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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
SEARS HOLDINGS CORPORATION, *et al*.,	:	Case No. 18-23538 (RDD)
Debtors.[1]	:	(Jointly Administered)

THE CREDITORS' COMMITTEE'S (I) QUALIFIED JOINDER TO THE DEBTORS' OBJECTION TO THE SECOND LIEN PARTIES' REQUESTS TO DETERMINE CLAIMS UNDER SECTION 506(A) AND SECTION 507(B) AND REPLY IN SUPPORT OF THE DEBTORS' RULE 3012 MOTION AND (II) SUPPLEMENTAL OBJECTION TO THE SECOND LIEN PARTIES' REQUEST TO DETERMINE CLAIMS UNDER SECTION 506(A) AND SECTION 507(B)

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc.(4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); and Sears Brands Management Corporation (5365). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

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The Official Committee of Unsecured Creditors (the "Creditors' Committee") of Sears Holdings Corporation ("Sears Holdings") and its affiliated debtors and debtors in possession (collectively with Sears Holdings, the "Debtors"), by and through its undersigned counsel, hereby files this qualified joinder to the *Debtors' (I) Opposition to Second–Lien Holders' Requests to Determine Amount of Second-Lien Secured Claims Under Section 506(a) and Section 507(b) Administrative Claims and (II) Reply in Support of Debtors' Rule 3012 Motion to Determine the Amount, if any, of 507(b) Claims and To Surcharge Second-Lien Collateral Pursuant to Section 506(c)* [ECF No. 4381] (the "Debtors' Objection")[2] and supplemental objection to the Second Lien Parties' request to determine the extent of their claims under sections 506(a) and 507(b) of the Bankruptcy Code (the "Joinder and Supplemental Objection"). In support of this Joinder and Supplemental Objection, the Creditors' Committee respectfully states as follows.

PRELIMINARY STATEMENT

1. The Creditors' Committee files this Joinder and Supplemental Objection to express its support for the Debtors' efforts to protect the estates' remaining value for bona-fide holders of claims, which already are facing precarious recoveries. As made evident by their pleadings, ESL Investments, Inc. ("ESL"),[3] Cyrus Capital Partners, L.P. ("Cyrus"),[4] and Wilmington Trust, N.A.

[2] On May 26, 2019, the Debtors filed the *Debtors' Motion to Estimate Certain 507(b) Claims for Reserve Purposes* [ECF No. 4034], which, pursuant to the *Stipulation and Order Concerning the Resolution of Certain Section 507(b) Claims* [ECF No. 4102], was "deemed to be a motion pursuant to Bankruptcy Rule 3012 to determine the amount, if any, of the Second Lien Parties' Section 507(b) Claims and, pursuant to Section 506(c) of the Bankruptcy Code, for a surcharge upon the collateral securing the Second Lien Parties' claims" (the "Rule 3012 Motion").

[3] *See Supplemental Memorandum of Law on Behalf of ESL Investments, Inc. in Support of Its Requests to Determine the Amount of Its Second Lien Secured Claims Under Section 506(A) and Its Section 507(B) Administrative Claims Pursuant to Bankruptcy Rule 3012; and In Opposition to the Debtors' Motion to Surcharge Its Collateral Pursuant to Section 506(C)* [ECF No. 4273] (the "ESL Supplemental Memo").

[4] *See Memorandum of Law In Support of Request of Cyrus Capital Partners, L.P. to Determine the Amount of Secured Claims Under Section 506(C) and Section 507(B) Administrative Claims Pursuant to Bankruptcy Rule 3012 and In Opposition to Debtors' Request to Surcharge Collateral Pursuant to Section 506(C)* [ECF No. 4313] (the "Cyrus Supplemental Memo").

("Wilmington Trust"[5] and, together with Cyrus and ESL, the "Second Lien Parties")[6] unjustly are seeking to capture the estates' unencumbered assets under the guise of Bankruptcy Code section 507(b) claims despite the absence of facts or law to support their contentions. As the Court is well aware, over the Creditors' Committee's staunch opposition, ESL (with the affirmative support and assistance of Cyrus) prevailed in its case-long effort to acquire substantially all of the Debtors' assets as part of a going-concern sale. The Second Lien Parties now decry the very process they advocated, funded and won. Even worse, the Second Lien Parties expect the expenses incurred to preserve the value of the assets they hand-selected, pursued and ultimately acquired to be borne by the Debtors' estates and their unsecured creditors.

2. This dispute, at its core, concerns (i) the Debtors' right under Bankruptcy Code section 506(c) to surcharge costs and expenses (the "Section 506(c) Expenses") incurred in connection with these chapter 11 cases and the going-concern sale of certain of the Debtors' assets (the "Sale") to ESL's affiliate Transform Holdco LLC ("Transform") against the collateral (the "Second Lien Collateral") securing the Second Lien Credit Facility,[7] the Second Lien PIK Notes,[8]

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[5] *See Supplemental Memorandum of Law Supplemental Memorandum of Law of Wilmington Trust, National Association, as Indenture Trustee and Collateral Agent, (I) In Support of Motion Pursuant to Bankruptcy Rule 3012 for Determination of Amount of Secured Claim Pursuant to 11 U.S.C. Section 506(a) and Amount of Claim Entitled to Priority Pursuant to 11 U.S.C. Section 507(b) and (II) In Opposition to the Debtors Motion Pursuant to 11 U.S.C. Section 506(c)* [ECF No. 4280] (the "Supplemental Wilmington Memo").

[6] *See Common Memorandum of Law on Behalf of the Second Lien Parties: (A) In Support of Their Requests to Determine the Amount of Their Second Lien Secured Claims Under Section 506(a) and Their Section 507(b) Administrative Claims Pursuant to Bankruptcy Rule 3012; and (B) In Opposition to Debtors Motion to Surcharge Their Collateral Pursuant to Section 506(c)* [ECF No. 4272] (the "Common Memo").

[7] The "Second Lien Credit Facility" refers to that certain Second Lien Credit Agreement, dated as of September 1, 2016 by and among Sears Roebuck Acceptance Corp. ("SRAC") and Kmart Corporation ("Kmart"), as borrowers, SHC, JPP LLC, as administrative agent and collateral administrator, JPP LLC and JPP II LLC, as lenders, and the guarantors party thereto.

[8] The "Second Lien PIK Notes" refers to the 8% Senior Unsecured Convertible PIK Toggle Notes due 2019 under the certain Indenture, dated as of March 20, 2018 (as amended or modified), among Sears Holdings, certain subsidiaries of Sears Holdings, as guarantors, and Computershare Trust Company, N.A. as trustee.

and the Second Lien Notes[9] (collectively, the "Second Lien Debt," and the holders thereof, the "Second Lien Holders") and (ii) the extent of the Second Lien Parties' claims under Bankruptcy Code section 507(b) for the purported diminution in value of the Second Lien Holders' interests in the Second Lien Collateral during the pendency of these cases (the "Section 507(b) Claims") and their rights to assert such Section 507(b) Claims. The Debtors contend that the Section 506(c) Expenses may be applied as surcharges (the "Proposed Surcharges") against the value of any allowed Section 507(b) Claims. The Second Lien Parties assert that the value of the Second Lien Collateral diminished by hundreds of millions of dollars during the pendency of these cases and their resulting claims, which are entitled to priority under Bankruptcy Code section 507(b), dwarf any legitimate Proposed Surcharges. Simply put, the Debtors are correct on the law, and the facts support the Debtors' requested relief and the denial of any Section 507(b) Claims for the benefit of the Second Lien Holders. As demonstrated in the Rule 3012 Motion, the Debtors' Objection and herein, it is appropriate and necessary that this Court apply the Proposed Surcharges, which have the effect of eliminating any Section 507(b) Claims to the extent such claims exist at all.

3. The Second Lien Holders directly and primarily benefited from the Sale (and the decision not to pursue a liquidation of the Debtors' estates as advocated by the Creditors' Committee), which resulted in, among other things, ESL acquiring the Debtors' most valuable assets and operating businesses and the allowance (for credit bidding and other purposes) of ESL's and Cyrus's secured claims against the Debtors. Having succeeded in obtaining approval of the going-concern Sale, the Second Lien Parties now hope to rewrite history and recast their roles in these cases. They claim that they instead would have been better off with a liquidation and

[9] The "Second Lien Notes" refers to the 6 5/8% Senior Secured Notes due 2018 under that certain Indenture, dated as of October 12, 2010 (as amended or modified), among Sears Holdings, certain subsidiaries of Sears Holdings, as guarantors, and Wilmington Trust as successor trustee and collateral agent.

therefore are entitled to recoveries based on the purported diminution in value of the Second Lien Collateral, which they also argue is not subject to surcharge for the expenses necessarily and reasonably incurred to preserve such collateral. It is a startling pivot. This hypocrisy would, if permitted, result in a massive windfall for the Second Lien Parties.

4. The Bankruptcy Code and the principles of equity incorporated therein do not countenance parties taking unfair advantage of such inconsistent positions. The plain language of Bankruptcy Code section 506(c) requires that the expenses sought to be surcharged against collateral were for the primary and direct benefit of the creditors whose claims are secured by such collateral—just as was the case here for the Second Lien Holders. The Second Lien Parties' arguments in opposition to the Proposed Surcharges depend on reading non-existent limitations into the Bankruptcy Code—namely that only a secured creditor who is the ***intended*** and ***sole*** beneficiary of expenses may have its collateral surcharged. The statute contains no such language and the Second Circuit—consistent with other circuit courts—has not read any such requirement into the statute.

5. Instead, the facts and actions and many statements of ESL and Cyrus in these cases demonstrate that the Second Lien Holders, individually and collectively, were the direct and primary beneficiaries of the expenses reasonably and necessarily incurred in preserving and enhancing the Second Lien Collateral and causing the Sale, which disposed of the Second Lien Collateral to the direct benefit of the Second Lien Holders. *First*, as set forth in the Debtors' Objection, the Second Lien Holders received a $433.45 million recovery on account of their interests in the Second Lien Collateral by way of an allowed credit bid in connection with the Sale, which is $60.5 million ***greater*** than the value ascribed to the Second Lien Holders' interests in the Second Lien Collateral on the petition date of October 15, 2018 (the "Petition Date"). *See* Debtors'

Objection ¶ 2. The significance of this cannot be minimized. In connection with the Sale and all times leading up to the Sale, ESL valued the inventory and accounts receivable that constituted the Second Lien Collateral at 85% of book value. Indeed, as noted in the Debtors' Objection, even the ESL Asset Purchase Agreement (the "APA") required such valuation. When this adjustment is applied to the book value of all Second Lien Collateral as of the Petition Date ($2.746 billion), and the resulting balance of $2.334 billion (85% of $2.746 billion) is reduced by the First Lien Debt[10] outstanding as of the Petition Date ($1.961 billion), the most the Second Lien Holders would have recovered on account of the Second Lien Collateral was $373 million. Having credit bid $433.5 million for the same collateral, as a matter of fact and law, the Second Lien Holders necessarily cannot have any Section 507(b) Claims.[11]

6. *Second*, ESL and Cyrus forcefully advocated against a liquidation throughout these cases and took extreme measures to ensure a going-concern sale was achieved. To that end, ESL repeatedly announced to the world its intention to purchase the Sears enterprise as a going concern

[10] "First Lien Debt" refers to all indebtedness under (i) that certain Third Amended and Restated Credit Agreement, dated as of July 21, 2015 (as amended or modified) between, among others, Bank of America, N.A., as administrative agent, co-collateral agent and swing line lender, Wells Fargo Bank, National Association, as co-collateral agent, a syndicate of financial institutions and other institutional lenders, SRAC and Kmart, as borrowers, and Sears Holdings; and (ii) the Letter of Credit and Reimbursement Agreement, dated as of December 28, 2016 (as amended or modified) among SRAC and Kmart, as borrowers, Sears Holdings, Citibank, N.A., as administrative agent and issuing bank, and a syndicate of financial institutions.

[11] Even if the First Lien Lenders were required to marshal the collateral securing their debt and collect in the first instance from cash on hand and specified other receivables that did not constitute Second Lien Collateral (*i.e.*, cash and pharmaceutical accounts receivable) which aggregated, according to the Second Lien Parties' experts, approximately $204 million on the Petition Date, the maximum amount of Section 507(b) Claims that could be asserted by the Second Lien Parties in the aggregate would be $143.5 million ($373 million plus $204 million less $433.5 million), which is a fraction of the amount asserted by the Second Lien Parties and does not take into account any 506(c) surcharge. This $143.5 figure is $63.2 million less than the 506(c) surcharge Wilmington Trust's expert tacitly acknowledges is appropriate. *See* Expert Report of William Henrich in Connection with Assessment of § 507(b) Adequate Protection Claims Asserted by Wilmington Trust, N.A. [ECF No. 4279] at 4 ("Corporate expenses that help to preserve the collateral value are a component of § 506(c) expenses"), 5 ("I understand that § 506(c) expenses include certain professional fees which are incurred in support of the process to monetize or preserve the capital."), and Ex. 2 (deducting $155.7 million in corporate expenses and $51 million in 506(c) professional fees from the Second Lien Collateral value). And the $143.5 million figure is $106.5 million less the approximately $250 million (net of professional fees) in necessary expenses incurred by the Debtors between the effective date of the APA (January 17, 2019) and the closing of the Sale (February 11, 2019) to support the continued operation of the Debtors' business that most obviously qualify as section 506(c) surcharges. *See* Debtors' Objection ¶ 45.

and even went so far as to threaten the board of directors of Sears Holdings with litigation should it fail to force the Debtors to accept ESL's going-concern bid. *See* Letter from J. Bromley (counsel to ESL) to Board of Directors, at 1 (Jan. 7, 2019) (the "Bromley Letter"), a true and correct copy of which is attached hereto as **Exhibit A** ("In the event that the Board does not override the Subcommittee's decision [to reject ESL's going-concern bid], ESL will have no choice but to commence litigation on an expedited basis to hold the relevant members of the Board and the Subcommittee responsible for their breaches of fiduciary duties."). Similarly, Cyrus provided the Junior DIP (as defined below) specifically to enable the going-concern Sale to ESL, and later agreed to roll over up to $350 million in Junior DIP obligations to ESL's purchasing entity, Transform, rather than require ESL to increase the cash component of its bid. The $350 million roll-up was crucial to the closing of the Sale. These were not the actions of mere bystanders. These were the actions of parties who expected these cases to proceed according to their plan—a plan that ultimately prevailed.

7. The equities of the cases also demand the denial of the Second Lien Parties' efforts to profit further at the expense of the Debtors' estates and creditors. In particular, two well-established equitable doctrines operate independently to prevent the sort of cynical flip-flopping engaged in by the Second Lien Parties: (i) judicial estoppel and (ii) the doctrine of "unclean hands." These doctrines prohibit the Second Lien Parties—who spent the duration of these bankruptcy cases deliberately opposing liquidation and pushing for the going-concern Sale—from now claiming that they wanted a different outcome, that they were not primary beneficiaries of the Section 506(c) Expenses or that they are entitled to allowed Section 507(b) Claims. ESL and the other Second Lien Parties argue that liquidation would have been the better path after all—just so they can attempt to enrich themselves with their Section 507(b) Claims at the expense of the

Debtors' unsecured creditors. The Second Lien Parties owe their successes in these cases to the expenses necessarily incurred to effectuate the Sale and cannot now claim that it worked to their detriment such that they should be compensated further.

8. The Second Lien Parties hope to have their cake and eat it—or at least not pay for it—too. To prevent this inequitable result, the Creditors' Committee joins in the relief requested in the Debtors' Objection and Rule 3012 Motion and respectfully requests that the Court deny the Second Lien Parties' Section 507(b) Claims in full and grant the Debtors' request for the Proposed Surcharges under Bankruptcy Code section 506(c).

ARGUMENT

9. The Second Lien Parties' efforts to dodge the expenses incurred to support their gain in the chapter 11 cases and, instead, realize upon substantial Section 507(b) Claims are meritless. Specifically, (i) the Second Lien Parties have failed to satisfy their burden of proving that they are entitled to any claims under Bankruptcy Code section 507(b); (ii) the Second Lien Parties have misconstrued the law interpreting Bankruptcy Code section 506(c), which requires only that a secured creditor receive a direct and primary benefit—and not the sole and/or intended benefit—from the expenses incurred to preserve the value of the collateral in question to be subject to a surcharge under Bankruptcy Code section 506(c); (iii) the circumstances of these cases demonstrate that the Second Lien Collateral is subject to surcharge under Bankruptcy Code section 506(c) because the Second Lien Parties—who got precisely what they wanted in these cases—directly benefited from the expenses reasonably and necessarily incurred to preserve and enhance the Second Lien Collateral; and (iv) the Second Lien Parties must be judicially estopped or prevented under the doctrine of unclean hands from asserting Section 507(b) Claims and arguing now that they would have been better off in a liquidation when they have argued throughout these cases in favor of a going-concern sale.

I. THE SECOND LIEN PARTIES HAVE FAILED TO SATISFY THEIR BURDEN OF PROVING THEY ARE ENTITLED TO CLAIMS UNDER BANKRUPTCY CODE SECTION 507(B)

10. To recover on their Section 507(b) Claims, the Second Lien Holders "must show that the aggregate value of [their] collateral diminished from the Petition Date to the Effective Date." *Off. Comm. Unsec. Creds. v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 501 B.R. 549 (S.D.N.Y. 2013). Any such diminution in value must be measured relative to the extent of the Second Lien Holders' "value of their interest in collateral as of the Petition Date." *Id.* (citing *United States Savings Ass'n v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 382 (1988)). The Second Lien Holders bear the burden of proving diminution in the value of the Second Lien Collateral. *In re Residential Capital*, 501 B.R. at 590. As detailed in the Debtors' Objection, the Second Lien Parties have failed to meet their burden. Indeed, the Second Lien Parties cannot demonstrate any diminution in the value of their interests in the Second Lien Collateral, even before consideration of the appropriate Proposed Surcharge under Bankruptcy Code section 506(c) (discussed at greater length below).

11. As detailed in the Debtors' Objection, a proper analysis of whether there has been any diminution in the value of the Second Lien Holders' interests in the Second Lien Collateral since the Petition Date evidences that the Second Lien Holders are not entitled to any Section 507(b) Claims at all. As of the Petition Date, the book value of the collateral securing the Second Lien Debt was $2.746 billion. This collateral secured not just the Second Lien Debt, but also the First Lien Debt of $1.961 billion. At all times during the pendency of these cases, ESL has valued the collateral securing the Second Lien Debt at 85 cents on the dollar.[12] This results in a net value

[12] As explained in the Debtors' Objection, the 85% figure is derived from the APA documenting the ***actual*** sale of the Second Lien Collateral to Transform and represents the *actual* recovery received on the Second Lien Collateral ($1.657 billion book value in inventory and accounts receivable sold for $1.408 billion, i.e., 85%). *See* APA §§ 3.1, 10.9; Debtors' Objection ¶ 25.

of $2.334 billion for the Second Lien Collateral as of the Petition Date. Once the First Lien Debt of $1.961 billion is subtracted from the net collateral value of $2.334 billion, the Second Lien Holders' remaining interest in the Second Lien Collateral as of the Petition Date is reduced to $373 million. Thus, the maximum amount of any Section 507(b) Claims that the Second Lien Holders could assert is $373 million (assuming all of the collateral value dissipated). However, as is well documented, in connection with the Sale, ESL (and Cyrus) credit bid $433.5 million in Second Lien Debt as part of the purchase price under the APA. As a result, the value of the Second Lien Holders' interests in the Second Collateral did not diminish at all, but rather ***increased*** by $60.5 million. *In re SubMicron Systems Corp.*, 432 F.3d 448, 460–61 (3d Cir. 2010) (holding that credit bidders in a 363 sale could bid up to the full value of their loan, and, thus, that the amount of the credit bid represented the value ascribed to the lender's secured interest in the collateral).

12. Even if the holders of First Lien Debt were required to marshal their collateral, which they are not, and recover on their claims in the first instance from the cash and pharmaceutical receivables (valued at approximately $204 million)[13] that are not part of the Second Lien Collateral, prior to realizing on the Second Lien Collateral on which they hold a first lien, the Second Lien Holders' Section 507(b) Claims could not exceed $143.5 million.[14] This $143.5 million is dwarfed by the Proposed Surcharges applicable to offset any claimed diminution in value. Moreover, as described in footnote 11, *supra*, such amount is even less than the approximately $207 million in 506(c) surcharges Wilmington Trust's expert tacitly acknowledges are due and the approximately $250 million that the Debtors incurred in necessary expenses (net of professional fees) between the execution of the APA (January 17, 2019) and the closing of the

[13] The Creditors' Committee has conservatively calculated this number as the average of the figures provided by the Second Lien Parties' experts.

[14] The $143.5 million figure is derived by adding the $373 million discussed above to the $204 million of cash and pharmaceutical receivables and subtracting from the total ($577 million) the $433.5 million credit bid amount.

Sale (February 9, 2019) to support the continued operation of the Debtors' business that most obviously qualify as surcharges under Bankruptcy Code section 506(c). In sum, the Second Lien Holders are not entitled to any Section 507(b) Claims.

II. THE DEBTORS HAVE MET THEIR BURDEN OF ESTABLISHING THAT THEY ARE ENTITLED TO THE PROPOSED SURCHARGES

13. Bankruptcy Code section 506(c) provides that a debtor may "recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of ***any benefit*** to the holder of such claim." 11 U.S.C. § 506(c) (emphasis added). In turn, surcharges under Bankruptcy section 506(c) may be used to offset Bankruptcy Code section 507(b) claims asserted by a secured creditor. *In re Blackwood Assocs., L.P.*, 153 F.3d 61, 68 (2d Cir. 1998). Here, the Rule 3012 Motion asks this Court to acknowledge that the reasonable and necessary costs and expenses incurred in preserving the Second Lien Collateral for the benefit of the Second Lien Holders—and at their behest—may be surcharged under Bankruptcy Code section 506(c), and that such surcharge dwarfs any possible Section 507(b) Claims asserted by the Second Lien Parties.

14. A secured creditor's collateral may be surcharged pursuant to Bankruptcy Code section 506(c) where costs and expenses, in addition to being reasonable and necessary, were incurred for the primary and direct benefit of that creditor. *In re Croton River Club, Inc.*, 162 B.R. 656, 658 (Bankr. S.D.N.Y. 1993) (stating that "if a secured creditor gains no direct and primary benefit from the imposition of administrative expenses, then the trustee may not recover such funds from the secured creditor's collateral as a § 506(c) expense"). Specifically, to surcharge expenses against collateral under Bankruptcy Code section 506(c), the expenses must be incurred "primarily for the benefit of a creditor," *In re Flagstaff Foodservice Corp.*, 739 F.2d 73, 76 (2d Cir. 1984) ("*Flagstaff I*"), and the creditor must "directly benefit[] from the expenditure." *In re Flagstaff*

Foodservice Corp., 762 F.2d 10, 12 (2d Cir. 1985) ("*Flagstaff II*"). The inquiry into whether a secured creditor is a primary beneficiary of expenses to be surcharged under Bankruptcy Code section 506(c) is case specific. *In re Domistyle, Inc.*, 811 F.3d 691, 699 (5th Cir. 2015) (citing *In re Senior–G&A Op. Co., Inc.*, 957 F.2d 1290, 1300 (5th Cir. 1992)).

15. As set forth in the Rule 3012 Motion, the Debtors' Objection and herein, the Debtors have demonstrated that the Section 506(c) Expenses primarily and directly benefited the Second Lien Holders and, therefore, may be used to offset any Section 507(b) Claims asserted by the Second Lien Parties, to the extent any such claims are allowed.

A. The Proposed Surcharges Are Appropriate Even if the Second Lien Parties Were Not the Intended or Sole Beneficiaries of the Section 506(c) Expenses

16. The Second Lien Parties impose a non-existent requirement on their Bankruptcy Code section 506(c) analysis that a debtor may surcharge expenses against a secured creditor's collateral only if that creditor is the ***intended*** or ***sole*** beneficiary of those expenses.[15] With that flawed legal construct in mind, the Second Lien Parties maintain that because the Debtors and other constituencies—and not just the Second Lien Holders—benefited from the Section 506(c) Expenses, the Proposed Surcharges are inappropriate and cannot be deducted from their Section 507(b) Claims (to the extent any such claims exist).

17. These arguments misconstrue applicable law. The number of cases interpreting Bankruptcy Code section 506(c) is limited, but none operate to punish a debtor's estate when resources are expended that directly and primarily benefit particular creditors. The Second Circuit did not hold in *Flagstaff I, Flagstaff II* or in any other case that Bankruptcy Code section 506(c)

[15] *See, e.g.*, Common Memo at 22 (". . . these cases have been run to achieve a sale process intended to maximize the value of all of the Debtors' considerable assets, not just the Prepetition Second Lien Collateral, for the benefit of the estates and all creditors, not just the Second Lien Parties . . . ."); ESL Supplemental Memo at 12 ("Moreover, that ESL ultimately submitted the winning bid does not mean that the Debtors intended ESL to be the primary beneficiary of that transaction . . . ."); Supplemental Wilmington Memo at 18 ("None of the Debtors' actions here were for the sole benefit of the Prepetition Second Lien Creditors, did not relate solely to the Collateral . . . .").

surcharges are appropriate only where the secured creditor was the ***intended*** beneficiary of the costs and expenses incurred in preserving or disposing of its collateral. Similarly, the Second Circuit has never required that a secured creditor be the ***only*** party that benefits from expenses incurred to protect or dispose its collateral.

18. To satisfy Bankruptcy Code section 506(c), the Debtors need only to establish—as they have—that the Second Lien Holders were primary beneficiaries of the expenses incurred to preserve and dispose of the Second Lien Collateral, and that the Second Lien Holders received direct benefits in connection therewith. Even if the Section 506(c) Expenses ultimately did benefit the Debtors' estates and other creditor constituencies, the Second Lien Holders nonetheless were direct and primary beneficiaries of such expenses. The Second Lien Parties completely overlook that a surcharge is appropriate where multiple parties benefited from the same expenses. *See In re Domistyle, Inc.*, 811 F.3d at 698 ("The possibility at the time the expenses were incurred that they could also benefit other creditors does not render surcharge unavailable."). Surcharging the Second Lien Collateral for expenses that ended up benefitting multiple parties therefore is appropriate given that the Second Lien Holders were primary beneficiaries of such expenses. *Id.* (rejecting "the creditor's argument that *primarily* means *solely*" when determining a surcharge (emphasis in original)).

19. To that end, statements made by the Debtors or the Court that the chapter 11 cases and Sale benefited multiple parties, including the Debtors and other stakeholders, do not counsel against a finding the Second Lien Holders were primary beneficiaries within the scope of Bankruptcy Code section 506(c). Such statements are extraneous to the question of whether the Second Lien Holders received primary and direct benefits in connection therewith.

20. The Second Lien Parties' misunderstanding of the law also is evident from their theory that "a process conducted for the primary benefit of the Second Lien Parties [would have started] with an immediate acceptance of ESL's initial bid," Common Memo at 25, and ESL's insistence it "was never chosen as a stalking horse bidder or provided with any of the benefits customarily provided to someone with that favored status," ESL Supplemental Memo at 2. The Debtors' refusal to accept ESL's bid reflected their view at the time that such bid did not maximize the value of their estates. And even though the Debtors declined to extend official purchasing privileges to ESL (as none were justified), there can be no dispute that ESL enjoyed the status of being the only bidder for the Debtors' assets as a going-concern, which fact ESL readily acknowledges. *See* ESL Supplemental Memo at 3 ("ESL emerged as the only party willing to make a going concern bid."). By leveraging the weight of its position, ESL singularly motivated the Debtors' going-concern Sale and, along with Cyrus (who financed the Debtors' ability to run the Sale process), enabled the Debtors, over the objection of the Creditors' Committee, to accomplish the Sale—an outcome that ESL did everything in its power to ensure.

21. The Sale ultimately closed on ESL's terms and resulted in primary and direct benefits for ESL, Cyrus and the Second Lien Holders. Indeed, as set forth below, the application of the correct legal standard to the facts of these cases yields the inescapable conclusion that the Second Lien Holders were primary beneficiaries of the Section 506(c) Expenses and, as a result, any Section 507(b) Claims assertable against the Debtors must be offset entirely by the Proposed Surcharges.

B. The Second Lien Holders Were Primary Beneficiaries of the Section 506(c) Expenses

22. The history of these cases demonstrates that the Second Lien Holders were primary beneficiaries of the Section 506(c) Expenses, which were incurred to effectuate the Sale to ESL.

As discussed herein, the Sale was a culmination of the ESL's and Cyrus's months-long campaign to consummate a going-concern sale of the Debtors' assets to ESL and, thereby, avoid liquidation at all costs. Beginning as far back as their prepetition negotiations with the Debtors over the terms of the Junior DIP, ESL and Cyrus worked in lockstep at every stage of these cases to enable the Sale. These efforts paid off, generating significant benefits and monetary recoveries for the Second Lien Holders that inarguably were direct, quantifiable, and for their primary benefit.

23. ESL, Cyrus and Wilmington Trust now assert—somehow without even a hint of irony—that they and the other Second Lien Holders would have been better off had the Debtors liquidated instead of pursing and consummating the Sale.[16] While the Creditors' Committee advocated that such a result would have been in the best interests of unsecured creditors, none of ESL, Cyrus or Wilmington Trust ever challenged the Sale or any component thereof on behalf of Second Lien Holders prior to seeking to impose hundreds of millions of dollars of Section 507(b) Claims on the Debtors' estates. Indeed, their misguided efforts should be rejected for the reasons that follow.

1. ESL Was a Direct and Primary Beneficiary of the Sale and Section 506(c) Expenses

24. Throughout these cases, ESL received precisely what it wanted: It acquired substantially all of the Debtors' most valuable assets. A mere sample of ESL's and its counsel's statements during the chapter 11 cases underscores both ESL's desired outcome (a going-concern sale of assets to ESL) and the significant pressure ESL exerted on the Debtors to ensure that outcome, rather than a liquidation, came to pass:

[16] *See, e.g.*, Common Memo at 25 ("[I]t can hardly be said that the Second Lien Parties benefited [from the Sale] when they would have achieved full or nearly full recoveries on their claims in a first-day liquidation."); ESL Supplemental Memo at 14 ("To the extent ESL benefited from the going-concern sale, it did so incidentally and alongside the other second Lien Creditors . . . ESL ultimately would have recovered more for its secured claims in a first-day liquidation.").

- "We intend to work closely and collaboratively with other stakeholders to restructure the company's balance sheet using the Chapter 11 framework as quickly and efficiently as possible and will continue to press forward with the goal of seeing Sears emerge from this process positioned for success as a smaller, less indebted retailer in an integrated retail environment." ESL Investments, Inc. and Edward S. Lampert Statement on Chapter 11 Reorganization Filing by Sears Holdings Corporation [Press Release] ESL Investments, Inc. and Edward S. Lampert Press Release on Chapter 11 Reorganization Filing by Sears Holdings Corporation (Oct. 15, 2018), attached hereto as **Exhibit B**.

- "ESL Investments' longstanding goal has been to enable Sears Holdings Corporation to return to profitability, for the benefit of Sears and all of its stakeholders . . . ESL put forward proposals in April and August to acquire certain Sears assets, followed by a comprehensive proposal in September for liability management transactions, strategic asset sales (including those assets that ESL had made proposals to purchase) and real estate transactions." *Id.*

- "As you know, ESL believes that the best way for the Debtors to maximize the value of the estates (and to preserve tens of thousands of jobs) may be a going concern sale." Letter from Sean O'Neal to Board of Directors, at 2 (Nov. 4, 2018). Letter from Sean O'Neal to Board of Directors, at 2 (Nov. 4, 2018) (the "<u>O'Neal Letter</u>"), a true and correct copy of which is attached hereto as **Exhibit C**.

- "ESL is investing substantial resources into developing a going concern bid for hundreds of Sears stores and other Sears assets. ESL is working around the clock with potential lenders seeking to finance a bid, with potential partners to structure a bid, conducting necessary diligence and building the business plan that will support a going concern bid. All of this requires a substantial commitment of time and effort from ESL, which ESL is willing to commit so long as the process is fair, and credit bidding is available." *Limited Response to the Preliminary Objection of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. to Debtors' Motion for Approval of Global Bidding Procedures* ¶ 4 [ECF No. 700].

- "In the event that the Board does not override the Subcommittee's decision [to reject ESL's going concern bid], ESL will have no choice but to commence litigation on an expedited basis to hold the relevant members of the Board and the Subcommittee responsible for their breaches of fiduciary duties." Bromley Letter, at 1.

- "ESL has expended substantial resources in its efforts to submit a going concern bid. ESL structured and offered to provide a junior debtor-in-possession financing facility . . . , which served as the (uncompensated) stalking horse for Great American and for the eventual Junior DIP provided by Cyrus." *Id.* at 2.

- "Here, the process from the beginning has focused on the narrow window available for a going concern transaction and the need for a wind-down reserve [unlike in the Toys R Us bankruptcy]." *Id.* at 4.

- "[T]he rejection of [ESL's] going concern proposal violates the duty of care, because it guarantees that the Debtors' largest creditor, ESL, will receive a materially lower recovery on its claims than if the January 7 proposal were accepted." *Id.* at 5.

- "ESL holds approximately $2.4 billion of senior secured debt of Sears. In the Buyer's capital structure, more than $1.3 billion of this debt will be converted into equity. ESL is investing over $300 million in cash to facilitate its credit bid, including buying out other senior debt holders under the IP/Ground Lease, the FILO Facility, the Real Estate Loan 2020 and the Sparrow mortgage debt. Furthermore, ESL will be extending substantial long-term credit to New Sears, including a minimum of $106 million of the New Letter of Credit Facility and $87.5 million as part of the three-year Real Estate Loan. ***ESL therefore has much to lose if the Buyer's go forward business plan is not successful.***" *ESL's Omnibus Response in Support of the Going Concern Sale Transaction* ¶ 30 [ECF No. 2379].

- "And, undercutting the UCC's purported concern about the risk and costs of uncertainty [in connection with the APA conditions] is its relentless pursuit of ***liquidation, a scenario far more uncertain and risky than the Proposed Sale.***" *Id.* ⁋ 77.

- "It is true that what happened in this case from the very beginning was that ESL has indicated very clearly that it was interested in a going concern transaction." Transcript of Feb. 7, 2019 Hearing 81:2-5 (J. Bromley on behalf of ESL).

- "In this circumstance, this transaction that is being proposed to be approved is substantially better than the liquidation alternative, and it's substantially better than the one that the Debtors have shown you." *Id.* at 95:16-19.

25. ESL's desire to credit bid and acquire the Debtors' assets was so ingrained that on January 8, 2019, ESL agreed to fund the negative operating costs of the estates through the auction while ESL worked to improve its bid. Transcript of Jan. 8, 2019 Status Conf. 10:8-18 (the parties agreeing that $17.9 million of ESL's $120 million deposit would be non-refundable and paid to the estates should ESL lose the auction). ESL was the only bidder at the auction (outside of the liquidation alternative favored by the Creditors' Committee) and submitted the only going-concern bid.

26. Moreover, ESL, Cyrus and the other Second Lien Holders received the quantifiable benefit of an allowed ***$433.45 million credit bid*** (of which ESL held 78.3%) and the allowance of the remainder of their secured claims for credit bidding and other purposes. *See Declaration of Brian J. Griffith in Support of the Debtors' Motion to Estimate Certain 507(b) Claims for Reserve Purposes* ⁋ 8 [ECF No. 4035]. Had there been a day-one liquidation, the Second Lien Holders likely would have received no recovery on account of the Second Lien Collateral. *Id.* ("Specifically, Second-Lien Holders, as participants in the credit bid, received a 100% recovery on account of their respective, credit bid Second-Lien Debt."). This $433.45 million was approximately 40% of the total $1.078 billion in Second Lien Debt outstanding, and it represented more than 100% of the value of the Second Lien Collateral as of the Petition Date. *See id.* at Ex. A. As detailed above, the value of the Second Lien Collateral on the Petition Date was only between $373 million and $577 million, meaning the recovery by the Second Lien Holders on account of the credit bid was between 75% and 116% of the value of the Second Lien Collateral as of the Petition Date.

27. As made clear through its press releases, letters and actions, ESL had one singular goal in these cases: to acquire its hand-selection of the Debtors' retail operations and real estate assets as a "going concern." The only reason those assets had value was because the Debtors expended significant estate resources to preserve those assets pending the Sale (at the expense of unsecured creditors, not Second Lien Holders in respect of the Second Lien Collateral). Indeed, ESL's desired outcome for which it so avidly fought was made possible because the Debtors incurred significant expenses to run the chapter 11 cases, preserve the value of the Second Lien Collateral and effectuate the Sale. The Proposed Surcharges are appropriate and necessary here as to the Second Lien Collateral securing ESL's claims.

2. Cyrus Was a Direct and Primary Beneficiary of the Sale and Section 506(c) Expenses

28. Cyrus likewise was a primary beneficiary of the Sale and Section 506(c) Expenses, and its attempt to recast its role in these cases as a mere bystander and unwilling participant in ESL's credit bid is revisionist. *See* Cyrus Supplemental Memo ¶ 6. Just as ESL was a principal driver of the campaign to cause the Sale and avoid liquidation at all costs, so too did Cyrus provide fundamental contributions in support of the Sale that ultimately yielded direct and quantifiable benefits to itself.

29. Cyrus's position that the Sale did not inure to its primary benefit is undermined by its own conduct throughout these cases in support of the very same Sale. Even prior to the Petition Date, Cyrus already had been identified as a co-lender with ESL for the contemplated junior debtor-in-possession facility (the "Junior DIP") described in the DIP Motion.[17] The Junior DIP was intended to fund the Debtors' efforts to market their assets, hold an auction, and ultimately consummate a going-concern sale. *See id.* ¶ 7 ("The [Junior DIP] would allow the Debtors to operate a larger number of stores while they try to secure a buyer for a substantial part of their business as a going concern"). By October 30, 2018, Cyrus had "agreed in principle to fund a significant portion of the proposed financing, which would have fully funded the proposed financing." O'Neal Letter, at 1. Later, after ESL withdrew its bid to fund the Junior DIP, Cyrus competed vigorously with a third-party lender to provide postpetition financing, ultimately agreeing to fund the entire $350 million Junior DIP that the Court approved. *See* Final Junior DIP

[17] *See Debtors' Motion for Authority to (A) Obtain Postpetition Financing, (B) Use Cash Collateral, (C) Grant Certain Protections to Prepetition Secured Parties, and (D) Schedule Second Interim Hearing and Final Hearing* [ECF No. 7] (the "DIP Motion") ¶ 15.

Order.[18] It defies logic that Cyrus would invest so substantially in the Debtors' ability to conduct a going-concern sale if it did not anticipate and receive benefits commensurate with its efforts.

30. As the Junior DIP lender, Cyrus's actions proved critical in enabling the Sale. Not only did Cyrus's Junior DIP provide the Debtors with the required runway to complete the Sale, but in agreeing to roll over up to $350 million of the Junior DIP into new financing for Transform on a cashless basis, Cyrus made the Sale possible. Absent Cyrus's agreement to roll over its debt, ESL would have had to advance or procure $350 million in additional cash to cover the Junior DIP obligations—something ESL would have been unwilling to do and unable to obtain from a third party.

31. The monetary benefits Cyrus received in connection with the Sale it enabled were direct and quantifiable. Cyrus received a substantial recovery on account of its Second Lien Debt as a result of its "unwilling" participation in the credit bid. Cyrus Memo ⁋ 6. Additionally, ESL agreed, pursuant to a Court-approved financing agreement, to purchase at closing all of Cyrus's outstanding obligations under the Term Loan Credit Agreement, dated January 4, 2018 (the "IP/GL Debt"). Specifically, ESL purchased from Cyrus approximately $48.1 million of its IP/GL Debt holdings at par, inclusive of accrued and unpaid interest, thereby providing Cyrus with a 100 percent recovery on account its substantial holdings of such debt. *See* Exhibit B to Project Transform Commitment Letter Between ESL Investments, Inc. and Cyrus Capital Partners, LP, dated January 17, 2019 (the "Cyrus Commitment Letter"), attached hereto as **Exhibit D** (providing that ESL shall purchase Cyrus's holdings IP/GL Debt in the principal amount of $48.1 million plus

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[18] *See Final Junior DIP Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing and (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims; (II) Modifying the Automatic Stay; and (III) Granting Related Relief* [ECF No. 1436] (the "Final Junior DIP Order").

accrued and unpaid interest). Cyrus's receipt of direct and quantifiable benefits is undeniable and the Proposed Surcharges are appropriate.

3. The Remaining Second Lien Holders Were Direct and Primary Beneficiaries of the Sale and Section 506(c) Expenses

32. The remaining Second Lien Holders, represented here through Wilmington Trust, as the collateral agent and indenture trustee for certain tranches of Second Lien Debt, also received direct benefits through the Sale and were primary beneficiaries of the Section 506(c) Expenses. Like ESL and Cyrus, the remaining Second Lien Holders participated in the credit bid and thereby received a substantial recovery on account of the Second Lien Collateral. At no time during these cases did they or Wilmington Trust express a preference for liquidation or oppose to the Sale. Therefore, the Proposed Surcharges are appropriate with respect to all Second Lien Holders.

III. THE EQUITIES OF THE CHAPTER 11 CASES WEIGH IN FAVOR OF ESTOPPING ESL, CYRUS AND WILMINGTON TRUST FROM ASSERTING SECTION 507(B) CLAIMS AND DENYING THEIR STATUS AS PRIMARY BENEFICIARIES OF THE SECTION 506(C) EXPENSES

33. Despite directly and indirectly opposing the Debtors' liquidation and demanding and/or supporting the Sale, ESL and Cyrus now claim that they were not the primary beneficiaries of the expenses that made the Sale possible, arguing instead that they would have fared better in a liquidation scenario. But for the deliberate actions of ESL and Cyrus, liquidation—for which the Creditors' Committee advocated as being in the best interests of unsecured creditors—would have been the Debtors' fate. This Court should recognize this about-face as the opportunistic ploy that it is and apply well-established principles of equity to estop ESL and Cyrus from asserting Section 507(b) Claims and denying their status as primary beneficiaries of the Sale and Section 506(c) Expenses.

A. The Equitable Doctrines of Judicial Estoppel and Unclean Hands Apply

34. Two equitable doctrines apply with equal force to this dispute: (i) judicial estoppel and (ii) unclean hands. "Judicial estoppel is designed to prevent a party who plays fast and loose with the courts from gaining an unfair advantage through the deliberate adoption of inconsistent positions in successive suits." *In re CCT Comms., Inc.*, 420 B.R. 160, 169 (Bankr. S.D.N.Y. 2009) (quoting *Wight v. BankAmerica Corp.*, 219 F.3d 79, 89 (2d Cir. 2000)). Although judicial estoppel "depends heavily on the specific factual context and is 'probably not reducible to any general formulation of principle," this Court nevertheless has made clear that it "generally will apply judicial estoppel 'if: [a] a party's later position [in a legal proceeding] is clearly inconsistent with its earlier position; [b] the party's former position has been adopted in some way by the court in the earlier proceeding; and [c] the party asserting the two positions would derive an unfair advantage against the party seeking estoppel.'" *In re Frontier Ins. Group, Inc.*, 585 B.R. 685, 703 (Bankr. S.D.N.Y. 2018) (Drain, J.) (quoting *BPP Illinois, LLC v. Royal Bank of Scotland Group PLC*, 859 F.3d 188, 192 (2d Cir. 2017)); *see also In re Delphi Corp.*, No. 05-44481 (RDD), 2008 WL 3486615, at *14 (Bankr. S.D.N.Y. Aug. 11, 2008) (stating that judicial estoppel applies where a party takes a position that is "clearly inconsistent with a position that it successfully pursued in the prior proceeding, in a way that the Court adopted," such that the party would receive an unfair advantage or impose an unfair detriment on opposing parties in the current proceeding). Judicial estoppel may apply to different proceedings within the same chapter 11 cases. *See In re CCT Comms., Inc.*, 420 B.R. at 169–71 (applying judicial estoppel where a debtor designated itself as a small-business debtor for purposes of an exclusivity motion and then tried to reverse this designation for purposes of a motion to dismiss or convert). It also may apply to inconsistent positions within the same proceeding. *See In re Andrews*, 385 B.R. 496, 502–04 (Bankr. D. Conn. 2008) (applying judicial estoppel where inconsistent statements were made in the same

proceeding); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (stating that judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase").

35. Under the doctrine of "unclean hands," any party "who comes to equity must come with clean hands." *PenneCom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004). "The unclean hands defense requires consideration of many facts, including not only the conduct of the opposing party . . . but the motivations for it and the alleged prejudicial impact" it causes. *In re Haimil Realty Corp.*, No. 14-11779 (MEW), 2015 WL 1396610, at *5 (Bankr. S.D.N.Y. Mar. 24, 2015) (citation omitted). Like judicial estoppel, the doctrine of unclean hands depends upon the specific facts of the case and "gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *In re Swift*, 496 B.R. 89, 101 (Bankr. E.D.N.Y. 2013) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814–15 (1945)). A party must "have acted fairly and without fraud or deceit as to the controversy in issue," or else the doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Id.* (quoting *Precision Instrument Mfg.*, 324 U.S. at 814–15).

B. The Equities of the Chapter 11 Cases Weigh in Favor of Estopping ESL from Asserting Section 507(b) Claims and Denying Its Status as a Primary Beneficiary of the Section 506(c) Expenses

36. ESL's about-face is an overt attempt to use the Bankruptcy Code in a manner that is contrary and offensive to its equitable foundation. It is indisputable that ESL played ***the*** central role at every major stage of these chapter 11 cases and was the primary driver of the Debtors' efforts to effectuate the Sale and avoid liquidation. The record demonstrates not only that ESL desired this outcome, but also that ESL did everything in its power to obtain it. ESL's claim that

it benefited from the Sale only "incidentally and alongside the other Second Lien creditors," ESL Supplemental Memo at 14, is beyond disingenuous and defies reality. In actuality, ESL received everything it wanted, including the Debtors' assets at a substantial discount.

37. From the inception of these cases, ESL demonstrated an unyielding commitment to its core belief that the value of the Debtors' assets is maximized through a going-concern sale and not through liquidation. ESL's first major step toward achieving its objective was proposing funding for the Debtors to conduct an auction process in support of a going-concern sale through the Junior DIP. *See* DIP Motion ⁋ 15. After the Debtors secured requisite financing to market and sell their assets on a going-concern basis through Cyrus's Junior DIP, ESL remained steadfast in its desire and support for the Sale and opposition to liquidation at all costs. In addition to making several statements on the record in support of the Sale, as set forth above, ESL accused the Debtors' board of directors of potential breaches of fiduciary duties if it did not accept ESL's going-concern bid. *See* Letter from J. Bromley, counsel to ESL, to Board of Directors, at 1 (Jan. 7, 2019). In ESL's own words "[i]t is true that what happened in this case from the very beginning was that ESL has indicated very clearly that it was interested in a going concern transaction." February 7, 2019 Hearing Tr. 81:2-5 (J. Bromley, counsel to ESL).

38. ESL now comes before this court of equity as if none of that ever happened. Instead of acknowledging its deliberate and, contrary to the Creditors' Committee's wishes, successful efforts to avoid liquidation and push for the Sale, ESL asks the Court to adopt its new position that it would have been better off under a first-day liquidation and, as a result of the Debtors' decisions, ESL suffered some type of harm. The equities of these cases estop ESL from adopting this new and contrary position when ESL already benefited from its prior position. *See In re CCT Comms., Inc.*, 420 B.R. at 171 (applying judicial estoppel where a debtor designated itself as a small

business to gain a benefit in the plan process and then "reverse[d] course to avoid the burdens of the plan process associated with small business debtor status").

39. Additionally, and for the same reasons, ESL's hands are unclean. Until now, ESL never so much as suggested that it might gain more in a liquidation scenario than through the Sale, instead demonstrating repeatedly through public statements and actions that it preferred the going-concern Sale, pursuing that Sale, and threatening those who questioned the wisdom of that Sale. The equities of the chapter 11 cases do not permit ESL's opportunistic attempt to reverse its earlier position for its sole pecuniary gain and at the expense of the Debtors' estates and all other creditors.

C. The Equities of the Chapter 11 Cases Weigh in Favor of Estopping Cyrus from Asserting Section 507(b) Claims and Denying Its Status as a Primary Beneficiary of the Section 506(c) Expenses

40. Like ESL, Cyrus is attempting to rewrite the history of these chapter 11 cases so that it can assert substantial Section 507(b) Claims and capture value from the Debtors' remaining unencumbered assets. To lend credibility to its new position that it would have preferred and benefited from a liquidation scenario, Cyrus attempts to recast itself as a mere bystander and unwilling participant in the going-concern sale process. This purely fictional account conveniently ignores the reality that Cyrus and ESL have long pursued a common goal of facilitating the Sale.

41. Cyrus's position is undermined by the entire history of its conduct during the chapter 11 cases. In addition to agreeing to fund a substantial portion of ESL's proposed postpetition financing, which Cyrus knew at the time was to fund a going-concern sale process, Cyrus ultimately provided the Debtors with the Junior DIP that directly enabled the Sale even after ESL dropped out of the contest to provide such funding. *See* Final Junior DIP Order. Even more telling of Cyrus's desire to effectuate the Sale was its decision to roll over up to $350 million of outstanding obligations under the Junior DIP to Transform on a cashless basis. Absent this concession, which another lender likely would been loath to make, the Sale most likely would not

have closed. As icing on the cake, Cyrus agreed to provide loan Transform with a new credit facility in the principal amount of $175 million to help ensure the viability of the Sale. *See* Exhibit A to the Cyrus Commitment Letter, attached hereto as **Exhibit E**.

42. Cyrus's preference for a going-concern sale and the avoidance of liquidation has been clear since prior to the inception of the chapter 11 cases, and the Sale is a direct result of Cyrus's efforts. If the Court were to accommodate Cyrus's about-face, such decision would unfairly benefit Cyrus at the expense of other interested parties (primarily unsecured creditors) by permitting an inequitable windfall for Cyrus. For these reasons, as with ESL, the equities of the chapter 11 cases weigh in favor of estopping Cyrus from asserting Section 507(b) Claims and denying its status as a primary beneficiary of the Section 506(c) Expenses. *See In re CCT Comms., Inc.*, 420 B.R. at 171.

43. Additionally, and for the same reasons, Cyrus does not come to this Court with clean hands. As with ESL, Cyrus's unclean hands are evidenced by its new position on liquidation and the Sale, which flatly contradicts the position it took earlier in the chapter 11 cases. Cyrus facilitated the Sale and enabled the Debtors to avoid liquidation, and it cannot now claim otherwise. The Court should recognize Cyrus's conduct for what it is and, accordingly, reject Cyrus's argument that it is entitled to Section 507(b) Claims and is not a primary beneficiary of the Section 506(c) Expenses.

D. The Equities of the Chapter 11 Cases Weigh in Favor of Estopping Wilmington Trust from Asserting Section 507(b) Claims and Denying Its Status as a Primary Beneficiary of the Section 506(c) Expenses

44. As with ESL and Cyrus, the equities preclude Wilmington Trust's Section 507(b) Claims. Wilmington Trust did not advocate for the Sale, but neither did it advocate ***against*** the Sale on behalf of Second Lien Holders. In fact, in its *Response of Wilmington Trust, National Association, as Collateral Agent to Notice of Successful Bidder and Sale Hearing* [ECF No. 2089]

(the "Wilmington Response"), Wilmington Trust expressly stated its acquiescence in the Sale. Wilmington Response ⁋ 4 ("[Wilmington Trust] has no objection to the sale pursuant to the [APA]."). Despite this, Wilmington Trust is now trying to put its thumb on the scale for its own benefit and to the detriment of the Debtors and the Debtors' unsecured creditors by claiming that the Sale negatively affected the Second Lien Holders. The Court should reject this belated and misguided effort on fundamental equitable principles.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Debtors' Rule 3012 Motion and the Debtors' Objection, the Creditors' Committee respectfully requests that the Court (i) deny the Second Lien Parties' claims under Bankruptcy Code section 507(b), (ii) grant the Debtors' request for a surcharge under Bankruptcy Code section 506(c), and (iii) grant such other and further relief as the Court deems just, proper and equitable.

New York, New York
Dated: June 27, 2019

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EXHIBIT A

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January 7, 2019

BY EMAIL

Board of Directors
Sears Holdings Corporation
3333 Beverly Road
Hoffman Estates, Illinois 60179

Re: Going Concern Sale/Liquidation

Dear Sir/Madam:

This firm represents ESL Investments, Inc. and its affiliates (including JPP, LLC and JPP II, LLC) and Mr. Edward S. Lampert (together, "ESL"), which submitted a series of proposals to purchase on a going concern basis substantially all of the operating assets of Sears Holdings Corporation ("SHC") and certain of its debtor affiliates, all of which are debtors and debtors-in-possession (collectively, the "Debtors").

As set forth in detail below, ESL hereby demands that the Board of Directors of SHC (the "Board") immediately override the decision of the Subcommittee of the Restructuring Committee of the Board (the "Subcommittee") to reject ESL's improved going concern bid referred to below to prevent an imminent breach of fiduciary duties, work to formalize and qualify that proposal and move forward with the auction contemplated by the Bidding Procedures Order. In the event that the Board does not override the Subcommittee's decision, ESL will have no choice but to commence litigation on an expedited basis to hold the relevant members of the Board and the Subcommittee responsible for their breaches of fiduciary duties.

As the Board is aware, ESL is the Debtors' largest creditor, having lent the Debtors more than \$2.6 billion, of which more than \$2.4 billion is secured by valid and enforceable security interests over much of the Debtors' assets. On January 4, 2019, ESL filed 236 proofs of claim memorializing its claims against the Debtors. In addition, Cascade, as agent, filed 12 proofs of claim memorializing additional claims against the Debtors in which ESL holds approximately 87% of the economic exposure.

As the Board is further aware, ESL has expended substantial resources in its efforts to submit a going concern bid. ESL structured and offered to provide a junior debtor-in-possession financing facility (a "Junior DIP"), which served as the (uncompensated) stalking horse for Great American and for the eventual Junior DIP provided by Cyrus. ESL has conducted substantial due diligence, engaged in extensive good faith negotiations with the Debtors, the Subcommittee and their respective advisors, and expended millions of dollars attempting to reach agreement on the terms of a going concern bid.

In addition, ESL has produced hundreds of thousands of pages of documents to the Subcommittee on a voluntary basis and made Mr. Lampert and Mr. Kamlani, its two most senior executives, available for full day interviews in connection with the Subcommittee's investigation. ESL refutes the allegations made by the Subcommittee's advisors that there are colorable claims against ESL and is confident that there will never be a finding of liability against ESL. In any event, the theories underlying the purported claims alleged against ESL actually concern the appropriateness of the conduct of the Board generally (not limited to ESL), the committees of independent directors that approved the relevant transactions, and the advisors to the Board and such committees.

Throughout this process, ESL has stated consistently its belief in Sears, its belief in the future of Sears and in its steadfast dedication to saving this iconic American retailer and the nearly 50,000 jobs that it provides to Americans across the country. In pursuit of its goal of consummating a going concern bid, ESL assembled and submitted a compelling and actionable bid by the December 28, 2018 deadline set forth in the Bidding Procedures Order (as set forth in more detail in the letter from ESL to Lazard Frères & Co. LLC dated December 28, 2018, the "December 28 Bid"). Among other things, the December 28 Bid included a commitment from three leading financial institutions for up to $1.3 billion of asset backed financing for "new" Sears, provided a basis to resolve virtually all secured claims against the Debtors, and would have preserved a substantial store footprint for Sears and continued employment opportunities for tens of thousands employees.

ESL strongly believes that the December 28 Bid, as submitted, should have been designated a "Qualified Bid" as defined in the Bidding Procedures. Representatives of ESL, including its Chief Executive Officer (Mr. Lampert), met with three of the four members of the Special Committee, including both members of the Subcommittee, and their respective advisors for three hours in the early evening of January 2, 2019 at the offices of Weil Gotshal & Manges LLP to discuss ESL's going concern proposal. A few hours after that meeting concluded, ESL was informed by representatives of the Debtors and the Subcommittee that the December 28 Bid would not be designated a qualified bid and advised that ESL would need to improve its proposal in at least four "threshold" respects. ESL was also advised that a chambers conference was scheduled with the Bankruptcy Court for the afternoon of January 4, 2019.

After further discussions on January 3, 2019, ESL worked to respond to those four issues. The first issue, which related to the availability of the ABL financing, was resolved after several discussions among ESL, the Debtors and their respective advisors. The second issue involved a

$30 million difference in the deposit, seemed capable of prompt resolution in the event that the other issues were resolved. After further discussions with the Debtors, ESL proposed on January 4, 2019 to resolve the remaining two issues, the responsibility for paying what was described as $450 million in administrative claims and the release requested by ESL as part of its proposal, by agreeing to assume approximately $225 million of administrative liabilities.

Despite these very material improvements, counsel for the Debtors informed counsel for ESL that the improved going concern proposal had also been rejected. ESL's counsel then attended the January 4 chambers conference, at which the Debtors' counsel stated in the presence of the Bankruptcy Court that despite the rejection of its most recent proposal, ESL should remain engaged in the process.

Again, notwithstanding ESL's even stronger belief that both the December 28 Bid and the substantially improved proposal should be qualified, ESL made a further improved proposal on the evening of January 5, 2019. The January 5 proposal included the assumption by ESL of "cure costs" in respect of contracts and leases that would be assumed as part of the going concern proposal. Although such cure costs were estimated to be as much as $180 million, ESL's January 5 proposal did not set any cap on such obligations. Repeating the now disheartening pattern, late in the afternoon of January 6, 2019, ESL was told that its further improved going concern proposal would not be qualified under the Bidding Procedures.

In rejecting the January 6 proposal, the primary rationale given by the Subcommittee and its representatives was that ESL's improved bid, if accepted, would not provide "complete assurance" that the Debtors would remain administratively solvent because there was some risk that the remaining assets of the estates would not be sufficient to satisfy the remaining administrative liabilities. As a result, ESL was advised that its bid could be qualified only if ESL assumed this risk and "backstopped" the payment of all administrative claims, estimated to be approximately $335 million. In a final attempt to bridge the gap, ESL proposed today to acquire certain assets and assume $257 million of additional administrative liabilities, including severance obligations and section 503(b)(9) obligations. With these additional modifications, ESL improved its December 28 Bid by taking responsibility for an additional $482 million in administrative claims, plus cure costs relating to assumed contracts in an uncapped amount. By this proposal, ESL clearly satisfied the Subcommittee's previously stated "threshold" issue of providing for payment of $450 million in administrative liabilities. Nevertheless, the Subcommittee rejected this still further improved proposal, again citing a concern about administrative solvency.

This oft-stated concern is unfounded for several reasons.

<u>First</u>, the January 7 proposal should not leave the Debtors administratively insolvent. When these cases were filed, the Debtors, with the consent of senior secured lenders, including ESL, agreed to establish a wind-down reserve of $240 million to avoid the risk of administrative insolvency. This wind-down reserve, managed prudently, particularly if the estates provide appropriate oversight of professionals' fees, should be more than enough to assure administrative solvency. Furthermore, we are confident that that the evidence will demonstrate that even in a going concern sale predicated on ESL's January 7 proposal, the Debtors should have reasonable assurance that the estates will remain administratively solvent. Quite simply, it would be a

terrible tragedy if Sears were to liquidate, with the attendant loss of tens of thousands of jobs and enormous value, as a result of a poorly managed wind-down or reckless reliance on inaccurate projections. In addition, the determination as to the possibility of administrative solvency should be made by management and the team from M-III Partners, who are most familiar with the numbers, and not the Subcommittee, which on this issue faces an insurmountable conflict described below.

This situation stands in stark contrast with the situation in Toys R Us. In Toys, the company plunged headlong into the holiday season with grand plans of a prompt emergence backed by billions in DIP loans and billions in new trade credit, only to find itself commencing a complete liquidation in the US by early March, with the main US operating entity administratively insolvent (administrative creditors at Toys R Us Delaware, Inc. are estimated to recover approximately 42 cents on the dollar). Here, the process from the beginning has focused on the narrow window available for a going concern transaction and the need for a wind-down reserve. Unlike Toys, where there was no going concern bid, the Debtors have a viable and fully funded going concern bid.

Second, even if there were a possibility that ESL's going concern proposal would leave the Debtors administratively insolvent, there is no alternative available to the Debtors that would lead to a better result for the Debtors or their creditors. Strikingly, the Subcommittee and its advisors have never advised that a piecemeal liquidation, the only real alternative to ESL's going concern proposal, would yield anywhere near the value that would be obtained by the January 7 proposal. Rather, every other alternative will yield a result that is materially worse for the Debtors' creditors and, in such circumstances, courts have recognized that administrative insolvency, while not favored, does not prevent approval of a going concern sale under section 363 of the Bankruptcy Code. The best overall result should be pursued, even if administrative insolvency may result.[1] In fact, given that a chapter 7 trustee is empowered to sell assets under section 363,[2] there is simply no argument that administrative solvency is a *sine qua non* for approval of a going concern bid.

To this end, the Debtors and, in particular, the Subcommittee, which is in control of the decision given its mandate, must focus on achieving the resolution of these cases that will maximize the value of the Debtors' assets. The proposition is quite simple – the Debtors have a duty to pursue the transaction that maximizes value. Period.

Under this standard, the January 7 proposal is far and away the best alternative for the Debtors. There is simply no comparison between ESL's going concern proposal and any other option. The going concern proposal is the only one that will satisfy, in full, nearly all of the Debtors' senior secured debt – the DIP Loan (the rolled-up $1.2 billion pre-petition ABL loan as well as the $300 million of post-petition incremental financing), the Junior DIP Loan, the FILO

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[1] *See In re ICL Holding Co.*, 802 F.3d 547 (3d Cir. 2015); *In re Real Mex Rests., Inc.*, No. 11-13122-BLS, Hr'g Tr., Dkt. No. 93 at 192 (Bankr. D. Del. Feb. 10, 2012) ("[W]hile I recognize that there is an administrative insolvency at present in this case, and I have noted my hope and expectation with respect to the, frankly, improvement via a sale in the prospects for all creditors in this case, I believe that it would be much worse, and the administrative insolvency and the circumstances for all creditors would be much worse without this sale."); *In re Allen Family Foods, Inc.*, No. 11-11764-KJC, Hr'g Tr., Dkt. No. 225 at 44 (Bankr. D. Del. July 27, 2011).

[2] 11 U.S.C. § 363(b), (c)1; *see also In re Mejia*, 576 B.R. 464, 468-69 and 471 (Bankr. S.D.N.Y. 2017) (Glenn, J.).

Facility, the IP/GL Facility, the Dove and Sparrow real estate facilities, and the Second Lien Loans. To fund the bid, ESL has raised $1.3 billion from three leading banks, ESL and Cyrus are adding an additional $175 million in incremental real estate loans, and ESL has committed to invest more than $200 million to buy out the senior lenders in several separate loan facilities, including Cascade, Kawa, Cyrus and Great American.

Third, the January 7 going concern proposal also is the best result for *all* of the Debtors' creditors, not just for the administrative creditors, which include retained professionals and the members of the Subcommittee themselves. It will eliminate the burden of billions of dollars of claims on the Debtors' estates, it will employ nearly 50,000 people and avoid the severance and similar claims that would arise if those employees were needlessly terminated, it would prevent claims from the rejection of real estate leases, and it would assume substantial claims of trade creditors.

Fourth, a rejection of the ESL proposal violates the very real duties that the Board and the Subcommittee owe to ESL and to Cyrus, which is participating in the bid, both of which are the Debtors' largest senior secured creditors. Based on extensive conversations with the advisors to the Debtors and the Subcommittee, all senior creditors – other than ESL and Cyrus – will be treated virtually the same (and are thus indifferent to the form of a resolution) under a liquidation or a going concern proposal. Moreover, the liquidation scenarios shared with ESL are hopelessly wrong, ignoring the hundreds of millions of dollars owed to ESL and Cyrus in respect of adequate protection replacement liens and superpriority claims under 507(b), which must be paid before general administrative claims. The Board and the Subcommittee cannot simply ignore the very real interests of their largest senior secured creditors, particularly on the basis of made up numbers.

While administrative solvency is important, it cannot be a myopic goal, particularly one that obscures logic and prevents the acceptance of the clearly superior going concern proposal. It is quite clear that the mere possibility of an administrative solvency on which the Subcommittee is focused is predicated on successful litigation against ESL on multiple fronts. There is not any question that ESL lent the Debtors over $2.6 billion, that each loan was approved by independent directors supported by their selected independent financial and legal advisors, and that all of the liens supporting ESL's secured debt are valid and perfected. Success in litigation therefore lies in what would be a lengthy, expensive and highly speculative attack on multiple transactions against the Debtors' largest creditor. The only thing that is certain from that approach is the feeding frenzy of professional fees that will result. That is not a prudent basis on which to predicate administrative solvency. That is casino gambling at its worst, particularly when ESL's proposal contains a very rich settlement offer made in the hope of facilitating a commercial resolution proffered only in the context of saving Sears.

The decision to reject the going concern proposal is simply not a decision that is consistent with the fiduciary duties that the members of the Subcommittee owe to the Debtors' creditors, including the Debtors' largest creditors, ESL and Cyrus. First, the rejection of the going concern proposal violates the duty of care, because it guarantees that the Debtors' largest creditor, ESL, will receive a materially lower recovery on its claims than if the January 7 proposal were accepted. Second, and more importantly, the rejection of the going concern proposal violates the duty of loyalty because the Subcommittee's focus on administrative solvency is a thinly disguised requirement that the members of the Subcommittee receive releases from the ramifications of their reckless decision to reject the going concern proposal, releases that would be provided through a confirmed chapter 11 plan of reorganization. Because a confirmed plan would not be possible without the administrative solvency required by 11 U.S.C. §1129(a)(9)(A), the Subcommittee is requiring unreasonable assurances of administrative solvency. Its members are hopelessly conflicted.

In light of the foregoing, ESL hereby demands that the Board immediately override the decision of the Subcommittee to reject the January 7 going concern proposal to prevent an imminent breach of fiduciary duties, work to formalize and qualify that proposal and conduct the auction on the basis of the qualified bids received by December 28, 2018 bid deadline. In the event that the Board does not immediately override the Subcommittee's decision, ESL will have no choice but to commence litigation on an expedited basis to hold the Board and the Subcommittee responsible for their breaches of fiduciary duties.

Very truly yours,

/s/ James L. Bromley

James L. Bromley

cc: Ray C. Schrock, P.C.
Paul M. Basta
Scott K. Charles

EXHIBIT B

ESL Investments, Inc. and Edward S. Lampert Statement on Chapter 11 Reorganization Filing by Sears Holdings Corporation

October 15, 2018 01:19 AM Eastern Daylight Time

BAY HARBOR ISLANDS, Fla.--(BUSINESS WIRE)--ESL Investments, Inc., Edward S. Lampert and certain affiliated entities (collectively "ESL") issued the following statement today regarding the announcement by Sears Holdings Corporation ("Sears") that the company has filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code:

"ESL Investments' longstanding goal has been to enable Sears Holdings Corporation to return to profitability, for the benefit of Sears and all of its stakeholders. ESL consistently believed that restructuring the company's finances as a going concern and outside a court-run bankruptcy process would have been a better path for Sears. To that end, ESL put forward proposals in April and August to acquire certain Sears assets, followed by a comprehensive proposal in September for liability management transactions, strategic asset sales (including those assets that ESL had made proposals to purchase) and real estate transactions. All the proposals had the goal of providing liquidity and runway for a transformation. While a comprehensive out-of-court resolution was ESL's preferred approach, it did not prove possible to achieve this outside the framework of a Chapter 11 process. ESL believes that supervision by a judge will enable creditors to address any issue among them according to a clear set of rules and permit the sale of certain assets through a court-approved auction process to maximize value.

ESL invested time and money in Sears because we believe the company has a future. We intend to work closely and collaboratively with other stakeholders to restructure the company's balance sheet using the Chapter 11 framework as quickly and efficiently as possible and will continue to press forward with the goal of seeing Sears emerge from this process positioned for success as a smaller, less indebted retailer in an integrated retail environment."

Contacts

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EXHIBIT C

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CONFIDENTIAL

November 4, 2018

BY EMAIL

Ray Schrock, Esq.
Sunny Singh, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153-0119

Re: DIP Process

Dear Ray:

I am writing on behalf of ESL Investments, Inc., its affiliated investment funds (collectively, "ESL") and Edward S. Lampert concerning ESL's previously submitted proposal for a potential debtor-in-possession financing for Sears Holdings Corporation and its affiliated debtors (collectively, the "Debtors").

As you recall, on October 30, 2018, ESL submitted a proposal for DIP financing involving a $350 million incremental facility that would be secured by a first priority lien on Previously Unencumbered Collateral. As part of that proposal, the existing ABL DIP Lenders would agree to certain changes to the ABL DIP Facility, including allowing the incremental DIP lenders to have a senior lien on the Previously Unencumbered Collateral and reducing the ABL DIP Lenders' new money commitment from approximately $300 million to $150 million, in keeping with the $150 million effective reserve that was established prior to the bankruptcy filing date.

At the time we submitted the October 30 proposal, one of ESL's co-lending partners, Cyrus Capital, had agreed in principle to fund a significant portion of the proposed financing, which would have fully funded the proposed financing. In addition, ESL and its advisors were in conversations with other potential DIP lenders and were seeking consents from the Debtors to reach out to additional potential DIP lending partners. Shortly after ESL submitted its proposal, it received a letter, dated November 1, 2018, from the Debtor's investment bank, Lazard, inviting ESL and other interested parties to submit DIP financing proposals based on one of three structures.

On November 2, 2018, Cyrus informed ESL that the Debtors had asked Cyrus to submit its own proposal and to not work with ESL on the October 30 proposal if it wanted the best chance of being selected as the DIP lender. We were subsequently informed that the Debtors had introduced other potential lenders to Cyrus for its incremental facility, which as requested by the Debtors would not include ESL. During my conversation with you yesterday, you confirmed that the Debtors' clear preference was for ESL to not be a DIP lender and that the Creditors Committee had informed you that they would object to any DIP financing proposed by ESL.

Given the Debtors' stated desire to not have ESL as a DIP lender (and their facilitation and encouragement of Cyrus' dropping out of ESL's bid), ESL is withdrawing its October 30 proposal and will not be submitting a proposal prior to tomorrow's 12 noon deadline. It is our understanding that the Debtors are confident that they will not need ESL's participation as a DIP lender in order to obtain the best possible terms, but if that is not the case, please let us know. As we have discussed on many occasions, ESL was interested in providing DIP financing only if the Debtors were unable to find other sources on terms attractive to the Debtors. We are gratified that ESL's work with Cyrus and the Debtors in structuring the Junior DIP Financing and the new incremental DIP financing has given the Debtors a blue print and path to obtaining other DIP financing sources.

As you know, ESL believes that the best way for the Debtors to maximize the value of the estates (and to preserve tens of thousands of jobs) may be a going concern sale. Based on your statements at the first-day hearing and the milestones set forth in the ABL DIP Financing Credit Agreement, we believe that the Debtors share this view. We understand, however, that other constituencies may prefer a full liquidation and that the Debtors will be influenced by their views. We therefore request that the Debtors immediately inform us if the Debtors change their position and prefer a liquidation, or otherwise determine that they will not be willing to accept any going concern bid by ESL, as ESL is investing substantial resources in conducting diligence, finding partners, arranging for financing, preparing documentation and otherwise pursuing a possible going concern bid. Much work needs to be completed prior to the December 15 deadline imposed by the ABL DIP Lenders in the ABL DIP Financing Credit Agreement, and we will certainly need the Debtors' ongoing cooperation and commitment to satisfy that milestone.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Sean O'Neal

Sean A. O'Neal

cc:

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EXHIBIT D

Execution Version
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ATTORNEY CLIENT COMMUNICATION

EXHIBIT B

SUMMARY OF AGREED TERMS

Parties	ESL Investments, Inc. (along with its affiliated investment funds, "ESL"), funds managed by Cyrus Capital Partners, LP ("Cyrus"), Transform Holdco LLC (a Delaware limited liability company), a wholly owned subsidiary of ESL ("Newco"), as borrower (the "Borrower"), and solely with respect to the New LC Facility, Citibank, N.A., as LC Issuer.
Transaction	Newco will acquire, directly or indirectly, substantially all of the go-forward retail footprint and other assets and component businesses of Sears Holdings Corporation and its debtor subsidiaries (collectively, "Sears") as a going concern pursuant to a sale under section 363 of title 11 of the United States Code and as further described in that certain Asset Purchase Agreement, executed by Newco as of January 17, 2019 (the "APA"). Cyrus will participate alongside ESL in Newco's transactions contemplated by the APA under the terms outlined herein (the "Transaction").
Treatment of Claims	
Debtor-in-Possession Conversion	The certain junior debtor-in-possession facility (the "Existing DIP"), pursuant to that Superpriority Junior Lien Secured Debtor-in-Possession Credit Agreement, dated as of November 29, 2018 (the "Existing DIP Agreement") shall be rolled into a new financing of Newco (the "Exit Financing Facility") with Cyrus acting as lender thereunder (in such capacity, the "Exit Financing Lender") at or substantially concurrently with the consummation of the Transaction, which shall include funding with the proceeds of a new senior asset-based loan facility (the "New ABL"), subject to limitations set forth in the following paragraph. The agreement to document the Exit Financing Facility shall be negotiated in good faith and shall be on substantially the same terms and conditions as the New ABL, other than (i) as otherwise specified herein, (ii) such other changes to the terms set forth therein as may be mutually agreed upon, taking into account the operational and strategic requirements of the Borrower and its subsidiaries (after giving effect to the acquisition and the Transaction) in light of their capitalization, size, business, industry, matters disclosed in the APA and the Borrower's proposed business plan, as well as the financial condition, credit quality and historical performance of the Company and (iii) modifications to reflect changes in law or standard market practice (such as bail-in provisions, provisions relating to successor LIBOR and provisions relating to divisible limited liability companies) (collectively, the "Exit Financing Documentation Principles"). The aggregate principal amount of the Existing DIP outstanding at the closing (the "Closing") of the Transaction (up to $350 million) will be rolled over on a cashless basis into the Exit Financing Facility at the Closing, with any amounts under the Existing DIP being paid off in full and commitments

	thereunder terminated at the Closing. The guarantors under the Exit Financing Facility shall be limited to each existing and future domestic subsidiary of Newco that guaranties the obligations incurred under the New ABL. The Borrower and each of the guarantors shall grant the Exit Financing Lender (as defined below) valid and perfected first priority liens in the Exit Financing Collateral, subject to certain customary exclusions to be agreed, consistent with the Exit Financing Documentation Principles. The Borrower and each of the guarantors shall grant the Exit Financing Lender (as defined below) valid and perfected first priority liens in the Exit Financing Collateral, subject to certain customary exclusions to be agreed, consistent with the Exit Financing Documentation Principles. No more than $170 million of the Existing DIP shall remain an obligation of the Debtors as of the Closing and such amount shall be repaid by the Debtors at Closing.
Term	The maturity of the Exit Financing Facility will be coterminous with the maturity of the New ABL, which will not exceed 5 years from the Closing, but the amounts outstanding may be pre-paid at any time by Newco or ESL, subject to the limitations on voluntary prepayments set forth in the New ABL. Pre-payment may be made at par plus accrued interest during the first year of the loan, at 103% plus accrued interest during the second year of the loan, at 102% plus accrued interest during the third year of the loan, at 101% plus accrued interest in the fourth year of the loan, and at par plus accrued interest thereafter. In addition to the right to prepay at any time, ESL shall have a call right pursuant to which it can purchase the loans under Exit Financing Facility from the Exit Financing Lender at a price equal to the principal amount outstanding under the Existing Financing Facility, plus accrued and unpaid interest (which shall exclude default interest, unless such default interest is actually repaid to ESL, as agent, in which case such amount for the applicable period shall be remitted by ESL to Cyrus), plus the prepayment penalties provided in the previous paragraph, if applicable. There shall be no amortization, cash sweeps or mandatory prepayments, except as set forth below under the caption “Asset Sales” below.
Interest Rate	The applicable interest rate of the Exit Financing Facility shall be LIBOR + 13%, paid in kind (“<u>PIK Interest</u>”) and will accrue monthly until full repayment of the Exit Financing. The PIK Interest shall be added to the principal amount of the Exit Financing Facility (the accrued PIK Interest, the “<u>PIK Principal</u>”). Pursuant to the terms of a letter agreement to be entered into between ESL and the Exit Financing Lender (the “<u>ESL/Cyrus Side Letter</u>”), ESL shall agree that it shall purchase and the Exit Financing Lender may sell to ESL on a monthly basis 100% of the PIK Principal accrued in respect of the previous month in exchange for an amount in cash equal to LIBOR +10% on the principal amount of the Exit Financing Facility outstanding as of such date (without giving effect to the PIK Interest), and the Exit Financing Lender shall have the right to put the PIK Principal to ESL if ESL fails to purchase the PIK Principal within 5 business days following the monthly payment date (which shall be mutually agreed). The PIK Principal will continue to accrue interest under the Exit Financing and, pursuant to the terms of the ESL/Cyrus Side Letter, will (x) be junior to any payment

	otherwise required to be made to the Exit Financing Lender and repaid following repayment of all other principal and accrued interest owing under the Exit Financing Facility to the Exit Financing Lender and (y) not have any voting rights under the Exit Financing Facility documentation.
Collateral	The Exit Financing Lender shall have a first lien priority on all of the assets that are acquired pursuant to the APA, other than (i) the ABL Priority Collateral (as defined in the ABL Commitment Letter (as defined below)), (ii) the assets secured under the Dove Loan Agreement[1] (the "Dove Collateral") and (iii) the assets secured under the Sparrow Loan Agreement[2] (the "Sparrow Collateral") (such collateral, the "Exit Financing Collateral"). The New ABL lenders shall have a first lien priority on the ABL Priority Collateral (as defined in that certain ABL commitment letter, dated as of January 9, 2019, by and among Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Citigroup Global Markets Inc., Royal Bank of Canada, RBC Capital Markets and Transform Holdco LLC (the "ABL Commitment Letter")) and a silent second lien priority on the Exit Financing Collateral. The New ABL lenders shall automatically release their liens on the Exit Financing Collateral upon any disposition of Exit Financing Collateral that constitutes a permitted disposition under the New ABL and/or upon repayment in full of the amounts outstanding under Exit Financing Facility (and any refinancing thereof) and the release of the liens on the Exit Financing Collateral by the Exit Financing Lenders in connection with such repayment. Intercreditor arrangements between the Exit Financing Lenders, the LC Lenders and the New ABL Lenders attached are set forth on Annex I hereto. For the avoidance of doubt, in connection with the Transaction, the holders of the debt secured by the Sparrow Collateral and/or Dove Collateral may credit bid the par amount plus accrued and unpaid interest of all debt secured by Sparrow Collateral and Dove Collateral in exchange for equity in Newco at par plus accrued interest. Newco shall agree that the equity interests in the entity that is the most junior mezzanine borrower, which is the indirect owner of the Dove Collateral and Sparrow Collateral, shall not be pledged to any Person.
Asset Sales	To the extent there is a sale of any of the Exit Financing Collateral, (x) 100% of the net cash proceeds (calculated net of taxes and expenses but before prepayment of the Exit Financing Facility) received by Newco from such asset sale shall be used to repay the amount outstanding under the Exit Financing Facility until the aggregate principal amount of such payments equal $230 million and (y) thereafter, (1) 50% of the net cash proceeds (calculated net of taxes and expenses but before prepayment of the Exit Financing Facility) received by Newco from such asset sale shall be used to repay the amount

[1] "Dove Loan Agreement" means that certain Third Amended and Restated Loan Agreement, dated as of June 4, 2018 (as may be amended, restated, amended and restated or otherwise modified from time to time), by and among Sears Holdings Corporation (the "Guarantor"), certain of the Debtors (individually or collectively, as the context may require, the "Borrowers"), JPP, LLC ("JPP"), JPP II, LLC and Cascade Investment, L.L.C. and JPP its capacity as the Administrative Agent at such time.

[2] "Sparrow Loan Agreement" means that certain Credit Agreement, dated March 14, 2018 (as may be amended, restated, amended and restated or otherwise modified from time to time), by and among SRC O.P. LLC, SRC Facilities LLC and SRC Real Estate (TX), LLC, collectively as borrower, the lenders party thereto, UBS AG, Stamford Branch, as administrative agent, and UBS Securities LLC, as Lead Arranger and Bookrunner.

	outstanding under the Exit Financing Facility and (2) 50% of the net cash proceeds (calculated net of taxes and expenses but before prepayment of the Exit Financing Facility) received by Newco from such asset sale shall be used to repay the amount outstanding under the New ABL (without a requirement to reduce revolving commitments).
Letter of Credit Facility	The certain letter of credit facility (the "LC Facility") pursuant to that certain Letter of Credit and Reimbursement Agreement, dated as of December 28, 2016, as amended prior to the date hereof, among Sears Holdings Corporation, Sears Roebuck Acceptance Corp. and Kmart Corporation, as borrowers, Citibank, N.A., as administrative agent and issuing bank and the lenders party thereto, (the "LC Facility Agreement"), at Closing, shall be rolled over into a new letter of credit facility with Newco (the "New LC Facility"), which documentation for the New LC Facility shall be negotiated in good faith and shall be on substantially the same terms and conditions as the LC Facility Agreement (including the related cash collateral agreement), other than (i) modifications as expressly set forth in this Term Sheet, including with respect to security and intercreditor agreements as described below, (ii) there shall be no restrictions on amendments to, or borrowings under, the New ABL, (iii) the borrowing base under the LC Facility Agreement shall be amended in the New LC Facility to be (x) 80% of the book value of pledged inventory of Newco, (y) 90% of the book value of pledged receivables of Newco and (z) 10% of the appraised equity value[3] of the Dove Collateral and the Sparrow Collateral, tested against the sum of (a) the outstanding LC Commitments under the New LC Facility and (b) the total amount of outstanding indebtedness secured by the ABL Priority Collateral that is senior to or pari passu with the New LC Facility, (iv) the New LC Facility will not be a "bank product" under the New ABL, (v) such other changes to the terms set forth therein as may be mutually agreed upon among Citibank, N.A., as LC Issuer, and if applicable, as administrative agent under the New LC Facility, Cyrus and ESL, as LC Lenders, taking into account (A) the operational and strategic requirements of the Borrower and its subsidiaries (after giving effect to the acquisition and the Transaction) in light of their capitalization, size, business, industry, matters disclosed in the APA and the Borrower's proposed business plan, as well as the financial condition, credit quality and historical performance of the Company and (B) the administrative, agency, policy and operational requirements of the administrative agent and LC Issuer under the New LC Facility in light of the transaction structure or otherwise and (vi) modifications to reflect changes in law or standard market practice (such as bail-in provisions, beneficial ownership provisions, provisions relating to successor LIBOR and provisions relating to divisible limited liability companies) (collectively, the "LC Documentation Principles"). ESL shall be a letter of credit lender and hold approximately $106 of the New LC Facility, Cyrus shall be a letter of credit lender and hold approximately $165 million of the New LC Facility (each of ESL and Cyrus, individually or collectively as the context may require, in such capacity, an "LC Lender") and Citibank, N.A. shall be the letter of credit issuer of the New LC Facility (in such capacity, the "LC Issuer").

[3] "Equity Value" means the appraised value of the Dove Collateral and the Sparrow Collateral less the amount of any debt secured by such real estate (to be based on the most recent Cushman & Wakefield appraisals and to be updated for any subsequent appraisals).

	The New LC Facility will have a silent second lien priority on the ABL Priority Collateral (which first lien priority, for the avoidance of doubt, shall be held by the lenders under the New ABL) and will have a third lien priority on the Exit Financing Collateral (which first lien priority, for the avoidance of doubt, shall be held by the lenders under the Exit Financing Facility and which second lien priority, for the avoidance of doubt, shall be held by the lenders under the New ABL). For the avoidance of doubt, the maturity date of the New LC Facility shall be the same as the LC Facility Agreement. The liens on the Exit Financing Collateral securing the New LC Facility shall be automatically released and cease to constitute "Collateral" upon payment in full of the amounts outstanding under the Exit Financing Facility (and any refinancing thereof) and the release of the liens thereunder. The borrower and each of the guarantors under the New LC Facility shall grant the LC Lenders valid and perfected second priority liens in the ABL Priority Collateral and perfected third priority liens in the Exit Financing Collateral, subject to certain customary exclusions to be agreed, consistent with the LC Documentation Principles. There shall be new security agreements put in place to evidence such liens. For the avoidance of doubt, all existing cash collateral pledged pursuant to that certain Amended and Restated Cash Collateral Agreement, dated as of August 9, 2017, as amended, among the Letter of Credit Lenders under the LC Facility Agreement as pledgers and Citibank, N.A., as secured party, shall remain in place and will continue to secure the obligations of the LC Lenders under the New LC Facility. Cyrus represents and warrants to ESL that, as of the date hereof, it holds approximately $165 million of the outstanding debt pursuant to the LC Facility, plus accrued and unpaid interest (the "Cyrus LC Debt").
FILO Term Loan	In connection with the Transaction, the par amount plus accrued and unpaid interest outstanding under FILO term loans shall be credit bid by its holders in exchange for equity in Newco on the same basis as other secured debt. Any lender under the FILO term loan facility that is not participating in such credit bid shall be paid in full in cash at or prior to the Closing Date, or, alternatively, ESL shall pay cash to the Sellers on the Closing Date in the amount of the obligations owed to such lender under the FILO term loan as of the Closing Date and such lender's liens shall attach to such proceeds in their relative order of priority.
Intellectual Property/Ground Lease Term Loans	Cyrus represents and warrants to ESL that, as of the date hereof, it holds $48.1 million Tranche A indebtedness of the principal amount outstanding pursuant to IP/GL Loan Agreement[4](the "Cyrus IP/GL Debt"). At Closing (and conditioned on the Closing occurring), ESL shall purchase the Cyrus IP/GL Debt for an amount equal to the outstanding principal amount of the Cyrus IP/GL Debt at such time plus accrued and unpaid interest

[4] "IP/GL Loan Agreement" means that certain Term Loan Credit Agreement, dated as of January 19, 2018 (at any time amended, restated, amended and restated, supplemented or otherwise modified), by and among Sears Holdings Corporation, Sears Roebuck Acceptance Corporation and Kmart Corporation, as borrowers, JPP LLC, the lenders party thereto and JPP, LLC as agent.

	(excluding default interest, unless such default interest is actually repaid to ESL as agent, in which case such amount for the applicable period shall be remitted by ESL to Cyrus, and including $93,000 in unpaid legal fees previously billed to Sears by Cyrus); provided, that upon the request of ESL the closing of such acquisition may be extended to a date no later than 60 days following Closing, with the consent of Cyrus in its sole discretion.
Second Lien Debt	"2L Notes" shall mean those certain 6.625% Notes due 2019 of Sears Holding Corporation. Cyrus represents and warrants to ESL that, as of the date hereof, it holds $155.6 million (including accrued interest through October 15th, 2018) of the 2L Notes (the "Cyrus 2L Notes"). "Second Lien Debt" shall mean (i) any amounts outstanding under that certain Second Lien Credit Agreement, dated September 1, 2016, by and among Sears Holding Corporation, Sears Roebuck Acceptance Corp. and Kmart Corporation, the lenders named therein and JPP, LLC as agent, and (ii) the 2L Notes The Cyrus 2L Notes that are being credit bid pursuant to the APA shall be exchanged for equity in Newco at Closing at par plus, in each case, the applicable interest accrued and unpaid thereon. Any remaining 2L Notes held by Cyrus and not credit bid as described in the forgoing sentence shall remain outstanding and be in full force and effect as of, and from and after, the Closing, and shall be (x) unaffected by any provisions hereof, and (y) be subject to the treatment and receive any and all distributions to which such remaining 2L Notes are entitled in the bankruptcy estates of the Debtors. At Closing, Cyrus will receive equity in Newco in the amount of the Second Lien Debt held at Closing by Cyrus consistent with valuing inventory at 100% of cost, but in no case less than 1.26% of the Newco equity per $50 million of principal and accrued interest (pro-rated for lesser amounts). Cyrus expects to deliver no less than approximately $159mm of Second Lien Debt principal including interest accrued through February 15, 2019 (equivalent to 4% of Newco equity). The Second Lien Debt held by Cyrus will retain a deficiency claim against the Debtors/Sellers consistent with valuing inventory at the actual credit bid amount (i.e., the difference between par plus accrued interest less the credit bid amount).
Debt and Dividend Restrictions	For so long as the principal amount outstanding under the Exit Financing Facility is equal to or greater than $50,000,000, the following covenants shall apply under the Exit Financing Facility (provided, that Borrower shall have the right at any time to request consent to take the following actions under the Exit Financing Facility, subject to the consent of the Required Lenders (as defined in the Exit Financing Facility agreement): • The total amount of debt, in the aggregate, that is secured by the Dove Collateral and Sparrow Collateral (including mortgage debt and mezzanine debt) shall not exceed $375,000,000; provided that in no event shall it exceed 50% of the as-leased appraised value of the Sparrow Collateral and Dove Collateral (in the aggregate) and • Newco shall not make any dividends or distributions to its equity holders (other than any amounts that are required pursuant to applicable law or the Internal Revenue Service Code).

Financial Covenant	None
Amortization	None
Affirmative Covenants	With respect to the Exit Financing Facility, the same as, and with respect to the New LC Facility, subject to the LC Documentation Principles, substantially the same as, those under the New ABL with conforming changes, but in no event less favorable to the Borrower than those in the Credit Documentation (as defined in the ABL Commitment Letter).
Negative Covenants	The same as those under the New ABL (but in no event less favorable to the Borrower than those in the New ABL) with conforming changes to be mutually agreed.
Representations and Warranties	The same as those under the New ABL with conforming changes, but in no event less favorable to the Borrower than those in the Credit Documentation (as defined in the ABL Commitment Letter).
Events of Default	The same as those under the New ABL with conforming changes to be mutually agreed, but in no event less favorable to the Borrower than those in the New ABL; *provided* that certain cushions to be agreed with respect to the increase of materiality thresholds in comparison to the corresponding thresholds under the New ABL.
Post-Transaction	
Corporate Governance	For so long as Cyrus holds at least 1% of Newco equity, Cyrus shall have the right to appoint one director of the board of directors of Newco that is acceptable to ESL, such consent not to be unreasonably withheld. If such director satisfies applicable independence requirements, including qualifying as an "Independent Director" as determined by the New York Stock Exchange and SEC rules) such director shall be a member of any independent committee of the board of directors of Newco that is formed to approve transactions of Newco with affiliates. Cyrus shall receive the following rights with respect to the Newco equity held by Cyrus: (i) customary tag-along rights, (ii) registration rights if Newco offers its shares through an initial public offering (for the avoidance of doubt, Cyrus cannot use registration rights to cause an initial public offering), and (iii) the right to receive monthly, quarterly and annual unaudited and audited financial reports of Newco. In addition, ESL shall have the right to drag-along Cyrus' equity interest in Newco in connection with any sale or merger of the equity of Newco to a third party (other than to ESL, any affiliate of ESL or any entity in which ESL is the largest shareholder of such entity).
Governing Law	New York

ANNEX I

[To attach Intercreditor Term Sheet]

EXHIBIT E

EXHIBIT A

PROJECT TRANSFORM
DESCRIPTION OF TRANSACTION

Capitalized terms used but not defined in this Exhibit A shall have the meanings set forth in the Commitment Letter to which this Exhibit A is attached (the "***Commitment Letter***"). In the case of any such capitalized term that is subject to multiple and differing definitions, the appropriate meaning thereof in this Exhibit A shall be determined by reference to the context in which it is used.

Newco, a newly created limited liability company formed under the laws of Delaware formed by ESL Investments, Inc. and certain of its affiliates intends to acquire directly or indirectly substantially all of the go-forward retail footprint and other assets and component businesses of Sears Holdings Corporation, a Delaware corporation and its subsidiaries, as a going concern with the Purchase Agreement pursuant to a sale under section 363 of the Bankruptcy Code.

The Acquisition and costs and expenses related to the Transactions and the ongoing working capital and other general corporate purposes of Newco and its subsidiaries after consummation of the Acquisition will be financed from the following sources (and no financing other than the financing described herein will be required in connection with the Transaction):

(a) at least $1.0 billion of common equity will be contributed in the form of cash, assets or other securities (the "***Equity Contribution***") to Newco by ESL or other Equity Investors;

(b) up to $1.3 billion in senior secured credit facilities (the "***Senior Credit Facilities***") of the Borrower (as defined in the Term Sheet), comprised of (i) a first-in last-out term loan facility aggregating not less than $250 million (subject to certain increases pursuant to any flex provisions) and (ii) a revolving credit facility of up to $1.05 billion, in each case described in Exhibit B to the Commitment Letter;

(c) gross proceeds from a non-recourse bridge loan secured by certain real property (the "***Real Estate Bridge Loan***"), not to exceed $175 million *plus* a $50 million incremental amount;

(d) $350 million in gross proceeds from the Exit Financing Facility;

(e) the New LC Facility; and

(f) at least $1.0 billion in gross proceeds from a credit bid as set out in the Purchase Agreement, which gross proceeds may be included in the calculation of the Equity Contribution described above in clause (a) above.

In connection with the foregoing, it is intended that:

ESL Investments, Inc. (together with any affiliate thereof) will establish (i) one or more newly formed corporations, limited liability companies and/or partnerships, (ii) Newco and (iii) one or more newly formed corporations, limited liability companies and/or partnerships as wholly owned direct subsidiary of Newco.

The principal, accrued and unpaid interest, fees and other amounts (other than contingent obligations that by their terms survive termination) outstanding on the Closing Date under (i) Third Amended and Restated Credit Agreement dated as of July 21, 2015 (as amended, restated, supplemented or otherwise modified from time to time prior to the date hereof, the "***Prepetition Credit Facility***"), among Sears Holdings Corporation, Sears Roebuck Acceptance Corp., Kmart Corporation, the Lenders from time to time party thereto, Bank of America as administrative agent and co-collateral agent and the other parties thereto, (ii) the Superpriority Senior Secured Debtor-in-Possession Asset-Based Credit Agreement, dated as of November 29, 2018 (as amended from time to time, the "***DIP Credit Facility***") by and among Sears Holding Corporation, Sears Roebuck Acceptance Corp., Kmart Corporation, Bank of America, N.A. as administrative agent and co-collateral agent and the other parties and the lenders party thereto and (iii) to the extent required to acquire the Purchased Assets free and clear of all liens, the Junior DIP Term Loan Agreement (as defined in the DIP Credit Facility; the Junior DIP Term Loan Agreement, the Prepetition Credit Facility and the DIP Credit Facility, the "***Existing Credit Facilities***") will be repaid in full in connection with the other Transactions and all commitments to extend credit under the Existing Credit Facilities will be terminated and guarantees in connection therewith shall be terminated and/or released and all letters of credit terminated (other than those grandfathered into, backstopped by or cash collateralized under the Senior Credit Facilities). The repayment of the Existing Credit Facilities shall be referred to herein as the "***Refinancing***."

The proceeds of the Facilities borrowed on the Closing Date and cash on hand at the Company and its subsidiaries on the Closing Date will be applied (i) as described above to pay the acquisition consideration, (ii) to pay the fees and expenses incurred in connection with the Transactions (such fees and expenses, the "***Transaction Costs***") and (iii) to consummate the Refinancing.

The transactions described above (including the payment of Transaction Costs) are collectively referred to herein as the "***Transactions***".