in connection with the auction for the Go Forward Stores or if those bids [would] instead be evaluated in connection with the Global Bidding Procedures.”⁶²⁹

Some landlords wanted a clarification as to whether the proposed bid procedures applie[d] to the assignment of leases.⁶³⁰

(8) *NOTICE*

Realty Investment Trust, Acadia Realty Limited Partnership, PGIM Real Estate, Pacific Retail Group, WBCMT 2007-C33 Independence Center LLC, Starwood Retail Partners LLC, Kravco Company, Brixmor Operating Partnership, L.P., Weitzman, Helios IV, LLC, Passco Hanford Mall, LLC, Centennial Real Estate Co., C. E. Johns Company, Inc., GEM Realty Capital, Inc., GS Pacific ER, LLC, The Macerich Company, Vintage Real Estate, LLC, White Plains Galleria Limited Partnership, C.J. Segerstrom & Sons, Heidenberg Properties, S-Tract LLC, and FBA Holdings, Inc. to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [638.pdf](#) at 10–11; Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 2–3.

⁶²⁶ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 2–3.

⁶²⁷ *Id.* at 4.

⁶²⁸ Limited Objection of Washington Prime Group Inc. to Debtors’ Motion for Approval of Global Bidding Procedures, Case 18-23538. [613.pdf](#) at 3.

⁶²⁹ *Id.* at 3–4.

⁶³⁰ Objection of Benderson Development Company LLC, Brookfield Properties Retail Group, Gregory Greenfield & Associates, Ltd., LBA Realty LLC, Nassimi Realty LLC, Radiant Partners LLC, Realty Income Corp., Regency Centers Corp., Shopcore Properties, L.P., Site Centers Corp., Sun Valley, Ltd., TLM Realty Corp., and Weingarten Realty Investors to Debtor’s Motion for Approval of Global Bidding Procedures. Case 18-23538. [617.pdf](#) at 5–6.

Landlords pointed out that the “Sale Notice Parties” were defined as “any person or entity with a particularized interest in the subject matter of the relevant Document.”⁶³¹ They insisted that “the proposed order should be modified, to include in the ‘Sale Notice Parties’ counterparties to executory contracts, leases and any other agreement regarding or affecting the property.”⁶³² Westfield also requested that the definition of “Sale Notice Parties” be expanded to include “counsel of record to each contract counterparty.”⁶³³

Many landlords objected to the “commercially reasonable efforts” and “as soon as reasonably practicable” standard when providing the assumption and assignment notice and the notice of auction results. Some landlords requested that there be “no subject element,” and Sears must provide the adequate assurance information for the Stalking Horse Bidder “on the same date as filing and service of the sale notice (or ‘the adequate assurance information for all qualified bidders by January 4, 2019’),” by “overnight mail to the affected counterparties and by electronic mail to counsel who have appeared for such counterparties in these cases.”⁶³⁴ Greensboro requested that “such service of the cure cost and adequate assurance notices (or similar notices) be made by email, hand delivery or overnight delivery, both to the lease counterparty and to its counsel of record,” and “[t]o the extent that the Debtors have email addresses for the landlords or other counterparties, they should be served by both email and U.S. Mail.”⁶³⁵

Lastly, landlords also stated that the proposed order needed to clarify to whom the notice of assumption and assignment and proposed cure costs must be provided.⁶³⁶

⁶³¹ Limited Objection of Aviation Mall Newco, LLC, Holyoke Mall Company, L.P., JPMG Manassas Mall Owner LLC, Poughkeepsie Galleria LLC, Salmon Run Shopping Center, L.L.C., S&R Company of West Seneca Newco, LLC and DGI LS, LLC to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [628.pdf](#) at 4.

⁶³² *Id.*

⁶³³ Limited Objection by Westfield, LLC, Benenson Capital Company Inc., and Certain of Their Respective Affiliates, to Debtors’ Motion for Approval of Global Bidding Procedures [Doc. ID. 429]. Case 18-23538. [512.pdf](#) at 2–3.

⁶³⁴ Limited Objection of Aviation Mall Newco, LLC, Holyoke Mall Company, L.P., JPMG Manassas Mall Owner LLC, Poughkeepsie Galleria LLC, Salmon Run Shopping Center, L.L.C., S&R Company of West Seneca Newco, LLC and DGI LS, LLC to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [628.pdf](#) at 6–7.

⁶³⁵ Objection of Greensboro Lease Management, L.L.C. to the Debtors’ Motion for Approval of Global Bidding Procedures [ECF No. 429]. Case 18-23538. [542.pdf](#) at 10.

⁶³⁶ Limited Objection of Aviation Mall Newco, LLC, Holyoke Mall Company, L.P., JPMG Manassas Mall Owner LLC, Poughkeepsie Galleria LLC, Salmon Run Shopping Center, L.L.C., S&R Company of West Seneca Newco,

(9) *MASTER LEASE*

To ensure that “counterparties will be provided appropriate notice and opportunity to object,” Simon Property Group insisted that “the generic rejection, assumption and assignment process cannot be used to seek to sever a master lease, but rather that such a proceeding would require separate motion or adversary proceeding.”⁶³⁷

2. *U.S. TRUSTEE*

The United States Trustee filed its objection on November 8, 2018.⁶³⁸ The U.S. Trustee argued that Sears did not disclose if “(i) they will be selling personally identifiable information of their customer base, (ii) their privacy policies that apply to their customer base, and (iii) if a purchaser will be required to comply with the Debtor’s privacy policies.”⁶³⁹ Therefore, the U.S. Trustee maintained that if Sears sought to sell its customers’ personally identifiable information, “the approval of any bidding procedures should require the appointment of a consumer privacy ombudsman pursuant to . . . Section 332(a).”⁶⁴⁰

3. *PERSONAL PROPERTY LESSOR*

Automotive Rentals, Inc. and ARI Fleet LT (“ARI”) “provided, and continues to provide, vehicle leasing and management services, as well as other services related thereto, to [Sears] . . . pursuant to [a] Master Agreement for Fleet Vehicle Leasing and Maintenance Services dated effective as of December 1, 2009, as amended (the ‘Master Agreement’),” and Sears “provided, and continue to provide, vehicle maintenance and repair services to ARI.”⁶⁴¹

LLC and DGI LS, LLC to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [628.pdf](#) at 16.

⁶³⁷ Limited Objection and Reservation of Rights of Simon Property Group, L.P. to the Debtors’ Motions for Approval of Bidding Procedures and Lease Rejection Procedures. Case 18-23538. [627.pdf](#) at 14.

⁶³⁸ Limited Objection of the United States Trustee to Motion of Debtors for Approval of Global Bidding Procedures. Case 18-23538. [522.pdf](#).

⁶³⁹ *Id.* at 4.

⁶⁴⁰ *Id.*

⁶⁴¹ Limited Objection by Automotive Rentals, Inc. and ARI Fleet LT to Debtors’ Motion for Approval of Global Bidding Procedures [ECF Doc. 429]. Case 18-23538. [545.pdf](#).

ARI considered Sears’s motion “generally acceptable.”⁶⁴² However, it needed clarification as to several ambiguities and omissions in Sears’s motion.⁶⁴³ First, ARI was concerned that “personal property leases [were] not included in the global bidding order.”⁶⁴⁴ Sears’s motion in pertinent part mentioned that Sears was seeking the court’s authorization to the procedures for “the assumption and assignment of executory contract or unexpired non-residential real property lease of [Sears] (collectively, the ‘Contracts and Leases,’ and such procedures, the ‘Assumption and Assignment Procedures’).”⁶⁴⁵ ARI argued that “[t]hese provisions omit[ted] personal property leases from the definition of ‘Contracts and Leases.’”⁶⁴⁶ As a result, ARI was concerned that it would not receive the “Assumption and Assignment Procedures Notices” provided for in the order.⁶⁴⁷ Second, ARI maintained that Sears should be precluded from selling or transferring the Master Agreement for Fleet Vehicle Leasing and Maintenance Services and/or any of the Leased Vehicles without providing notice and a meaningful opportunity to be heard.⁶⁴⁸ Third, ARI requested that the court’s order should preserve ARI’s rights of setoff and/or recoupment.⁶⁴⁹

4. CREDITORS’ COMMITTEE

Without more, the OCC filed its preliminary objection on November 9, 2018.⁶⁵⁰ The OCC did not believe that the going concern sale process was “in the best interest of [Sears’s] estate and creditors.”⁶⁵¹ It estimated that Sears would spend \$375 million from the approval of Sears’s motion

⁶⁴² *Id.*

⁶⁴³ *Id.*

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.* at 4.

⁶⁴⁹ *Id.*

⁶⁵⁰ Preliminary Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [640.pdf](#).

⁶⁵¹ *Id.* at 3.

to the closing of a going concern sale.⁶⁵² On the contrary, the OCC believed that going-out-of-business sales (GOB sales) would maximize the value of Sears’s estate.⁶⁵³ Furthermore, the OCC argued that Sears did not “have the liquidity necessary to run the Going Concern Sale Process without incurring junior DIP financing in addition to the DIP financing already in place,” and “the collateral for the junior DIP financing would compromise assets that were unencumbered prepetition—assets that otherwise would be available for unsecured creditors.”⁶⁵⁴ It was concerned that once the Going Concern Sale failed, the cost incurred in connection with this process would “leave the Debtors’ estates administratively insolvent.”⁶⁵⁵

Apart from the concerns regarding the cost of the Going Concern Sale, the OCC was also concerned that ESL would be the only bidder for the Going Concern Stores.⁶⁵⁶ The OCC insisted that ESL should be barred from credit bidding on any assets that Sears proposed to sell until the OCC had completed its investigation and had determined whether to pursue claims and causes of action against ESL.⁶⁵⁷ Further, it argued that if the Sears were to designate ESL as a qualified bidder on January 4, 2018 (and not as a Stalking Horse Bidder), the OCC would not have had enough time to object to such designation.⁶⁵⁸

The OCC was scheduled to meet with Sears on November 12, 2018, in order to receive “newly compiled qualitative data [to] justify the Going Concern Sale Process.”⁶⁵⁹ After the meeting, the OCC filed a supplemental objection on November 14, 2018.⁶⁶⁰ The OCC stated that “the information provided on November 12th did not assuage the Creditors’ Committee’s concerns but, rather, heightened its fears that pursuing the Going Concern Sale process may lead [Sears]

⁶⁵² *Id.* at 4–5.

⁶⁵³ *Id.* at 5.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.* at 6–7.

⁶⁵⁷ *Id.* at 7.

⁶⁵⁸ *Id.* at 8.

⁶⁵⁹ *Id.* at 6.

⁶⁶⁰ Supplemental Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. to Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [729.pdf](#).

towards administrative insolvency.”⁶⁶¹ Based on the information available to the Committee, it argued that “pursuing a GOB process would (a) minimize the use of the junior DIP financing and (b) obviate the additional cost required to consummate the sale of the Go Forward Stores.”⁶⁶²

C. *SEARS’S RESPONSE*

Sears filed its omnibus response the objections described above.⁶⁶³

⁶⁶¹ *Id.* at 2–3.

⁶⁶² *Id.* at 5.

⁶⁶³ Debtors’ Omnibus Reply in Support of Motion for Approval of Global Bidding Procedures. Case 18-23538. [683.pdf](#).

I. LANDLORDS

(1) THE EXPEDITED TIMELINE

A number of the objections requested additional time to respond to certain information. Sears made it clear that it did not think additional time was needed, but “in an effort to consensually address” the objections, Sears revised the procedures to provide additional time as summarized in the following table:⁶⁶⁴

<i>Objection Type</i>	Revised Objection Deadlines		
	Stalking Horse Package for Go Forward Stores	Go-Forward Stores (if no Stalking Horse)	All other Assets
<i>Stalking Horse Designation Objection</i>	Sixteen (16) days after service of the Sale Notice ⁵	N/A	Ten (10) days after service of the Sale Notice if proposed Stalking Horse Bidder is not an insider or affiliate Fourteen (14) days after service of the Sale Notice if proposed Stalking Horse Bidder is an insider or affiliate
<i>Sale Objection</i>	At least eight (8) days after service of the Notice of Auction Results and Adequate Assurance Information ⁶	At least eight (8) days after service of the Notice of Auction Results and Adequate Assurance Information ⁶	Ten (10) days after service of the Notice of Auction Results and Adequate Assurance Information
<i>Cure Objection</i>	Within fourteen (14) days of service of the Assumption and Assignment Notice	Eight (8) days after service of the Notice of Auction Results (containing proposed Cure Costs) and service of the Adequate Assurance Information	Fourteen (14) days after service of the Assumption and Assignment Notice
<i>Adequate Assurance Objection</i>	Fourteen (14) days of service of the Assumption and Assignment Notice	Eight (8) days after service of the Notice of Auction Results and Adequate Assurance Information	Fourteen (14) days after service of the Notice of Auction Results and Adequate Assurance Information

Sears argued that this revised schedule met “the minimum notice required by the Bankruptcy Code and Bankruptcy Rules,” and “[was] consistent with and generally more generous than the notice periods previously approved by the court and other courts in this District.”⁶⁶⁵

⁶⁶⁴ *Id.* at 12–13.

⁶⁶⁵ *Id.* at 14.

(2) *“GO FORWARD STORES”*

As to what stores were included in the “Go Forward Stores,” Sears replied that, “the stores to be included in the Go Forward Stores will be determined by the bids received and the Debtors in the exercise of their fiduciary duties and business judgment. The Landlords will be notified if their leases are proposed to be assumed and assigned pursuant to the Revised Global Bidding Procedures.”⁶⁶⁶

As to Simon Property Group’s concern that the proposed global bidding procedures appeared to exclude bids other than going concern bids for the Go Forward Stores, Sears made it clear that, “the Global Bidding Procedures d[id] not limit the structure of bids that may be proposed.”⁶⁶⁷ With respect to Simon’s requirement that all forms of bids involving the Go Forward Stores should be subject to the same timeline, Sears ensured that “[a]ll bids for Go Forward Stores must adhere to the same timeline.”⁶⁶⁸

(3) *DESIGNATION RIGHTS*

Additionally, Sears addressed landlords concerns regarding the designation rights. The Debtors made it clear that “designation rights will be addressed if a proposed asset purchase agreement includes such mechanic, . . . Counterparties to leases and contracts [would] receive adequate notice and opportunity to be heard if their lease or contract [were] proposed to be assigned.”⁶⁶⁹

(4) *ASSUMPTION AND ASSIGNMENT*

Regarding the request that leases be assumed and assigned without modification, Sears stated that, “no modifications to leases [were] proposed by the Revised Global Bidding Procedures.”⁶⁷⁰ Moreover, Sears thought the objection was misplaced, as it related to a potential

⁶⁶⁶ *Id.* at Exhibit A, page 2.

⁶⁶⁷ *Id.* at Exhibit A, page 10.

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.* at Exhibit A, page 2.

⁶⁷⁰ *Id.* at Exhibit A, page 3.

sale and would be addressed at the appropriate sale hearing.”⁶⁷¹ Sears reserved its right “to respond to such objection at the appropriate time.”⁶⁷²

With respect to any non-consensual request to assume and assign any leases, Sears responded that a preliminary hearing was not necessary, as “a motion to assume or reject ‘should be considered a summary proceeding, intended to efficiently review the trustee’s or debtor’s decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate.” Sears claimed this was not the “time or place for prolonged discovery or a lengthy trial with disputed issues.”⁶⁷³ Sears added that the court could individually address any discovery or hearings needed if a particular dispute could not be resolved by the parties.⁶⁷⁴

As to the landlords’ request that bidding procedures and information provided to potential purchasers should clearly state that real estate would be sold subject to existing easements and reciprocal easement agreements, Sears replied that this requirement had been included into the Revised Global Bidding Procedures Order.⁶⁷⁵

(5) *ADEQUATE ASSURANCE INFORMATION*

Sears also addressed landlords’ concerns about what type of information constituted adequate assurance information. Sears maintained that the Global Bidding Procedures “[did] not, and should not, dictate the specific types of information that might be provided to satisfy adequate assurance.”⁶⁷⁶ Rather, “what constitute[d] adequate assurance under the Bankruptcy Code [would] be decided by the Court (not by the Debtors and their landlords) on a case-by-case basis.”⁶⁷⁷

Sears pointed out that the Revised Global Bidding Procedures Order mentioned that Sears would provide to applicable counterparties, information supporting the prospective bidder’s (or

⁶⁷¹ *Id.*

⁶⁷² *Id.*

⁶⁷³ *Id.* (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir. 1993); *In re Old Carco LLC*, 406 B.R. 180, 188 (Bankr. S.D.N.Y. 2009)).

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.* at Exhibit A, page 10.

⁶⁷⁶ Debtor’s Omnibus Reply in Support of Motion for Approval of Global Bidding Procedures. Case 18-23538. [683.pdf](#) at 15.

⁶⁷⁷ *Id.*

any other proposed assignee's) ability to comply with the requirement to provide adequate assurance of future performance under Section 365(f)(2)(B) and, if applicable, Section 365(b)(3), including the prospective bidder's financial wherewithal and willingness to perform under the applicable proposed assumed contracts and any other contracts or leases that may later be designated by the prospective bidder (if named a successful bidder) for assumption and assignment in connection with a sale transaction.⁶⁷⁸ To the extent that any landlord is not satisfied with the information provided, it would "have an opportunity to object and be heard by the Court."⁶⁷⁹

(6) *LANDLORDS' BID*

Sears stated that it had clarified in the Revised Global Bidding Procedures that landlords had the ability to bid on their own leases, credit bid without limitation, and do so without providing any cash deposit.⁶⁸⁰ It also made it clear that interested landlords were "not required, but [were] encouraged, to submit non-binding indications of interest as to any assets that they wish[ed] to purchase."⁶⁸¹

(7) *CLARIFICATIONS*

Furthermore, Sears responded that it had not decided whether to sell the "Sears" brand but interested parties would receive notification if a sale decision was made.⁶⁸²

As to WPG's concern regarding whether or not bids submitted by counterparties would be evaluated in connection with the auction for the Go Forward Stores, Sears replied that the "Global Bidding Procedures intentionally [gave] the Debtors discretion to consider bids and sell assets in connection with or separate from the Go Forward Stores,"⁶⁸³ and the stores to be included in the Go Forward Stores would be determined by the bids received and by the Debtors in the exercise of their fiduciary duties and business judgment.⁶⁸⁴

⁶⁷⁸ *Id.* at 15–16.

⁶⁷⁹ *Id.* at 16.

⁶⁸⁰ *Id.* at Exhibit A, page 10.

⁶⁸¹ *Id.* at Exhibit A, page 1.

⁶⁸² *Id.* at Exhibit A, page 2.

⁶⁸³ *Id.* at Exhibit A, page 8.

⁶⁸⁴ *Id.* at Exhibit A, Page 2.

Sears also made a clarification as to whether the proposed Bid Procedures applied to the assignment of leases. It stated that “[t]he Global Bidding Procedures [applied] to all assets including the assignment of leases.”⁶⁸⁵

(8) *NOTICE*

In the Revised Global Bidding Procedures, the definition of “Sale Notice Parties” had been changed to list specifically those parties with an interest in the sale of the Debtors’ assets, including “all Counterparties to Contracts and Leases (including any reciprocal easement agreements) that could be assumed or rejected in connection with a Sale Transaction and any additional Contracts or Leases that may be designated for assumption and assignment” and “counsel of record to each counterparty.”⁶⁸⁶

Sears also amended its proposed order, adding the specific parties, deadlines and means to send notices:

The Debtors shall, within five (5) days of filing and service of a Sale Notice, or as soon as reasonably practicable thereafter, file with the Court, serve on the Sale Notice Parties, including each applicable Counterparty, and cause to be published on the Prime Clerk Website, the Assumption and Assignment Notice . . .”⁶⁸⁷

Parties shall serve Counterparties to Contracts and Leases by overnight delivery and by e-mail to counsel for such Counterparties who have filed a notice of appearance in these chapter 11 cases.⁶⁸⁸

(9) *MASTER LEASE*

Sears had added in the Revised Global Bidding Procedures order language that required a separate motion or adversary proceeding to sever a master lease.⁶⁸⁹

2. *U.S. TRUSTEE*

⁶⁸⁵ *Id.* at Exhibit A, page 9.

⁶⁸⁶ *Id.* at Exhibit A, page 1, 11.

⁶⁸⁷ *Id.* at Exhibit B, paragraph 28.

⁶⁸⁸ *Id.* at Exhibit B, paragraph 42.

⁶⁸⁹ *Id.* at Exhibit A, page 11.

With regard to the U.S. Trustee’s objection, Sears indicated that it is in discussion with, and have provided information to the U.S Trustee to try to resolve the objection, and it would promptly notify the court if the parties agreed to the appointment of a privacy ombudsman.⁶⁹⁰

3. *PERSONAL PROPERTY LESSOR*

All ARI’s objections were resolved between the parties.⁶⁹¹ Personal property leases were expressly included in the definition of “Contracts and Leases,”⁶⁹² and notice of sale would be provided to ARI according the Revised Global Bidding Procedures.⁶⁹³ As to ARI’s rights of setoff and/or recoupment, Sears replied that the motion did “not seek to compromise any setoff or recoupment rights.”⁶⁹⁴

4. *CREDITORS’ COMMITTEE*

Sears argued that the OCC’s “premature and uninformed conclusion to liquidate” should not be substituted for Sears’s “sound business judgment to pursue an auction and sale process.”⁶⁹⁵ First, Sears insisted that it had appropriately exercised its “reasonable business judgment [in] seeking approval of bidding procedures that provide them an efficient way to maximize value.”⁶⁹⁶ It believed that the approval of the streamlined procedure would allow them to solicit bids that might maximize the value of the Debtors’ estates in an efficient, orderly and fair manner, for the benefit of their stakeholders, including bids for Go Forward Stores that could lead to the reorganization of the Company.⁶⁹⁷ Second, Sears maintained that “[t]he Committee’s conclusion that a drastic and immediate liquidation would achieve a better result for stakeholders than evaluating a potential going concern sale through the efficient process proposed by the Debtors”

⁶⁹⁰ *Id.* at Exhibit A, page 4.

⁶⁹¹ *Id.* at Exhibit A, page 7.

⁶⁹² *Id.* at Exhibit C, preamble.

⁶⁹³ *Id.* at Exhibit B, Exhibit 1, at page 7.

⁶⁹⁴ *Id.* at Exhibit A, page 7.

⁶⁹⁵ Debtor’s Omnibus Reply in Support of Motion for Approval of lobal Bidding Procedures. Case 18-23538. [683.pdf](#) at 6.

⁶⁹⁶ *Id.* at 7.

⁶⁹⁷ *Id.*

is “purely speculative” and “based upon a hasty back-of-the-envelope calculation using a single, outdated number, [namely], the Debtors’ prepetition monthly cash burn rate of \$125 million.”⁶⁹⁸ It argued that the OCC provided no support to its argument that a liquidation sale would maximize Sears’s value.⁶⁹⁹ Lastly, Sears asserted that it is the “sole fiduciary” of “all stakeholders” in this case, and it would not “abdicate [its] judgment for the judgment of the [OCC] regarding the best path forward in these chapter 11 cases.”⁷⁰⁰

As to the OCC’s objection to ESL, Sears argued that there’s no legal basis to “outright prevent a party from credit bidding on relevant assets,” and “if an ESL Credit Bid is submitted as a stalking horse bid or otherwise, that bid may not be qualified for an auction absent an order from the Court.”⁷⁰¹ Sears added, “[a]ny challenges to ESL’s ability to Credit Bid can be addressed at that time.”⁷⁰² In addition, Sears disagreed with the OCC’s assertion that it does not have enough time to object. Sears argued, “the Committee has expressly acknowledged that ESL may emerge as a possible bidder for the Go Forward Stores,” and “the procedures provide the Committee at least six weeks from today [until December 31, 2018] to object to a Credit Bid from ESL.”⁷⁰³

D. COURT’S ORDER ON THE GLOBAL BIDDING PROCEDURE

The court held a hearing to consider the relief requested in the Sears’s motion on November 15, 2018.⁷⁰⁴ On November 19, 2018, the court granted the motion, approving the global bidding and sale procedures.⁷⁰⁵

On November 21, 2018, Sears filed the Notice of Filing of Global Bidding Procedures Process Letter soliciting bids on the assets including the Debtors’ retail stores or groups of stores on a going concern or liquidation basis and individual target businesses. This included Sears Home

⁶⁹⁸ *Id.* at 8.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.* at 10.

⁷⁰¹ *Id.* at 11.

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ Order Approving Global Bidding Procedures and Granting Related Relief, at 3. Case 18-23538. [816.pdf](#).

⁷⁰⁵ *Id.* at 5.

Services, PartsDirect, Sears Auto Centers, and Innovel (the “Target Businesses”) (the Retail Stores together with the Target Businesses, the “Global Assets”).⁷⁰⁶

On January 14, 2019, Sears commenced an auction for the sale of the Global Assets.⁷⁰⁷ Transform Holdco, LLC, established by ESL Investments, Inc. offered the only bid of \$5.2 billion for the Global Assets.⁷⁰⁸

On January 18, 2019, Sears filed the sale notice, attaching the Asset Purchase Agreement between the parties.⁷⁰⁹

E. MORE OBJECTIONS

After the sale notice, more objections were received by the court. Apart from many objections reiterating previous concerns regarding the Global Bidding Procedure, the following objections are worth mentioning:

1. THE PBGC

The PBGC filed its objection on January 26, 2019.⁷¹⁰ The PBGC’s claims against Sears were estimated in the total amount of \$1,737,500,000, and since the commencement of the case it had obtained interests in the Kenmore and DieHard trademarks.⁷¹¹ PBGC’s main objection was that the Asset Purchase Agreement and the proposed Sale Order “intentionally undermine PBGC’s statutory and contractual Pension Plan protections.”⁷¹² According to PBGC’s objection, Sears imbedded a scheme in the Asset Purchase Agreement to “deliver the Kenmore and DieHard trademarks to ESL free and clear of PBGC’s interests” by involving its two non-debtor affiliates – Sears Re and KCD:⁷¹³

⁷⁰⁶ Notice of Successful Bidder and Sale Hearing, Case 18-23538. [1730.pdf](#) at 2.

⁷⁰⁷ *Id.* at 2.

⁷⁰⁸ Chris Isidore, *Lampert's winning bid for Sears swelled to \$5.2 billion*, CNN (January 17, 2019), <https://www.cnn.com/2019/01/17/business/sears-eddie-lampert-bid/index.html>. <https://perma.cc/X6KS-XD2J>.

⁷⁰⁹ Notice of Successful Bidder and Sale Hearing, Case 18-23538. [1730.pdf](#) at 2.

⁷¹⁰ Objection and Reservation of Rights of Pension Benefit Guaranty Corporation to Debtors’ Sale Motion, Case 18-23538. [2002.pdf](#).

⁷¹¹ *Id.* at 2–3.

⁷¹² *Id.* at 3.

⁷¹³ *Id.* at 3–4.

First, they manufacture breaches of the [the Pension Plan Protection and Forbearance Agreement] by the Debtors and non-Debtor KCD to seize control of the inter-company licenses of the Kenmore and DieHard trademarks. See APA, § 9.14. Second, they require Sears Reinsurance Limited Ltd. (“Sears Re,” with KCD, the “Non- Debtor Affiliates”), another non-Debtor subsidiary of SHC (domiciled in Bermuda), to sell the asset-backed securities issued by KCD that are owned by Sears Re (the KCD Notes (as defined in the APA)) to ESL. See APA, § 2.1(r). Third, by positioning ESL to be in control of both the licenses and the KCD Notes if the sale closes, they will allow ESL to thereafter manufacture a default under the KCD Indenture—the agreement that funnels the license royalties to the holder of the KCD Notes—so that ESL can foreclose on the Kenmore and DieHard trademarks directly. Finally, once this occurs, the responsible non-Debtor subsidiaries of SHC, along with ESL, will presumably point to the Sale Order’s “free and clear” protections and related provisions to shield themselves (and their respective directors and officers) from liability.⁷¹⁴

On February 1, 2019, Sears responded to PBGC’s objection, saying that it did not intend to “seek section 363 protections for the sale of non-Debtor assets.”⁷¹⁵ Sears said that it had added language to the Revised Proposed Sale Order (filed on the same day as its response) that states “Notwithstanding anything to the contrary herein or in the Asset Purchase Agreement, nothing in this Sale Order shall approve the sale or transfer of any Acquired Assets of non-Debtors free and clear of all Claims pursuant to section 363(f).”⁷¹⁶

On February 6, 2019, Sears entered into a settlement with the PBGC, and filed with the court a term sheet summarizing the settlement on February 8, 2019.⁷¹⁷ According to the term sheet, Sears and PBGC agreed to “consensual termination of Sears Pension Plan and Kmart Pension Plan, effective January 31, 2019.”⁷¹⁸ PBGC would get a \$800 million unsecured claim against Sears’s estate, and a \$80 million secured claim against any net proceeds of estate avoidance actions

⁷¹⁴ *Id.*

⁷¹⁵ Debtors’ Omnibus Reply in Support of the Going Concern Sale Transaction. Case 18-23538. [2328.pdf](#) at 74.

⁷¹⁶ *Id.*

⁷¹⁷ Notice of Filing of Settlement Term Sheet with Pension Benefit Guaranty Corporation. Case 18-23538. [2529.pdf](#) at 2.

⁷¹⁸ *Id.* at 4.

successfully pursued on behalf of the Sears's estates on or after October 15, 2018.⁷¹⁹ The term sheet required PBGC to withdraw its objection, and not to assert PBGC plan termination premium claims against Sears, including a claim in bankruptcy.⁷²⁰

As a result of this settlement, the pension plans terminated on January 31, 2019.⁷²¹ PBGC also announced that it withdrew its objection to the proposed sale of Sears's assets to ESL Investments.⁷²²

2. CREDITOR'S COMMITTEE

The OCC mainly objected that the sale would result in Sears's administrative insolvency.⁷²³ Sears replied that it "need not prove administrative solvency as a predicate to a 363 sale," and it believed Sears "will remain administratively solvent as a result of Sale Transaction and, more immediately important, meet the various closing conditions to the global sale's Asset Purchase Agreement."⁷²⁴

3. SERVICE.COM

Service.com could not file an objection based upon its status as a failed third-party purchaser, however, it did so based on its standing as a creditor holding a \$900 claim against the estate of Debtor Sears Home Improvement Products, Inc. separate and apart from the SHIP Purchase Agreement.⁷²⁵

Service.com's attempted purchase of the SHIP business failed, and it received the notice of termination the day after Sears entered into Asset Purchase Agreement with Transform Holdco

⁷¹⁹ *Id.* at 5.

⁷²⁰ *Id.* at 4–5.

⁷²¹ *Sears Holdings Pension Plans*, Pension Benefit Guaranty Corporation, <https://www.pbgc.gov/wr/sears-holdings-pension-plans> (last visited April 5, 2019). <https://perma.cc/NF2H-NJMV>.

⁷²² *PBGC and Sears Reach an Agreement*, Pension Benefit Guaranty Corporation, <https://www.pbgc.gov/news/press/releases/pr19-03> (last visited April 5, 2019). <https://perma.cc/AK3D-A34M>.

⁷²³ Debtors' Omnibus Reply in Support of the Going Concern Sale Transaction. Case 18-23538. [2328.pdf](#) at 68.

⁷²⁴ *Id.*

⁷²⁵ Limited Objection of Service.com to Global Asset Sale Transaction and Statement of Continued Interest in Purchase of Sears Home Improvement Business. Case 18-23538. [2130.pdf](#) at 6.

LLC to acquire substantially all of Sears’s assets.⁷²⁶ Service.com alleged that “ESL’s vast knowledge and control over [Sears] made it impossible for third parties to properly evaluate third party financing for the SHIP business to compete with ESL.”⁷²⁷ It requested the court to deny the sale transaction between Sears and ESL in whole or in part to allow Service.com to “move forward with its purchase of the SHIP business in accordance with the terms of the SHIP Purchase Agreement with a new closing date to be agreed upon by the parties.”⁷²⁸

Sears responded that:

Service.com has violated section 2.07(a) of the Asset Purchase Agreement ... approved by this Court, for the [] Sears Home Improvement business (the “SHIP Business”) by failing to consummate the purchase of the SHIP Business, even though [Sears] had granted Service.com an extension for closing and all of the conditions required for [Sears] to sell the SHIP Business ... had been satisfied or had otherwise been waived.⁷²⁹

Therefore, Sears maintained that Service.com’s objection should be overruled because the objection did not raise “any legitimate issues regarding the propriety of the Sale Transaction or the benefits thereof to the estates.”⁷³⁰

4. CURE AMOUNT

Many parties filed objections regarding the cure amounts.⁷³¹ Sears adjourned these objections by replying that:

The Asset Purchase Agreement permits Buyer to modify the list of Initial Assigned Agreements until two Business Days prior to Closing. To the extent that the applicable agreements are ultimately assumed and assigned, the Buyer will pay the undisputed portion of the Cure Cost on the Assumption Effective Date. The Buyer will reserve the disputed portion of the Cure Cost asserted by the Objecting Party, pending consensual resolution by the Debtors, the Buyer, and the Objecting Party

⁷²⁶ *Id.* at 5.

⁷²⁷ *Id.* at 6.

⁷²⁸ *Id.*

⁷²⁹ Debtors’ Omnibus Reply in Support of the Going Concern Sale Transaction. Case 18-23538. [2328.pdf](#) at 78–79.

⁷³⁰ *Id.* at 78.

⁷³¹ *Id.* at Exhibit A.

or determination by the Court, in accordance with the procedures in the Sale Order.⁷³²

5. ASSUMPTION AND ASSIGNMENT

Many counterparties also concerned about whether their agreements will be assumed and assigned, and if yes, whether their agreements will be assumed and assigned entirely without modification.⁷³³ These objections were not resolved in Sears's reply. Sears responded that it will work with the objecting party "toward the proper and complete identification and description of the applicable contracts and to determine whether each of the agreements is intended to be assumed and assigned."⁷³⁴ Sears added that if the parties cannot resolve the issue, they could seek court's determination.⁷³⁵

6. ADEQUATE ASSURANCE INFORMATION

Objections also were filed arguing that Adequate Assurance Information was not provided.⁷³⁶ Sears insisted that it had provided Adequate Assurance Information of future performance in accordance with the Bankruptcy Code.⁷³⁷

F. COURTS APPROVAL OF THE SALE

Sears filed two revised proposed orders on February 1, 2019 and February 3, 2019, to address other parties' concerns.⁷³⁸

The court conducted a sale hearing commenced on February 4, 2019 and granted Sears's motion on February 8, 2019.⁷³⁹

⁷³² *Id.*

⁷³³ *Id.*

⁷³⁴ *Id.*

⁷³⁵ *Id.*

⁷³⁶ *Id.*

⁷³⁷ *Id.*

⁷³⁸ Notice of Filing Second Revised Proposed Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection therewith and (IV) Granting Related Relief. Case 18-23538. [2378.pdf](#).

⁷³⁹ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption

G. SUMMARY OF THE ASSET PURCHASE AGREEMENT

The asset purchase agreement, effective as of January 17, 2019, was between buyer Transform Holdco LLC, an affiliate of ESL Investments, Inc., and seller Sears Holdings Corporation.⁷⁴⁰

It is worth noting that the assets in the transaction include the “Sears” name, the “Kmart” name, the “Kenmore” brand and the “DieHard” brand.⁷⁴¹ The agreement also required that Seller Sears Holdings (Old Sears) to “as soon as practicable after the Closing Date and in any event within six months following the Closing Date, cease to make use of” and “change the Business Names of all of their applicable Affiliates to a Business Name that does not consist of, contain or incorporate” these names and brands.⁷⁴² In addition, the agreement also required Old Sears to “as promptly as practicable after the Closing Date, file a motion with the Bankruptcy Court to amend the caption of the Bankruptcy Cases to reflect a change in the name of the Sellers,” and “cease to hold themselves out as having any affiliation with” these names and brands.⁷⁴³

What’s more, the assets to be sold to Transform Holdco included the SHIP business.⁷⁴⁴ Section 2.1(z) of the Asset Purchase Agreement provided that the assets to be transferred included:

[E]ither (i) the SHIP Purchase Agreement Assets, if the SHIP Closing shall not have occurred prior to the Closing Date (in which circumstance, for the avoidance of doubt, any Owned Real Property (as defined in the SHIP Purchase Agreement) shall be deemed Operating Owned Property, and all Leased Real Property (as defined in the SHIP Purchase Agreement) shall be deemed Operating Leased Property), or (ii) any and all proceeds received by Sellers pursuant to the SHIP

and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#).

⁷⁴⁰ *Id.* at Exhibit B.

⁷⁴¹ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#) at 56.

⁷⁴² *Id.* at 95.

⁷⁴³ *Id.*

⁷⁴⁴ *Id.* at Exhibit B, page 38.

Purchase Agreement, if the SHIP Closing shall have occurred prior to the Closing Date.⁷⁴⁵

Since Sears terminated the sale of the SHIP business to Service.com on January 18, 2019, what was originally to be Service.com's business would now be Transform Holdco's.

In addition, Old Sears's designation right was also transferred to Transform Holdco.⁷⁴⁶ As a result of this transfer, Transform Holdco had the right to "designate itself or, with the consent of [Old Sears], any other Person as the Assignee to which a Designatable Lease is to be assumed and assigned."⁷⁴⁷ The designation rights terminate upon the expiration of the designation rights period, which was defined as "the period commencing on the Closing Date and ending on the earliest of (i) five (5) Business Days after delivery of the applicable Buyer Rejection Notice,⁷⁴⁸ (ii) the date on which an applicable agreement is assumed and assigned to an Assignee, (iii) the date which is sixty (60) days after the Closing Date and (iv) May 3, 2019."⁷⁴⁹

The purchase price of the assets to consisted of cash, a credit bid, and the assumption of liabilities,⁷⁵⁰ which means that the roughly \$5.2 billion bid is not an injection of new and real money, only a fraction of it is new cash, about \$900 million (or even less).⁷⁵¹ Furthermore, it is

⁷⁴⁵ Limited Objection of Service.com to Global Asset Sale Transaction and Statement of Continued Interest in Purchase of Sears Home Improvement Business. Case 18-23538. [2130.pdf](#) at 5.

⁷⁴⁶ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#) at Exhibit B, page 45.

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.* at Exhibit B, page 60.

⁷⁴⁹ *Id.* at Exhibit B, page 12.

⁷⁵⁰ *Id.* at Exhibit B, page 51–53.

⁷⁵¹ *Id.* Section 3.1 of the Asset Purchase Agreement is about "Purchase Price," and subsection (a) put forward the "cash" required for the sale and purchase: "(a) cash in an amount (the "Closing Payment Amount") equal to: (i) \$1,408,450,000; plus (ii) an amount in cash equal to the Store Cash as of 12:00 a.m. New York City time on the Closing Date; plus (iii) the Credit Bid Release Consideration; less (iv) the aggregate amount of (A) the credit bid set forth in Section 3.1(b)(ii) plus (B) the credit bid set forth in Section 3.1(b)(iv), plus (C) the FILO Facility Buyout Amount (if any)." Therefore, the calculation goes as follows: (i) [~~\$1,408,450,000~~]; plus (ii) an amount in cash equal to the Store Cash as of 12:00 a.m. New York City time on the Closing Date [an amount "not to exceed \$17,000,000" according to the definition of "Store Cash" under Section 1.1 of the Asset Purchase Agreement]; plus (iii) the Credit Bid Release Consideration [cash equal to \$35,000,000 according to the definition of "Credit Bid Release Consideration" under Section 1.1 of the Asset Purchase Agreement]; less (iv) the aggregate amount of (A) the credit bid set forth in Section 3.1(b)(ii) plus – [Section 3.1(b)(ii) is "all outstanding obligations held by Buyer and its Affiliates as of the Closing Date under the FILO Facility;" the Asset Purchase Agreement did not disclose the amount

Transform Holdco, the shell holding company that was formed for this transaction, that will assume the liabilities, not Eddie Lampert or the ESL hedge fund.

As to employment matters, Transform Holdco agreed to offer employment to about 45,000 Old Sears's existing employees.⁷⁵² Some commentators speculate that the job offer is the main reason why Judge Drain approved the only bid.⁷⁵³

H. CLOSE OF THE SALE AND THE DISPUTES AFTERWARDS

On February 11, 2019, Old Sears completed the sale transaction with Transform Holdco, transferring substantially all of its assets to the buyer.⁷⁵⁴

After the global sale, Old Sears and New Sears commenced litigation regarding certain disputes arising from the Asset Purchase Agreement,⁷⁵⁵ as more fully discussed in the conclusion, *infra*.

of the FILO Facility, according to Sears Holdings Form 8-K, (<https://www.sec.gov/Archives/edgar/data/1310067/000119312518092755/d500560d8k.htm>)(<https://perma.cc/8KZN-22Y9>), the full FILO Facility amount is \$125,000,000] (B) the credit bid set forth in Section 3.1(b)(iv), plus – [Under Section 3.1(b)(iv), the amount is \$433,450,000] (C) the FILO Facility Buyout Amount (if any) [subject to the buyout of the FILO Facility]. If we take the “Store Cash” and the “outstanding FILO Facility obligation” to the full amount, and assume that there’s no FILO Facility Buyout Amount, the result is *approximately*: \$1,408,450,000 + \$17,000,000 + \$35,000,000 – [\$125,000 + \$433,450,000] = \$902,000,000. According to another article, the cash amount is about 855 million. (<https://www.dealerscope.com/article/101883/>) (<https://perma.cc/928Z-ZDH4>).

⁷⁵² Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#) at Exhibit B, page 7, 90.

⁷⁵³ Rebecca Choong Wilkins, *Jobs, Jobs, Jobs: Why Lampert's Bid Won Contest for Sears*, BLOOMBERG (Feb. 9, 2019). <https://www.bloomberg.com/news/articles/2019-02-09/jobs-jobs-jobs-jobs-why-lampert-s-bid-won-contest-for-sears>. <https://perma.cc/N96G-GKL3>.

⁷⁵⁴ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 13.

⁷⁵⁵ *Id.*

I. WHAT'S BEHIND THE GLOBAL SALE

Sears alleged that the global sale was made to save Sears and to keep jobs,⁷⁵⁶ but people have different views regarding the true intentions behind the Global Sale of Sears.

Some speculate that Lampert bought substantially all assets of Sears because he wants to squeeze more value from the assets through long-term piecemeal sale rather than a one-time liquidation. “Lampert managed the company since 2005 as if it were a slow-motion liquidation . . . He steadily closed hundreds of stores and the spun off assets, such as Land's End and Craftsman tools. Keeping Sears open means Lampert could continue that strategy.”⁷⁵⁷ These individuals believe that “[the stores sold in Sears’s global sale] are worth more if Sears remains in business because they can be sold in piecemeal transactions, rather than be put up for sale all at once during a liquidation. That works to Lampert's advantage.”⁷⁵⁸

Some focused specifically on Sears’s real estate value noting, “Sears’ bankruptcy filing claims that the stores it plans to keep open have been mostly profitable, even when the rest of the company was losing money. One way to interpret the data is that those stores offer better real estate value and could be sold in the future.”⁷⁵⁹ From another perspective, “[t]here is also a property play as Lampert is [one of Sears’s many landlords], so if the company keeps going, he can collect rent on some of the stores.”⁷⁶⁰

Others believe that there is an issue of ego. “Lampert, who created the modern Sears in 2005 when he merged it with Kmart, is not ready to admit defeat . . . I think there is definitely an element of ego and pride in this thing . . . For him not to do anything at this stage would be a real loss of face.”⁷⁶¹ Some still believe that “Lampert’s emotional attachment to Sears has gotten the

⁷⁵⁶ Debtors’ Motion for Approval of Global Bidding Procedures. Case 18-23538. [429.pdf](#) at 2.

⁷⁵⁷ Chris Isidore, *Why does Eddie Lampert want to keep Sears alive?*, CNN BUSINESS (Jan. 28, 2019). <https://perma.cc/62LK-CHEW>.

⁷⁵⁸ *Id.*

⁷⁵⁹ *Id.*

⁷⁶⁰ Kate Gibson, *What Does Eddie Lampert Really Want With Tattered Old Sears?*, CBS NEWS (Jan. 14, 2019). <https://perma.cc/CLG9-W8R9>.

⁷⁶¹ Isidore, *supra* note 757. <https://perma.cc/62LK-CHEW>.

better of him and that he needs to prove he has been right all along about its potential to be a profitable, ongoing retail concern.”⁷⁶²

Tax advantages may also be considered in this transaction. “He stands to realize a big tax advantage if he keeps Sears alive by using the company’s years of net operating losses to offset future taxable income if one of his other companies takes it over.”⁷⁶³

Litigation protection is also a theory. “[T]his is all about legal protection for Lampert. By reacquiring the company, he short-circuits any attempt by other potential suitors to get inside the Sears books and find out what kind of things may have actually been going on. If he owns the place, they say, he won’t sue himself, potentially saving himself billions in legal fees and judgments.”⁷⁶⁴

X. CLOSURE

A. LEADERSHIP CHANGES AND STOCK REACTIONS TO SEARS’S BANKRUPTCY

Once traded at \$96.78 back in April 2010, Sears Holdings’s stock sunk in the following years.⁷⁶⁵ At the beginning of 2018, its stock was traded at \$3.78.⁷⁶⁶ After Sears announced bankruptcy in October 2018, its stock reached its bottom at \$0.16.⁷⁶⁷ In February 2019, when the court approved Sears’s global sale, the stock was back to \$1.89 and now (on April 3, 2019) it is traded at around \$0.69.⁷⁶⁸

⁷⁶² Warren Shoulberg, Why In The World Does Eddie Lampert Still Want Sears?, FORBES (Dec. 11, 2018), <https://perma.cc/JBC5-Z373>.

⁷⁶³ Anne D’Innocenzio, Sears’ Chairman Stands at the Center of Fight for Company, NBCDFW.COM (Jan. 14, 2019), <https://perma.cc/YK93-3B5Y>.

⁷⁶⁴ Warren Shoulberg, Why In The World Does Eddie Lampert Still Want Sears?, FORBES (Dec. 11, 2018), <https://perma.cc/JBC5-Z373>.

⁷⁶⁵ *Sears Holdings Corporation Historical Stock Prices*, NASDAQ, <https://www.nasdaq.com/symbol/shldq/historical> (last visited April 2, 2019).

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.*

⁷⁶⁸ *Id.*

On October 15, 2018, when Sears filed for Bankruptcy, Eddie Lampert stepped down as the CEO of Sears.⁷⁶⁹ On February 12, 2019, after the sale of Sears was approved by Judge Drain, Eddie Lampert stepped down as the chairman of the Sears Holdings Corp's board.⁷⁷⁰

B. COST ANALYSIS OF THE CHAPTER 11 CASE

The overall bill for Sears's use of professional services in conducting its Chapter 11 bankruptcy was \$70,168,829.40 as of mid-February, 2019, and was estimated by Sears to be \$108 million by April 12, 2019.⁷⁷¹ One source even estimated the amount of professional fees as of April 12, 2019 to be around \$128 million.⁷⁷² This amount represents eighty percent of the monthly professional service fees requested by the various professionals to the bankruptcy.⁷⁷³ The services provided by these professionals ultimately resulted in an asset sale that provided \$5.2 billion for the bankruptcy estate, \$855 million of which was in cash.⁷⁷⁴ Consequently, the professional fees as of the time of the sale commanded 1.3% of the proceeds created for the estate. A Chapter 11 case is considered to have gone extremely well when there are 100 percent payouts to unsecured creditors and money left over for equity.⁷⁷⁵ However, in this case there were far greater amounts of secured and unsecured claims than the proceeds that the asset sale to Transform Co. produced. For example, considering only the largest five secured claims alone, the total amount was \$3,017,200,000⁷⁷⁶ which only left \$2,182,800,000 to be allocated elsewhere.

⁷⁶⁹ Lauren Hirsch & Lauren Thomas, *Sears files for bankruptcy, and Eddie Lampert steps down as CEO*, CNBC (October 15, 2018), <https://www.cnbc.com/2018/10/15/sears-files-for-bankruptcy.html>. <https://perma.cc/ZSF2-KPWZ>.

⁷⁷⁰ Sears Holdings Corporation. (filed February 14, 2019). 8-K Form. Retrieved from <https://www.sec.gov/Archives/edgar/data/1310067/000119312519041193/d704657d8k.htm>. <https://perma.cc/6UNA-YPGB>.

⁷⁷¹ WYCO Researcher, *Sears Bankruptcy is in Chaos*, SEEKING ALPHA (Apr. 12, 2019, 9:43 AM). <https://perma.cc/332A-USZN>.

⁷⁷² *Id.*

⁷⁷³ Order Authorizing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals. Case 18-23538. [796.pdf](#) at 4.

⁷⁷⁴ Lauren Hirsch, *Eddie Lampert's Deal to Buy Sears Granted Approval, as Retailer is Given a Second Life* (2019). <https://perma.cc/J42U-XDTV>.

⁷⁷⁵ Nancy b. Rapport, *Rethinking Professional Fees in Chapter 11 Cases* (2010). [Rethinking Professional Fees.pdf](#).

⁷⁷⁶ Declaration of Robert A. Riecker. [3.pdf](#) at 59.

Between the remaining secured creditors not listed, unsecured creditors, and equity, there were little to no proceeds left. The professional fees poured salt in the wounds of those fighting for any remaining value in Sears’s bankruptcy estate because the professional fees were given first priority under a carve-out, placing yet another group ahead of the unsecured creditors and equity holders.⁷⁷⁷

The unsecured creditors wanted Sears to test the market and see what Sears’s assets were actually worth in an orderly liquidation.⁷⁷⁸ Given the difference in complexity between coming up with a burdensome plan of reorganization and simply liquidating the assets of Sears, the estate likely could have avoided a large amount of professional fees by converting to a Chapter 7 and “let[ting] a trustee supervise it out.”⁷⁷⁹ In reality, Sears liquidated anyway when it sold substantially all of its marketable assets to Transform Holdco, so a liquidation earlier on, under Chapter 7, could have avoided months of litigation and given the creditors a chance to test the market for the true value of Sears’s assets. The chaos that surrounded this case and the large amount of professional fees, “all point to the conclusion that stakeholders in Sears would have been better off if the company would have filed for chapter 7 [in] October [2018].”⁷⁸⁰ Many of the fees for both legal work and consulting would have been avoided, “which would have meant more cash for investors/other stakeholders.”⁷⁸¹

As of October 15, 2018, skepticism over the Chapter 11 case had already developed, with one writer saying, “honestly, Sears is essentially dead already. . . maybe it limps along for a while,

⁷⁷⁷ Final Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Pre-Petition Secured Parties; (III) Modifying the Automatic Stay; and (IV) Granting Related Relief. Case 18-23538. [955.pdf](#).

⁷⁷⁸ Steven R. Strahler, *Sears Creditors Wipeout Under Lampert Plan*, CRAIN’S CHICAGO BUS. (Feb. 4, 2019, 1:26 PM). <https://perma.cc/A7ST-WXWC>.

⁷⁷⁹ BERNSTEIN & KUNEY, *supra* note 111, at 157.

⁷⁸⁰ WYCO Researcher, *The Sale of Sears to Lampert Ain’t Over Yet – Major Problems Have Developed*, SEEKING ALPHA (Mar. 11, 2019, 12:33 PM). <https://perma.cc/QC9R-ZKAS>.

⁷⁸¹ *Id.*

but it is a walking zombie.”⁷⁸² Another said, “Sears filed for chapter 11 in New York and not chapter 7. . . I am still expecting a complete liquidation of the entire company.”⁷⁸³ A Chapter 7 filed in October could have resulted in much different professional fees. Under the Bankruptcy Code:

[I]n a case under chapter 7. . . the court may allow reasonable compensation under section 330. . . for the trustee’s services. . . not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.⁷⁸⁴

Trustees would also hire attorneys to bring motions and assist in administering the estate, which would add to the expense of converting to a Chapter 7. A reasonable amount of attorney’s fees that could be expected by converting to a Chapter 7 case would likely equal the \$8,396,877.20 amount spent by the OCC in the Chapter 11 case.

To put this in perspective, if a Trustee had been appointed to liquidate Sears’s assets and had garnered \$855 million in cash, as the Chapter 11 case did, the disbursement to parties in interest by the trustee would have resulted in fees of \$24,660,000. There are also reasonableness standards in place that could limit the trustee’s recovery of compensation and provide further value for interested parties such as when, “monies disbursed are disproportionate to [the] trustee’s services” and in extraordinary circumstances, “where [a] trustee’s fees exceed funds available to pay unsecured claims.”⁷⁸⁵

Given the simplicity and lower expense a Chapter 7 being filed in October of 2018 would have provided Sears, it is difficult to see a justification for the Chapter 11 case and the professional fees that came along with it.

⁷⁸² Michael Corkery, *Sears Plan to Get Out of Bankruptcy has a Familiar Ring*, NY TIMES (Oct. 15, 2018), <https://perma.cc/XT88-ZTWD>.

⁷⁸³ WYCO Researcher, *Expecting Sears Holdings to Liquidate*, SEEKING ALPHA (Oct. 15, 2018, 2:23 PM), <https://perma.cc/M8FY-AWL8>.

⁷⁸⁴ 11 U.S.C. § 326.

⁷⁸⁵ The Rutter Group, *Appointment and Compensation of Trustees*, Cal. Prac. Guide Bankruptcy Ch. 4 (2018).

I. FEE STATEMENTS

Fee Statement of Paul, Weiss, Rifkind, Wharton & Garrison LLP (Attorneys for Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁷⁸⁶	October 15, 2018 to October 31, 2018	\$1,040,459.57
<i>SECOND MONTHLY FEE STATEMENT</i> ⁷⁸⁷	November 1, 2018 to November 30, 2018	\$2,305,835.83
<i>THIRD MONTHLY FEE STATEMENT</i> ⁷⁸⁸	December 1, 2018 to December 31, 2018	\$3,024,135.60
<i>FOURTH MONTHLY FEE STATEMENT</i> ⁷⁸⁹	January 1, 2019 to January 31, 2019	\$3,576,324.77
<i>TOTAL</i>	3 ½ Months	\$9,946,865

Fee Statement of Young Conaway Stargatt & Taylor LLP (Conflicts Counsel for Sears):

⁷⁸⁶ First Monthly Fee Statement of Paul, Weiss, Rifkind, Wharton & Garrison LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for Period from October 15, 2018 through October 31, 2018. [936.pdf](#).

⁷⁸⁷ Second Monthly Fee Statement of Paul, Weiss Rifkind, Wharton & Garrison LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for Period from November 1, 2018 through November 30, 2018. [1376.pdf](#).

⁷⁸⁸ Third Monthly Fee Statement of Paul, Weiss Rifkind, Wharton & Garrison LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for Period from December 1, 2018 through December 31, 2018. [2204.pdf](#).

⁷⁸⁹ Fourth Monthly Fee Statement of Paul, Weiss Rifkind, Wharton & Garrison LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for Period from January 1, 2019 through January 31, 2019. [2707.pdf](#).

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁷⁹⁰	October 15, 2018 to October 31, 2018	\$23,035.50
<i>SECOND MONTHLY FEE STATEMENT</i> ⁷⁹¹	November 1, 2018 to November 30, 2018	\$67,909.60
<i>THIRD MONTHLY FEE STATEMENT</i> ⁷⁹²	December 1, 2018 to December 31, 2018	\$63,782.78
<i>FOURTH MONTHLY FEE STATEMENT</i> ⁷⁹³	January 1, 2019 to January 31, 2019	\$28,132.88
<i>FIFTH MONTHLY FEE STATEMENT</i> ⁷⁹⁴	February 1, 2019 to February 28, 2019	\$10,444.00
<i>TOTAL</i>	4 ½ Months	\$193,304.76

⁷⁹⁰ First Monthly Fee Statement of Young Conaway Stargatt & Taylor, LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Conflicts Counsel for the Debtors for the Period from October 15, 2018 through October 31, 2018. [950.pdf](#).

⁷⁹¹ Second Monthly Fee Statement of Young Conaway Stargatt & Taylor, LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Conflicts Counsel for the Debtors for the Period from November 1, 2018 through November 30, 2018. [1447.pdf](#).

⁷⁹² Third Monthly Fee Statement of Young Conaway Stargatt & Taylor, LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Conflicts Counsel for the Debtors for the Period from December 1, 2018 through December 31, 2018. [2195.pdf](#).

⁷⁹³ Fourth Monthly Fee Statement of Young Conaway Stargatt & Taylor, LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Conflicts Counsel for the Debtors for the Period from January 1, 2019 through January 31, 2019. [2706.pdf](#).

⁷⁹⁴ Fifth Monthly Fee Statement of Young Conaway Stargatt & Taylor, LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Conflicts Counsel for the Debtors for the Period from February 1, 2019 through February 28, 2019. [2988.pdf](#).

Fee Statement of Weil, Gotshal & Manges LLP (Attorneys for Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁷⁹⁵	October 15, 2018 to October 31, 2018	\$4,146,824.61
<i>SECOND MONTHLY FEE STATEMENT</i> ⁷⁹⁶	November 1, 2018 to November 30, 2018	\$8,200,449.40
<i>THIRD MONTHLY FEE STATEMENT</i> ⁷⁹⁷	December 1, 2018 to December 31, 2018	\$6,636,458.18
<i>TOTAL</i>	2 ½ Months	\$18,983,732.20

⁷⁹⁵ First Monthly Fee Statement of Weil, Gotshal & Manges LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for the Period from October 15, 2018 through October 31, 2018. [1101.pdf](#).

⁷⁹⁶ Second Monthly Fee Statement of Weil, Gotshal & Manges LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for the Period from November 1, 2018 through November 30, 2018. [1729.pdf](#).

⁷⁹⁷ Third Monthly Fee Statement of Weil, Gotshal & Manges LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for the Period from December 1, 2018 through December 31, 2018. [2729.pdf](#).

Fee Statement of M-III Advisory Partners LP (Restructuring Advising to Sears):

MONTHLY STATEMENTS	FEE	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁷⁹⁸		October 15, 2018 to October 31, 2018	\$777,089.36
<i>SECOND MONTHLY FEE STATEMENT</i> ⁷⁹⁹		November 1, 2018 to November 30, 2018	\$1,526,649.49
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸⁰⁰		December 1, 2018 to December 31, 2018	\$1,475,215.47
<i>FOURTH MONTHLY FEE STATEMENT</i> ⁸⁰¹		January 1, 2019 to January 31, 2019	\$3,999,461.41
<i>FIFTH MONTHLY FEE STATEMENT</i> ⁸⁰²		February 1, 2019 to February 28, 2019	\$1,436,089.49
<i>TOTAL</i>		4 ½ Months	\$9,214,505.22

⁷⁹⁸ First Monthly Fee Statement of M-III Advisory Partners, LP for Compensation Earned and Expenses Incurred for Period of October 15, 2018 through October 31, 2018. [1180.pdf](#).

⁷⁹⁹ Second Monthly Fee Statement of M-III Advisory Partners, LP for Compensation Earned and Expenses Incurred for Period of November 1, 2018 through November 30, 2018. [1379.pdf](#).

⁸⁰⁰ Third Monthly Fee Statement of M-III Advisory Partners, LP for Compensation Earned and Expenses Incurred for Period of December 1, 2018 through December 31, 2018. [1904.pdf](#).

⁸⁰¹ Fourth Monthly Fee Statement of M-III Advisory Partners, LP for Compensation Earned and Expenses Incurred for Period of January 1, 2019 through January 31, 2019 and Transaction Fee. [2722.pdf](#). This monthly fee statement included a \$2,000,000 transaction fee pursuant to the terms of its engagement letter with Sears, for the sale of substantially all of Sears' assets to Transform Holdco LLC on February 11, 2019. *Id.*

⁸⁰² Fifth Monthly Fee Statement of M-III Advisory Partners, LP for Compensation Earned and Expenses Incurred for Period of February 1, 2019 through February 28, 2019. [2894.pdf](#).

Fee Statement of Alvarez & Marsal North America LLC (Restructuring Advising to Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸⁰³	October 15, 2018 to November 30, 2018	\$1,309,209.48
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸⁰⁴	December 1, 2018 to December 31, 2018	\$983,323.12
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸⁰⁵	January 1, 2019 to January 31, 2019	\$708,716.34
<i>FOURTH MONTHLY FEE STATEMENT</i> ⁸⁰⁶	February 1, 2019 to February 28, 2019	\$192,546.34
<i>TOTAL</i>	4 ½ Months	\$3,193,795.28

⁸⁰³ First Monthly Fee Statement of Alvarez & Marsal North America, LLC for Compensation Earned and Expenses Incurred for October 15, 2018 through November 30, 2018. [1366.pdf](#).

⁸⁰⁴ Second Monthly Fee Statement of Alvarez & Marsal North America, LLC for Compensation Earned and Expenses Incurred for December 1, 2018 through December 31, 2018. [2159.pdf](#).

⁸⁰⁵ Third Monthly Fee Statement of Alvarez & Marsal North America, LLC for Compensation Earned and Expenses Incurred for January 1, 2019 through January 31, 2019. [2705.pdf](#).

⁸⁰⁶ Fourth Monthly Fee Statement of Alvarez & Marsal North America, LLC for Compensation Earned and Expenses Incurred for February 1, 2019 through February 28, 2019. [2921.pdf](#).

Fee Statement of Wachtell, Lipton, Rosen & Katz (Attorneys for Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸⁰⁷	October 15, 2018 to December 31, 2019	\$376,287.16
<i>TOTAL</i>	2 ½ Months	\$376,287.16

⁸⁰⁷ First Monthly Fee Statement of Wachtell, Lipton, Rosen & Katz for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Attorneys for Debtors for the Period from October 15, 2018 through December 31, 2018. [1590.pdf](#).

Fee Statement of McAndrews, Held & Malloy, Ltd (Patent Attorneys for Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸⁰⁸	October 15, 2018 to December 31, 2019	\$376,439.15
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸⁰⁹	January 1, 2019 to January 31, 2019	\$105,089.63
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸¹⁰	February 1, 2019 to February 10, 2019	\$39,934.41
<i>TOTAL</i>	3 Months & 25 days	\$521,463.19

⁸⁰⁸ McAndrews, Held and Malloy’s First Monthly Fee Statement for Compensation Earned and Expenses Incurred for October 15, 2018 through December 31, 2018. [1762.pdf](#).

⁸⁰⁹ McAndrews, Held and Malloy’s Second Monthly Fee Statement for Compensation Earned and Expenses Incurred for January 2019. [2592.pdf](#).

⁸¹⁰ McAndrews, Held and Malloy’s Second Monthly Fee Statement for Compensation Earned and Expenses Incurred for January 2019. [2989.pdf](#).

Fee Statement of Stout Risius Ross LLC (Real Estate Consultant and Advisor to Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸¹¹	October 15, 2018 to December 31, 2018	\$122,355.38
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸¹²	January 1, 2019 to January 31, 2019	\$23,662.45
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸¹³	February 1, 2019 to February 28, 2019	\$1,575.60
<i>TOTAL</i>	4 ½ Months	\$147,593.43

⁸¹¹ First Monthly Fee Statement of Stout Risius Ross, LLC for Compensation Earned and Expenses Incurred for October 15, 2018 through December 31, 2018. [1798.pdf](#).

⁸¹² Second Monthly Fee Statement of Stout Risius Ross, LLC for Compensation Earned and Expenses Incurred for January 1, 2019 through January 31, 2019. [2601.pdf](#).

⁸¹³ Third Monthly Fee Statement of Stout Risius Ross, LLC for Compensation Earned and Expenses Incurred for February 1, 2019 through February 28, 2019. [2793.pdf](#).

Fee Statement of Akin Gump Strauss Hauer & Feld LLP (Counsel to the Official Committee of Unsecured Creditors):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸¹⁴	October 24, 2018 to October 31, 2018	\$873,974.00
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸¹⁵	November 1, 2018 to November 30, 2018	\$4,062,269.60
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸¹⁶	December 1 to December 31, 2018	\$3,460,633.60
<i>TOTAL</i>	2 ¼ Months	\$8,396,877.20

⁸¹⁴ First Monthly Fee Statement of Akin Gump Straus Hauer & Feld LLP for Professional Services Rendered and Disbursements Incurred as Counsel to the Official Committee of Unsecured Creditors for the Period of October 24, 2018 through October 31, 2018. [2567.pdf](#).

⁸¹⁵ Second Monthly Fee Statement of Akin Gump Straus Hauer & Feld LLP for Professional Services Rendered and Disbursements Incurred as Counsel to the Official Committee of Unsecured Creditors for the Period of November 1, 2018 through November 31, 2018. [2794.pdf](#).

⁸¹⁶ Third Monthly Fee Statement Akin Gump Straus Hauer & Feld LLP for Professional Services Rendered and Disbursements Incurred as Counsel to the Official Committee of Unsecured Creditors for the Period of December 1, 2018 through December 31, 2018. [2958.pdf](#).

Fee Statement of FTI Consulting, Inc. (Financial Advisor to the Official Committee of Unsecured Creditors):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸¹⁷	October 25, 2018 to November 30, 2018	\$2,107,602,.17
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸¹⁸	December 1, 2018 to December 31, 2018	\$1,558,431.14
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸¹⁹	January 1, 2018 to January 31, 2018	\$1,969,154.97
<i>FOURTH MONTHLY FEE STATEMENT</i> ⁸²⁰	February 1, 2019 to February 28, 2019	\$371,891.08
<i>TOTAL</i>	3 Months & 6 days	\$6,007,079.36

⁸¹⁷ First Monthly Fee Statement of FTI Consulting, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Financial Advisor to the Official Committee of Unsecured Creditors for the Period from October 25, 2018 through November 30, 2018. [2575.pdf](#).

⁸¹⁸ Second Monthly Fee Statement of FTI Consulting, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Financial Advisor to the Official Committee of Unsecured Creditors for the Period from December 1, 2018 through December 31, 2018. [2576.pdf](#).

⁸¹⁹ Third Monthly Fee Statement of FTI Consulting, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Financial Advisor to the Official Committee of Unsecured Creditors for the Period from January 1, 2019 through January 31, 2019. [2733.pdf](#).

⁸²⁰ Fourth Monthly Fee Statement of FTI Consulting, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Financial Advisor to the Official Committee of Unsecured Creditors for the Period from February 1, 2019 through February 28, 2019. [2937.pdf](#).

Fee Statement of Houlihan Lokey Capital, Inc. (Investment Banker for the Official Committee of Unsecured Creditors):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸²¹	October 29, 2018 to October 31, 2018	\$263,771.59
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸²²	November 1, 2018 to November 30, 2018	\$272,921.31
<i>THIRD MONTHLY FEE STATEMENT</i> ⁸²³	December 1 to December 31, 2018	\$7,772,531.69
<i>FOURTH MONTHLY FEE STATEMENT</i> ⁸²⁴	January 1, 2019 to January 31, 2019	\$291,124.85
<i>TOTAL</i>	2 Months and 3 days	\$8,600,349.44

⁸²¹ Fee Statement of Houlihan Lokey Capital, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Investment Banker for the Official Committee of Unsecured Creditors for the Period from October 29, 2018 through October 31, 2018. [2595.pdf](#).

⁸²² Fee Statement of Houlihan Lokey Capital, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Investment Banker for the Official Committee of Unsecured Creditors for the Period from November 1, 2018 through November 31, 2018. [2596.pdf](#).

⁸²³ Fee Statement of Houlihan Lokey Capital, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Investment Banker for the Official Committee of Unsecured Creditors for the Period from December 1, 2018 through December 31, 2018. [2730.pdf](#).

⁸²⁴ Fee Statement of Houlihan Lokey Capital, Inc. for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Investment Banker for the Official Committee of Unsecured Creditors for the Period from January 1, 2019 through January 31, 2019. [2967.pdf](#).

Fee Statement of Deloitte Transactions and Business Analytics LLP (Bankruptcy Advisor):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸²⁵	November 1, 2018 to November 30, 2018	\$953,324.78
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸²⁶	December 1, 2018 to December 31, 2018	\$1,028,849.60
<i>TOTAL</i>	2 Months	\$1,982,174.40

Fee Statement of Evercore Group LLC (Advisors to Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸²⁷	November 16, 2018 to February 15, 2019	\$485,244.86
<i>SECOND MONTHLY FEE STATEMENT</i> ⁸²⁸	February 16, 2019 to March 15, 2019	\$160,000.00
<i>TOTAL</i>	4 Months	\$645,244.86

⁸²⁵ First Monthly Fee Statement of Deloitte Transactions and Business Analytics LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Bankruptcy Advisor from November 1, 2018 through November 30, 2018. [2680.pdf](#).

⁸²⁶ Second Monthly Fee Statement of Deloitte Transactions and Business Analytics LLP for Compensation for Services Rendered and Reimbursement of Expenses Incurred as Bankruptcy Advisor from December 1, 2018 through December 31, 2018. [2882.pdf](#).

⁸²⁷ First Monthly Fee Statement of Evercore Group L.L.C. for Compensation Earned and Expenses Incurred for November 16, 2018 through February 15, 2019. [2725.pdf](#).

⁸²⁸ Second Monthly Fee Statement of Evercore Group L.L.C. for Compensation Earned and Expenses Incurred for February 16, 2019 through March 15, 2019. [2982.pdf](#).

Fee Statement of Deloitte Tax LLP (Tax Services Provider for Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸²⁹	October 15, 2018 to November 30, 2018	\$1,029,986.18
<i>TOTAL</i>	1 ½ Months	\$1,029,986.18

Fee Statement of Deloitte & Touche LLP (Independent Audit and Advisory for Sears):

MONTHLY FEE STATEMENTS	Date	Fee Amount \$
<i>FIRST MONTHLY FEE STATEMENT</i> ⁸³⁰	October 15, 2018 to November 30, 2018	\$1,431,075.02
<i>TOTAL</i>	1 ½ Months	\$1,431,075.02

⁸²⁹ First Combined Monthly Fee Statement of Deloitte Tax LLP for Compensation for Services Rendered and Reimbursement of Expenses as Tax Services Provider to the Debtors for the Period from October 15, 2018 through November 30, 2018. [2771.pdf](#).

⁸³⁰ First Combined Monthly Fee Statement of Deloitte & Touche LLP for Compensation for Services Rendered and Reimbursement of Expenses as Independent Audit and Advisory Services Provider to the Debtors for the Period from October 15, 2018 through November 30, 2018. [2855.pdf](#).

XI. CONCLUSION

A. OLD SEARS

Through the Chapter 11 process Sears effectuated a sale of substantially all of its assets as a going concern pursuant to Section 363 prior to confirmation of a Chapter 11 plan.⁸³¹ This forced Sears to choose between three possible courses of action moving forward. First, Sears could move forward with the confirmation of a liquidating Chapter 11 plan, which requires satisfaction of Sections 1123 and 1129.⁸³² Second, Sears could convert the Chapter 11 case to a Chapter 7 case and a Chapter 7 trustee would then distribute Sears's remaining assets to creditors and prosecute any available claims.⁸³³ Lastly, Sears could choose to seek entry of an order dismissing the Chapter 11 case in one of two ways.⁸³⁴ The dismissal can either be of the "plain-vanilla" sort, which simply returns the creditors and other parties in interest to their state law rights and remedies or the bankruptcy court can approve a structured dismissal that has "bells and whistles" in the form of conditions that must be satisfied and covenants that must be performed before the dismissal is effective.⁸³⁵

1. CONTINUING WITH CHAPTER 11

Continuing with the Chapter 11 case would mean that Sears would file a plan. "A plan is a collective contract among the debtor, its creditors, equity interest-holders, and administrative claimants."⁸³⁶ The creditors and interest-holders of Sears would be divided into classes made up of similarly situated parties to vote upon the plan after receiving disclosure about the plan from Sears.⁸³⁷ The results of the vote on Sears's plan would then be considered by the bankruptcy court.

⁸³¹ Norman L. Pernick & David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative after Asset Sales*, AM. BANKRUPTCY INST. J. (2010). [Structured Dismissals.pdf](#).

⁸³² *Id.*

⁸³³ *Id.*

⁸³⁴ *Id.*

⁸³⁵ *Id.*

⁸³⁶ BERNSTEIN & KUNEY, *supra* note 111, at 515.

⁸³⁷ *Id.*

The bankruptcy court may then confirm the plan, in which case it would become effective and supersede all prior contracts and legal relationships between the parties unless these prior contracts and relationships were incorporated into the plan.⁸³⁸

In order to confirm a plan of reorganization under Chapter 11, the plan must satisfy the confirmation requirements in Section 1129(a).⁸³⁹ The most important confirmation requirements would require Sears to divide its creditors into classes of similarly situated claims and ask, with respect to each class, whether the class is impaired, and if so, whether the plan has sufficient votes in the class so that the class can be deemed to have accepted the plan.⁸⁴⁰ The plan is deemed to have been accepted if a majority in number and two-thirds in amount of voting claims vote to accept the plan.⁸⁴¹ If the class is unimpaired, it is likely that the class will vote to approve the plan.⁸⁴²

Given that every creditor does not have to vote to approve the plan, a dissenting impaired creditor can be subject to imposition of a plan.⁸⁴³ However, a dissenting creditor can defeat confirmation of a plan, even if voted by the requisite majority to accept the plan, if it can show the bankruptcy court that it is getting less than it would in a Chapter 7 liquidation.⁸⁴⁴ This is called the “best interest” rule, and is set out under Section 1129(a)(7)(A).⁸⁴⁵ This best interest test is applied to each creditor individually, as opposed to the entire class.⁸⁴⁶

⁸³⁸ *Id.*

⁸³⁹ *Id.* at 516

⁸⁴⁰ *Id.*; A class is impaired when the plan modifies the rights that the class of creditors would otherwise have had without a plan. *Id.*

⁸⁴¹ *Id.* at 517

⁸⁴² *Id.*

⁸⁴³ *Id.* at 517.

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.*

⁸⁴⁶ *Id.* at 518.

If the plan is found to be “fair and equitable,” the plan may be imposed under the “cramdown” rule set out in Section 1129(b).⁸⁴⁷ The cramdown rule would allow Sears to impose the plan on a class without its consent.⁸⁴⁸ However, to approve a cramdown Sears would need to show that at least one impaired class of creditors voted to approve the plan.⁸⁴⁹ So, as long as there is one impaired accepting class, Sears could cramdown a dissenting class by satisfying the requirements of Section 1129(b).⁸⁵⁰ Thus, in sum, the three ways to obtain confirmation of a plan with respect to an individual class are: (1) leave the class unimpaired, (2) obtain the requisite votes plus satisfy the best interest test, or (3) cram down the class.⁸⁵¹

Also important is the mandate of Section 1129(a)(11) which sets forth the “feasibility rule.”⁸⁵² Under this rule, the court may not confirm a plan unless it finds that confirmation would likely not be followed by liquidation, or the need for further financial reorganization, unless the liquidation or reorganization is set out in the plan.⁸⁵³ Therefore, any plan to liquidate or conduct a financial reorganization after the plan would require disclosure of this purpose in the plan.

Another requirement to confirm a plan of reorganization, is that Sears would have to be able to pay all administrative claims, including attorneys’ fees and professional fees, in full, unless the claimants agree otherwise.⁸⁵⁴ If Sears has insufficient assets to cover its administrative expenses, it would be said to be “administratively insolvent,” and thus unable to confirm any Chapter 11 plan.⁸⁵⁵ At the time of the Section 363 sale to Transform Holdco, many believed that

⁸⁴⁷ *Id.*

⁸⁴⁸ *Id.*

⁸⁴⁹ *Id.*

⁸⁵⁰ *Id.* at 519.

⁸⁵¹ *Id.*

⁸⁵² *Id.*

⁸⁵³ *Id.*

⁸⁵⁴ Pernick & Dean, *supra* note 831. [Structured Dismissals.pdf](#).

⁸⁵⁵ *Id.*; *see also* 11 U.S.C. §§ 530(B), 507(a)(2), 1129(a)(9)(A).

the sale was basically a complete liquidation, and that Sears was administratively insolvent and without any reasonable likelihood of rehabilitation.⁸⁵⁶

2. CONVERT TO CHAPTER 7

The second option for Sears would be to convert the Chapter 11 case to a Chapter 7 case and allow a trustee to allocate its remaining assets to creditors and decide how any existing claims will be handled.⁸⁵⁷ Section 1112 gives Sears the right to convert to a Chapter 7 case as long as the conversion is in the best interest of creditors and the estate, and as long as Sears can establish the presence of cause for such relief.⁸⁵⁸ In Sears's case, if it were to remain in Chapter 11, there would be a continuation of loss to the estate in the form of professional fees and this continuing loss would be compounded by the absence of any reasonable likelihood of rehabilitation because the Sears estate had no chance of emerging from Chapter 11.⁸⁵⁹ This establishes the presence of cause under Section 1112(b)(1) and the bankruptcy court is required to convert the case to a Chapter 7 case unless a dismissal would be in the best interest of creditors and the estate.⁸⁶⁰

Conversion to Chapter 7 may not be in the best interest of the creditors and the estate, because a Chapter 7 trustee will be paid trustee fees.⁸⁶¹ A subsequent Chapter 7 trustee's fees have priority over administrative claims in the previous Chapter 11 case.⁸⁶² Thus, while cause could be shown under Section 1112, the costs of converting to and administering the case under Chapter 7 may indicate that all parties' interests are better served by a structured dismissal of the Chapter 11 case.⁸⁶³

⁸⁵⁶ WYCO Researcher, *What Really Happened at the Sears Hearing, and Now What?*, SEEKING ALPHA (Feb. 11, 2019, 4:44 PM). <https://perma.cc/M9XW-BQH3>.

⁸⁵⁷ *Id.* <https://perma.cc/M9XW-BQH3>.

⁸⁵⁸ *Id.*; see also § 11:13. Conversion or dismissal, *Chapter 11 Reorganizations*, WESTLAW.

⁸⁵⁹ Pernick & Dean, *supra* note 831. [Structured Dismissals.pdf](#); see also 11 U.S.C. § 1112(b)(1).

⁸⁶⁰ Pernick & Dean, *supra* note 831. [Structured Dismissals.pdf](#).

⁸⁶¹ Shane G. Ramsey & John T. Baxter, *Applying Jevl How Courts are Interpreting and Applying the Supreme Court's Ruling on Structured Dismissals and Priority Skipping*, HARV. L. SCHOOL BANKR. ROUNDTABLE (2018). <https://perma.cc/4HTW-Z4DG>.

⁸⁶² *Id.*

⁸⁶³ *Id.*

3. *STRUCTURED DISMISSAL*

If Sears were to seek a dismissal of the case it would rely on Sections 1112(b) and 305(a)(1).⁸⁶⁴ Section 1112(b) allows the bankruptcy court to dismiss a case if it is in the best interests of the creditors and the estate, as long as the debtor establishes cause.⁸⁶⁵ Section 305(a)(1) further provides that the bankruptcy court may dismiss a case if the interests of creditors and the debtor would be better served by such dismissal.⁸⁶⁶ Most parties who seek dismissals argue that cause exists because the debtor cannot confirm a Chapter 11 plan, and that a conversion to Chapter 7 is not in the best interests of the debtor or creditors due to the costs associated with administering the Chapter 7 case.⁸⁶⁷ Further, under Section 349(b), while courts ordering a dismissal attempt to restore the prepetition state law rights, the court may, for cause, alter the dismissal's normal restorative consequences, which gives us the "structured dismissal."⁸⁶⁸

Some bankruptcy courts have refused to permit structured dismissals and thus only approve a "plain-vanilla" dismissal that simply returns all parties in interest to their state law rights and remedies.⁸⁶⁹ In *Jevic*, the United States Supreme Court held that structured dismissals must comply with the priority rules of the bankruptcy process absent consent from the affected parties.⁸⁷⁰ For example, in that case, truck drivers who had been terminated by Jevic Holding Corp. (the debtor in that case) held a \$8.3 million priority wage claim, but the structured settlement between the debtor and its shareholders, senior lenders, and creditor's committee denied the truck drivers' priority payment, while also dismissing the bankruptcy, and foreclosing the truck drivers' rights to bring a suit.⁸⁷¹ The structured settlement in *Jevic* was deemed to violate the priority rules and

⁸⁶⁴ Pernick & Dean, *supra* note 831. [Structured Dismissals.pdf](#).

⁸⁶⁵ *Id.*

⁸⁶⁶ *Id.*

⁸⁶⁷ *Id.*

⁸⁶⁸ *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 197 (2017).

⁸⁶⁹ Jonathon C. Lipson & Melissa B. Jacoby, *Jevi SCOTUS Holds That Priority Rules Apply in Structured Dismissals*, HARV. L. SCHOOL BANKR. ROUNDTABLE (2017). <https://perma.cc/4HTW-Z4DG>.

⁸⁷⁰ *Id.*

⁸⁷¹ *Id.*; see also *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 197 (2017).

was not upheld.⁸⁷² Most bankruptcy courts to date have approved structured dismissals, especially in circumstances similar to Sears's, where the debtor's assets have been sold in a Chapter 11 case and the debtor is administratively insolvent, so long as the prescribed priority rules are followed.⁸⁷³

A structured dismissal contains “bells and whistles” that grant relief and provide certain provisions in addition to returning the parties in interest back to their state law rights and remedies.⁸⁷⁴ Structured dismissals often contain a “claims-reconciliation process” by which it attempts to incorporate an expedited, cost effective way to handle claims and distribute funds to creditors.⁸⁷⁵ Also, as part of negotiating an acceptable consensual structured dismissal, the debtor's senior secured lenders often agree to “carve out” a portion of proceeds and “gift it” (i.e., donate them) to a trust so that they can be distributed to the unsecured creditors.⁸⁷⁶ This can provide for a vehicle where subordinate creditors are able to get some sort of recovery that they otherwise would not have received under the priority structure of a plan.⁸⁷⁷ The structured dismissal may also provide that the bankruptcy court retains jurisdiction over certain post-dismissal matters.⁸⁷⁸

A structured dismissal would allow Sears to conclude the Chapter 11 case while avoiding the fees that are associated with remaining in Chapter 11 or converting to a Chapter 7 case. Thus, a structured dismissal may be the most cost-effective way to handle the old Sears estate.

4. SEARS CHOOSES TO FILE A PLAN

On April 17, 2018 Sears Holdings Corporation filed a joint Chapter 11 plan.⁸⁷⁹ The plan contemplates:

⁸⁷² Lipson & Jacoby, *supra* note 869. <https://perma.cc/4HTW-Z4DG>.

⁸⁷³ Pernick & Dean, *supra* note 831. [Structured Dismissals.pdf](#).

⁸⁷⁴ *Id.*

⁸⁷⁵ *Id.*

⁸⁷⁶ *Id.*

⁸⁷⁷ *Id.*

⁸⁷⁸ *Id.*

⁸⁷⁹ Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors. Case 18-23538. [3275.pdf](#).

[A] Wind Down of the remaining assets of the Debtors’ estates—primarily litigation claims—and a distribution to creditors in accordance with the absolute priority rule and certain settlements, as described herein. Specifically, the Plan provides for the approval of the settlement with the Pension Benefit Guaranty Corporation (the “PBGC” and, such settlement, the “PBGC Settlement”). On the Effective Date of the Plan, all of the Debtors’ assets will be transferred to the Liquidating Trust and the Debtor legal entities will be dissolved. A Liquidating Trustee and board of directors will be appointed to carry out the terms of the Plan. The Plan constitutes a single chapter 11 plan for all of the Debtors and the classifications and treatment of Claims and Interests therein apply to each of the Debtors separately. The Plan does not propose to substantially consolidate the Debtors. Under Article VI of the Plan, on or before the Effective Date, the Liquidating Trustee shall execute the Liquidating Trust Agreement and shall take all other necessary steps to establish the Liquidating Trust, which shall be for the benefit of the Liquidating Trust Beneficiaries. The liquidating trust shall be established for the sole purpose of liquidating and administering the Liquidating Trust Assets of the Debtors in accordance with Treas. Reg. 301.7701-4(d), with no objective to continue or engage in conduct of a trade or business.⁸⁸⁰

The contemplated plan provides that distributions of cash will come from assets as they are monetized, including from cash on hand and from the net proceeds of the following:⁸⁸¹

1. [A]ny Causes of Action (a) for constructive or actual fraudulent transfer under 11 U.S.C. 544(b), 547, 548 or 550(a) or any applicable state or federal law, for breach of fiduciary duty, or for illegal dividend under 8 Del. C. 170-174 or any other state Law (including, but not limited to, any Claims for damages or equitable relief other than disallowance of the ESL Claims) or for common law fraud; (b) that are related to Lands’ End, Inc., the “spin-off,” Seritage Growth Properties, Inc., . . . or (c) any Cause of Action involving any intentional misconduct by ESL Parties. (collectively, the “Specified Causes of Action”).

⁸⁸⁰ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and its Affiliated Debtors. Case 18-23538. [3276.pdf](#); “The absolute priority rule comes into play when a class of similarly situated creditors do not agree with the plan. The bankruptcy court will only confirm a plan of the objections of this dissenting group of creditors if: (1) The dissenting creditors will be paid in full, *see* 11 U.S.C. § 1129(b)(2)(B)(i), or (2) No one with a claim or interest that is junior to the claims of the dissenting creditor will get or retain anything under the plan, *see* 11 U.S.C. § 1129(b)(2)(B)(ii).” Nicholas Ortiz, *What is the Absolute Priority Rule*, BANKR. L. NETWORK (2019). <https://perma.cc/24FM-XPWA>.

⁸⁸¹ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 14–15.

2. [A]ll Causes of Action belonging to [Sears's] Estate, other than the Specified Causes of Action, that were not otherwise transferred to Buyer (Transform Holdco) pursuant to the Sale Order (the "Other Causes of Action"), including actions under Chapter 5 of the Bankruptcy Code.

3. All remaining assets of each of the Debtors, other than the Specified Causes of Action, the Other Causes of Action, and the Credit Bid Release Consideration, including all Cash owned by each of the Debtors on the Effective Date other than Cash used to fund or held in the Disputed Claim Reserve Account(s) or the Carve Out Account.⁴ [T]he Credit Bid Release Consideration.

4. Cash in the deposit account at Bank of America, N.A. established pursuant to the Final Junior DIP Order. . . in the amount of approximately \$93 million as of this Disclosure Statement, which is available and may be used only to satisfy Wind Down costs. . . but excluding any prepetition liens or any adequate protection liens or superpriority claims granted under the Final DIP ABL Order. . . and the Final Junior DIP Order"; and
6. Cash in the Carve Out Account for the payment of estate professional fees.⁸⁸²

In addition, Sears proposed that it will:

[R]etain all rights to commence and pursue all Causes of Action that are expressly preserved and not released, vested, settled or sold to a third party under the Plan, the Sale Transaction, or any other order of the Bankruptcy Court, including the Specified Causes of Action and the Other Causes of Action (the "Preserved Causes of Action").⁸⁸³

Together with the cash sources already mentioned, Sears claimed in the plan that up to \$347 million of administrative expense claims are the responsibility of Transform Holdco under the Asset Purchase Agreement and the Sale Order.⁸⁸⁴

⁸⁸² The Credit Bid Release Consideration was an amount equal to Thirty-Five Million Dollars (\$35,000,000). The Credit Bid Release unconditionally and irrevocably released and forever discharged ESL from any and all Released Estate Claims. Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#).

⁸⁸³ Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and its Affiliated Debtors. Case 18-23538. [3276.pdf](#) at 15.

⁸⁸⁴ *Id.*

These claims and interests were then classified:

A Claim or Interest is placed in a particular Class for all purposes, including voting, confirmation, and Distribution under the Plan and under sections 1122 and 1123(a)(1) of the Bankruptcy Code; provided, that a Claim or Interest is placed in a particular Class for the purpose of receiving Distributions pursuant to the Plan only to the extent that such Claim or Interest is an Allowed Claim or Allowed Interest in that Class and such Allowed Claim or Allowed Interest has not been satisfied, released, or otherwise settled prior to the Effective Date.

The classes of claims against and interests in Sears are as follows:

Class	Designation	Treatment	Entitled to Vote
1	Priority Non-Tax Claims	Unimpaired	No (Presumed to Accept)
2	Other Secured Claims	Unimpaired	No (Presumed to Accept)
3	PBGC Claims	Impaired	Yes
4	General Unsecured Claims	Impaired	Yes
5	ESL Unsecured Claims	Impaired	Yes
6	Intercompany Claims	Impaired	No (Deemed to Reject)
7	Intercompany Interests	Impaired	No (Deemed to Reject)
8	Subordinated Securities Claims	Impaired	No (Deemed to Reject)
9	Existing SHC Equity Interests	Impaired	No (Deemed to Reject)

As the above table shows, only three classes are being allowed the vote: Class 3 – PGBC Claim; Class 4 – General Unsecured Claims; and Class 5 – ESL Unsecured Claims.⁸⁸⁵ “Sears Holdings has been negotiating [with] PBGC,” so there is possibly already some type of mutual understanding that PGBC has agreed to accept.⁸⁸⁶

On May 16, 2019, there will be a disclosure statement hearing in accordance with Bankruptcy Rule 3017(a), and notice will be given by Sears to provide parties with at least twenty-seven (27) days’ notice of the hearing and at least twenty (20) days’ notice of the proper procedures and content for responses and objections to the disclosure statement.⁸⁸⁷

⁸⁸⁵ *Id.*

⁸⁸⁶ WYCO Researcher, *Sears Files Reorganization Plan – Shareholders Get Nothing*, SEEKING ALPHA (Apr. 18, 2019, 8:11 AM), <https://perma.cc/M8Y5-KDKX>.

⁸⁸⁷ Notice of Hearing on Debtors’ Motion for an Order (I) Approving Disclosure Statement; (II) Establishing Notice and Objection Procedures for Confirmation of the Plan; (III) Approving Solicitation Packages and Procedures for

The voting deadline for the submission of ballots to accept or reject the plan was set for July 2, 2019.⁸⁸⁸ All votes were required to be actually received by Prime Clerk, Sears's voting agent.⁸⁸⁹

The plan confirmation objection deadline was set for July 8, 2019, and the confirmation hearing was set for July 23, 2019.⁸⁹⁰ As detailed above, if Sears can get approval for the plan by at least one class that is impaired, and they are administratively solvent, the plan could be confirmed at the confirmation hearing on July 23, 2019.⁸⁹¹

5. *ADVERSARY CLAIMS*

On April 17, 2019, Sears Holding Corporation filed an adversary proceeding against (i) Eddie Lampert, (ii) ESL Investments, Inc., (iii) ESL Shareholders, (iv) ESL Lenders, (v) Fairholme Capital Management, L.L.C., (vi) the directors of ESL, (vii) Seritage Growth Properties, Inc., and (viii) Seritage Growth Properties, L.P.⁸⁹² The complaint alleged, among other things, that Eddie Lampert – in concert with and assisted by the other defendants, transferred billions of dollars of Sears Holdings's assets to the defendants' own shareholders for grossly inadequate consideration or no consideration at all.⁸⁹³

Sears Holdings Corporation provided that:

While these violations occurred, Lampert and ESL were Sears'[s] largest shareholders, holding between 47.8% and 62% of Sears'[s] issued and outstanding stock. Another large shareholder, Fairholme, held between 15.1% and 25% of Sears'[s] stock and had affiliated directors on Sears'[s] Board. Thomas Tisch, another Sears director, held between 3.5% and 3.7% of Sears'[s] stock. Together. .

Distribution Thereof; (IV) Approving the Forms of Ballots and Establishing Procedures for Voting on the Plan; and (IV) Granting Related Relief. Case 18-23538. [3277.pdf](#) at 37.

⁸⁸⁸ *Id.* at 14.

⁸⁸⁹ *Id.* at 60.

⁸⁹⁰ *Id.* at 8.

⁸⁹¹ WYCO Researcher, *Sears Files Reorganization Plan – Shareholders Get Nothing*, SEEKING ALPHA (Apr. 18, 2019, 8:11 AM). <https://perma.cc/M8Y5-KDKX>.

⁸⁹² Complaint. Case 18-23538. [3278.pdf](#).

⁸⁹³ *Id.* at 2.

. Lampert, the ESL Shareholders, Fairholme, and Tisch (the “Culpable Shareholders”) received at least 80.1% of the value of the 2011 spinoff of Orchard Supply Hardware Stores, Inc., 74.7% of the value of the 2014 spinoff of Lands’ End, Inc., and 76.3% of the value of the 2015 Seritage rights distribution. The Culpable Shareholders were aided and abetted by four directors affiliated with the Culpable Shareholders who approved some or all of these transactions: Cesar L. Alvarez, a director of Fairholme’s parent company; Bruce Berkowitz, Fairholme’s founder and president; Kunal Kamani, the president of ESL; and Steven Mnuchin, an investor in ESL and former vice chairman of ESL.⁸⁹⁴

Below are five of the “fraudulent transfers” that Sears Holdings Corporation seeks relief for. They are the 2011 spinoff of Orchard (a home improvement retailer), the SHO rights offering in 2012, the Sears Canada partial spinoff in 2012, the Lands’ End spinoff in 2014, and the Seritage transaction in 2015.⁸⁹⁵

Orchard was acquired by Sears Roebuck in 1996 and in December 2011, Sears spun off its entire 80.1% common stock and 100% preferred stake stack in the company while the company was more profitable compared to the rest of Sears.⁸⁹⁶ After the spinoff, Lampert and ESL held 48% of Orchard’s common stock and 61.2 % of Orchard preferred stock, Fairholme held 12.2% of the common stock and 15.2% of the preferred stock, and Tisch held 3% of the common stock and 3.7% of the preferred stock.⁸⁹⁷ Sears Holdings Corporation believes that given the ownership of the “insiders” in Orchard after the spinoff, the special rights under a shareholder’s agreement that the insiders received, and Sears Holdings Corporation receiving no consideration in the spinoff, that it is evident that the Orchard spinoff was a fraudulent transaction.⁸⁹⁸

⁸⁹⁴ *Id.* at 4–5.

⁸⁹⁵ Wolf Richter, *Here are Sears Holding’s Five “Fraudulent Transfers” and Why “Culpable Insiders” Lampert, Mnuchin, et. al Got Sued*, WOLF STREET (Apr. 18, 2019), <https://perma.cc/DN4E-HYBP>.

⁸⁹⁶ *Id.* <https://perma.cc/DN4E-HYBP>.

⁸⁹⁷ *Id.*

⁸⁹⁸ *Id.* <https://perma.cc/DN4E-HYBP>; ESL and Lampert received a right of first offer, a “tag along” right, a “drag along” right, preemptive rights with respect to Orchard’s future debt offerings, registration rights with respect to certain unregistered securities that ESL might acquire, and the right to approve composition of the boards of Orchard’s subsidiaries and its annual budget. Sears Holdings Corporation received no consideration in the spinoff because the shareholders who received the Orchard stock paid nothing in exchange for it. *Id.*

SHO was a wholly owned direct subsidiary of Sears that operated stores that sold appliance and tools under Sears's brands.⁸⁹⁹ SHO was much more profitable than the rest of Sears at the time of the spinoff.⁹⁰⁰ Sears created 105,919,089 rights to purchase shares which gave their holders the option to purchase 0.22 shares of common stock of SHO at an exercise price of \$15 per share, payable to Sears.⁹⁰¹ Sears distributed all of the SHO rights to its shareholders which included 80.8% being given to the "Culpable Shareholders" mentioned above.⁹⁰² Sears received no consideration for the distribution of these SHO rights and only received consideration of \$346.5 million when the rights were exercised, while the market capitalization of SHO was \$709 million.⁹⁰³ As the complaint provides, this implies a transfer of \$362 million from Sears to its shareholders.⁹⁰⁴

Sears indirectly owned 95.5% of Sears Canada before conducting a spinoff.⁹⁰⁵ In November of 2012, Sears spun off 44.5% of Sears Canada to its shareholder while the shareholders paid no consideration to Sears for the shares.⁹⁰⁶ This reduced Sears's remaining stake in Sears Canada to 51%.⁹⁰⁷ After the spinoff, the "Culpable Shareholders" owned 81.2% of Sears's stock, and thus received nearly 36.3% of the equity in Sears Canada when the stock was distributed.⁹⁰⁸ Then just two months after the spinoff, Sears Canada paid a \$102 million dividend.⁹⁰⁹ Had this

⁸⁹⁹ *Id.*

⁹⁰⁰ *Id.*

⁹⁰¹ *Id.*

⁹⁰² *Id.*

⁹⁰³ *Id.*

⁹⁰⁴ *Id.*

⁹⁰⁵ *Id.*

⁹⁰⁶ *Id.*

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.*

⁹⁰⁹ *Id.*

dividend been paid before the spinoff, Sears would have received 95.5% of it, instead only 51% of the dividend was paid to Sears.⁹¹⁰

The Lands' End spinoff transferred more than \$1 billion of common stock from Sears to its shareholders after "Lampert insisted on a spinoff" even after investment groups offered up to \$1.6 billion for the company.⁹¹¹ Lampert said that the sale was a "non-starter" because it would have diluted his and ESL's stake in Lands' End relative to the spinoff that occurred.⁹¹² The spinoff resulted in Lands' End being distributed to shareholders for no consideration, which was preceded by a dividend from Lands' End of \$500 million.⁹¹³ Lands' End comprised a significant percentage of Sears's positive EBITDA producing assets and this spinoff left Sears with "unreasonably small capital" and "insolvent."⁹¹⁴

The Seritage Transaction that occurred in 2015 was a sale-and-lease-back agreement between Sears and Seritage that allegedly undervalued the real estate of Sears by hundreds of millions of dollars that was coupled with one-sided and costly lease terms.⁹¹⁵ Sears sold to Seritage the title for the land of its 266 most profitable stores for a purchase price of \$2.58 billion, while simultaneously leasing those spaces back from Seritage.⁹¹⁶ The complaint alleged that the transferred stores were undervalued by \$649 to \$749 million and that the Sale-and Lease Back contained one-sided terms that benefited Seritage and harmed Sears.⁹¹⁷ Under the Sale-and-Lease back agreement, Seritage was given the right to recapture up to 50% of the space at 224 properties, and 100% at 21 other properties, and was given no limitations on its rights to lease space to anyone, including competitors of Sears.⁹¹⁸ Sears was also made subject to an obligation to pay a punitive

⁹¹⁰ *Id.*

⁹¹¹ *Id.*

⁹¹² *Id.*

⁹¹³ *Id.*

⁹¹⁴ *Id.*

⁹¹⁵ *Id.*

⁹¹⁶ *Id.*

⁹¹⁷ *Id.*

⁹¹⁸ *Id.*

termination fee of one year's rent if it elected to terminate the lease at any individual store which harmed Sears's strategy of closing unprofitable stores.⁹¹⁹ Seritage was a new entity controlled by Lampert's ESL Investments, and Fairholme also was granted a side agreement that gave it special controlling interests in Seritage.⁹²⁰ The "Culpable Shareholders" received approximately 76.3% of the Seritage rights.⁹²¹

Sears contends that these five asset transfers were part of a years-long strategy of stripping Sears's most valuable assets mainly for the benefit of Eddie Lampert and ESL Investments that led Sears to a "death spiral. . . without any realistic plan to return to profitability."⁹²²

B. NEW SEARS

The sale of substantially all of Sears's assets to Transform Holdco, LLC, a subsidiary of ESL Investments, gave Lampert control over the new entity with an opportunity to move forward. Judge Drain said, in a February 8, 2019 sales hearing that, "Lampert has an opportunity to not be a cartoon character. . . he should do that."⁹²³ When Transform Holdco acquired the assets in the Asset Purchase Agreement with Sears Holdings (old Sears), the transaction included the "Sears" name.⁹²⁴ The agreement also required that Sears Holdings:

[A]s soon as practicable after the closing date and in any event within six (6) months following the closing date, cease to make use of and change the Business Names of all their applicable affiliates... and as promptly as practicable after the closing date,

⁹¹⁹ *Id.*

⁹²⁰ *Id.*

⁹²¹ *Id.*

⁹²² Complaint. Case 18-23538. [3278.pdf](#) at 9.

⁹²³ Anne D'Innocenzio, *Bankruptcy Judge Gives Sears Another Chance, Oks \$5.2 Billion Plan*, INDUSTRIAL DISTRIBUTION (Feb. 8, 2019, 9:14 AM). <https://perma.cc/94JB-3NTG>.

⁹²⁴ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#) at 116.

file a motion with the Bankruptcy Court to amend the caption of the Bankruptcy Cases to reflect the change in the name of the Sellers [old Sears].⁹²⁵

Transform Holdco might have taken on the image of the “new Sears,” however it faces mounting challenges moving forward.⁹²⁶

1. *LANDS’ END & SERITAGE CLAIMS*

As part of the Asset Purchase Agreement, the Sears estate, agreed to release many claims and causes of action against ESL Investments and Lampert; however they did not release claims related to the prepetition “spin-off” of Lands’ End, Inc., or the dealings with Seritage Growth Properties, Inc., which ESL and Lampert facilitated.⁹²⁷ Judge Drain allowed the “old Sears” bankruptcy estate to proceed with these claims, that creditors alleged, “stripped the best assets out of the company and contributed to its demise.”⁹²⁸ This provided a thorough distraction to the new image that Lampert was trying to bring to Sears moving forward. However, the claims also provided the hope of more proceeds for the creditors fighting over the remaining value of the bankruptcy estate.

2. *OLD SEARS V. NEW SEARS*

Only weeks after Transform Holdco took the reins of Sears’s future, animosity between the company and the old Sears, presumably behind in bankruptcy, began.⁹²⁹ First, the “old Sears” bankruptcy estate and the OCC claimed that ESL wrongfully withheld \$57.5 million dollars after the Asset Purchase Agreement was executed.⁹³⁰ This claim arose because Transform Holdco “was

⁹²⁵ *Id.*

⁹²⁶ Lillian Rizzo, *Edward Lampert’s New Sears Faces Legal Troubles*, WALL ST. J. (Mar. 7, 2019, 5:20 PM). <https://perma.cc/V74P-N5KU>.

⁹²⁷ Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief. Case 18-23538. [2507.pdf](#).

⁹²⁸ Soma Biswas, *Sears and Its Creditors Can Sue Lampert, ESL Over Past Deals*, WALL ST. J. (Jan. 18, 2019, 4:21 PM). <https://perma.cc/2UHD-QWJS>.

⁹²⁹ Rizzo, *supra* note 926. <http://perma.cc/V74P-N5KU>.

⁹³⁰ Joinder of the Official Committee of Unsecured Creditors to Debtors’ (I) Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property and (II) Response to Transform Holdco LLC’s Motion to Assign Matter to Mediation. Case 18-23538. [2808.pdf](#).

not prepared to set up its own cash management system at the time of closing,”⁹³¹ so old Sears “gave ESL control of their cash management system at closing in an attempt to close the sale as expeditiously as possible.”⁹³² The old Sears estate and the OCC claimed that when they allowed Transform Holdco to use its cash management system, there was an agreement under the Asset Purchase Agreement that “excluded assets” would be turned back over to the old Sears estate.⁹³³ Old Sears then claimed that Transform Holdco failed to turn over the \$57.5 million and this threatened “to render [Sears] administratively insolvent and impair creditor recoveries.”⁹³⁴

Judge Drain “strongly advised Eddie Lampert’s hedge fund [ESL Investments], . . . to hand over millions of dollars to the old Sears” in conjunction with the claim for the failure to turn over the \$57.5 million from the cash management system.⁹³⁵ Judge Drain urged that \$14.6 million in credit card receivables and \$18.5 million in cash needed to be returned to the old Sears or that Lampert’s ESL “could be in violation of an automatic stay and liable for damages.”⁹³⁶ Judge Drain expressed his frustration with ESL and Lampert failing to live up to the Asset Purchase Agreement’s terms by saying, “you have a contract; live up to it.”⁹³⁷

3. *STANLEY BLACK & DECKER V. NEW SEARS*

Transform Holdco’s legal trouble with Stanley Black & Decker was over the use by Transform Holdco of the “iconic Craftsman brand name, which [Stanley Black & Decker] bought for \$900 million in 2017.”⁹³⁸ The conflict concerned the extent to which Transform Holdco was exercising its “limited right” to continue using the Craftsman brand when it launched the product

⁹³¹ WYCO Researcher, *Sears Files Reorganization Plan – Shareholders Get Nothing*, SEEKING ALPHA (Apr. 18, 2019, 8:11 AM). <https://perma.cc/M8Y5-KDKX>.

⁹³² Joinder of the Official Committee of Unsecured Creditors to Debtors’ (I) Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property and (II) Response to Transform Holdco LLC’s Motion to Assign Matter to Mediation. Case 18-23538. [2808.pdf](#).

⁹³³ *Id.* [2808.pdf](#). at 4.

⁹³⁴ *Id.*

⁹³⁵ Lisa Fickenscher, *Judge Advises Lampert’s Firm to Pay Back Millions Swiped from Sears*, NY POST (Mar. 22, 2019, 10:09 AM). <https://perma.cc/33QT-L3D8>.

⁹³⁶ *Id.*

⁹³⁷ *Id.*

⁹³⁸ Rizzo, *supra* note 926. <http://perma.cc/V74P-N5KU>.

under the new Sears operations.⁹³⁹ The old Sears had retained this limited right when it sold Craftsman to Stanley Black & Decker and assigned this right to Transform Holdco as part of the Asset Purchase Agreement.⁹⁴⁰ Lawyers for Stanley Black & Decker stated that, “by touting itself as ‘the real home of. . . Craftsman,’ Transform Holdco falsely implies that only products carried in New Sears. . . are genuine.”⁹⁴¹ Stanley Black & Decker sought a temporary restraining order in district court to keep Sears from selling Craftsman products,⁹⁴² while in bankruptcy court Stanley sought to keep the limited rights to sell Craftsman products from being assigned from the old Sears to the New Sears at all.⁹⁴³

This presents a huge obstacle for the new Sears moving forward, because, if its rights to market the Craftsman brand are obsolete or highly diminished, one of the iconic brands of the Sears image would be washed away.

⁹³⁹ *Id.*

⁹⁴⁰ *Id.*

⁹⁴¹ *Id.*

⁹⁴² Fickenscher, *supra* note 935. <https://perma.cc/CH7X-6ZDH>.

⁹⁴³ Objection of Stanley Black & Decker to Debtors’ Potential Assumption and Assignment of Executory Contracts and Unexpired Leases Notice of Cure Costs and in Connection with Global Sale Transaction. Case 18-23538. [2072.pdf](#).

4. SEARS RETIREES HAVE THEIR LIFE INSURANCE SLASHED

More bad publicity came the new Sears's way when they decided to slash the life insurance policies of its retirees'.⁹⁴⁴ The average age of an affected retiree was 80 years old, and many of the retirees were likely "not to be able to replace their life insurance."⁹⁴⁵ Senator Bernie Sanders even chimed in saying, "Sears gave executives over \$25 million in bonuses. Now the company says it's ending life insurance benefits that were promised to thousands of retirees. This is the kind of corporate greed that is destroying the social fabric of America."⁹⁴⁶

Sears wrote a letter to its retirees informing them that they could "convert all or part of their group life insurance policies to individual whole life policies and pay the premiums."⁹⁴⁷ However, retirees felt like the news was improperly delivered to them, and one retiree said, "I spent my adult life [working] there. . . that requires a little bit of dignity opposed to a letter saying your benefits are gone."⁹⁴⁸

5. NEW SEARS'S FUTURE

Sears asserted through its advisor Mohsin Neghji that the company has a "reasonable probability of operating as a going concern upon emerging from Chapter 11 bankruptcy."⁹⁴⁹ Lampert even hinted that "Sears would eventually be taken public" and that he "doesn't want the company to stay private indefinitely."⁹⁵⁰ The outlined plan moving forward for Sears is to have fewer and "smaller stores and a focus on the retailer's strengths like appliances."⁹⁵¹ This strategy is similar to many of Sears's prepetition strategies that proved unsuccessful, however without the

⁹⁴⁴ Aine Cain, *Sears is Reportedly Slashing Life Insurance Policies for Some of Its 90,000 Retirees as the Retailer Continues to Scramble*, BUSINESS INSIDER (2019). <https://perma.cc/4SVX-5UDW>.

⁹⁴⁵ *Id.*

⁹⁴⁶ *Id.*

⁹⁴⁷ Lauren Zumbach, *Sears Ends Retirees' Life Insurance Benefits*, CHICAGO TRIBUNE (Mar. 26, 2019, 3:15 PM). <https://perma.cc/LU8W-BBUN>.

⁹⁴⁸ *Id.*

⁹⁴⁹ Declaration of Mohsin Y. Meghji. Case 18-23538. [2336.pdf](#) at 4.

⁹⁵⁰ Eddie Lampert *Hints Sears Could Eventually Go Public Again*, NY POST (Feb. 13, 2019, 10:45 AM). <https://perma.cc/86GN-39J8>.

⁹⁵¹ Lauren Zumbach, *A Leaner Sears Emerges From Bankruptcy, But Can It Survive*, CHICAGO TRIBUNE (Feb. 14, 2019, 4:25 PM). <https://perma.cc/KBX5-MCS8>.

“contractual obligations, debt leverage and liquidity management” that it was able to shed through the chapter 11 process, Sears hopes that its strategies will be more likely to succeed.⁹⁵²

However, Sears’s strategy of shedding unprofitable stores and going for a slimmer profile could have the consequence of driving down its scale below what is feasible for a successful national retailer.⁹⁵³ Sears’s rationale for their plan is that “the company has hundreds of profitable stores that have been dragged down by. . . unprofitable stores.”⁹⁵⁴ However, this plan will shrink the store base to a level that many think cannot be competitive, because it will cause a reduction in Sears’s market share and economies of scale.⁹⁵⁵ Ray Wimer, a professor of retail practice at Syracuse University said, “closing stores that don’t make money will help, but shrinking means giving up economies of scale and power to negotiate.”⁹⁵⁶ On the other side, Paula Rosenblum, a managing partner at a retail technology research firm said, “even a smaller Sears is big enough to get some of those benefits [of economies of scale].”⁹⁵⁷

After Sears was restructured, the company had 425 stores and Lampert said, “it would be difficult to keep all 425 stores open.”⁹⁵⁸ The extent to which the new Sears decides to scale back stores will play greatly on the issues of economies of scale and market share discussed above.

As of April 4, 2018, the new Sears has shown signs that it is attempting to adapt to the marketplace.⁹⁵⁹ The company made several moves, the first of which was “plans to open smaller-sized stores in Anchorage, Alaska; Lafayette, Louisiana and Overland Park Kansas” which will focus on selling DieHard products and increasing its lawn and garden offerings.⁹⁶⁰ These stores

⁹⁵² *Id.*; see also Declaration of Mohsin Y. Meghji. Case 18-23538. [2336.pdf](#).

⁹⁵³ Adam Levine-Weinberg, *Sears Will Stumble On*, THE MOTLEY FOOL (Feb. 11, 2019, 9:50 PM). <https://perma.cc/8DUD-3FWL>.

⁹⁵⁴ *Id.*

⁹⁵⁵ *Id.*

⁹⁵⁶ Zumbach, *supra* note 951. <https://perma.cc/KBX5-MCS8>.

⁹⁵⁷ *Id.*

⁹⁵⁸ *Eddie Lampert Hints Sears Could Eventually Go Public Again*, NY POST (Feb. 13, 2019, 10:45 AM). <https://perma.cc/86GN-39J8>

⁹⁵⁹ Clark Schultz, *New Format Sears Stores to Open*, SEEKING ALPHA (Apr. 4, 2019, 9:04 AM). <https://perma.cc/K6DZ-BPY5>.

⁹⁶⁰ *Id.*

will be marketed as “Sears Home & Life stores” and will stop offering apparel which has fallen out of favor with Sears’s customer base.⁹⁶¹ Also, part of the new plans moving forward is an increased relationship with Amazon.⁹⁶²

When Sears issued a statement on its website regarding the new smaller stores, investors were confused.⁹⁶³ The way media reported the news likely led to investors thinking that Sears Holdings Corporation was opening the stores.⁹⁶⁴ However, the Sears name and operation is held by Transform Holdco and this confusion needs to be avoided because Sears Holdings Corporation has nothing to do with opening the stores and the future of Sears is in the hands of Transform Holdco now.⁹⁶⁵

Most importantly Sears must “bring back the customers it needs.”⁹⁶⁶ Lampert and the company “insist that it has the brand loyalty and reputation that people will want to shop again.”⁹⁶⁷ However, with the market becoming more competitive than ever with companies such as Amazon, and the issues outlined above that will follow Sears on its journey forward, “Sears has a mountain to climb just to get back to normal.”⁹⁶⁸

⁹⁶¹ *Id.*

⁹⁶² *Id.*

⁹⁶³ WYCO Researcher, *Sears Bankruptcy is in Chaos*, SEEKING ALPHA (Apr. 12, 2019, 9:43 AM), <https://perma.cc/332A-USZN>.

⁹⁶⁴ *Id.*

⁹⁶⁵ *Id.*

⁹⁶⁶ Chris Isidore, *Sears’ Brand Has Been Badly Damaged. Now It Has to Win Back Customers*, CNN BUS. (Feb. 12, 2019, 2:22 PM), <https://perma.cc/4W9M-6ACF>.

⁹⁶⁷ *Id.*

⁹⁶⁸ *Id.*