

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

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7 SEARS HOLDING CORPORATION, et al.,

8

9 Debtor.

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12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 April 27, 2021

17 10:11 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN WALKER

1 HEARING re Case Status Conference

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3 HEARING re Motion to Compel: Debtors Third Motion to Enforce  
4 the Asset Purchase Agreement (ECF #9395)

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6 HEARING re Opposition Brief / Transform Holdco LLCs Brief in  
7 Opposition to the Debtors Third Motion to Enforce the Asset  
8 Purchase Agreement (related document(s)9395) (ECF #9426)

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10 HEARING re Response: Debtors' Reply in Further Support of  
11 Third Motion to Enforce the Asset Purchase Agreement  
12 (related document(s)9426, 9395 ) filed by Jacqueline Marcus  
13 on behalf of Sears Holdings Corporation. (ECF #9436)

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15 HEARING re Declaration of Charles W. Allen in Support of  
16 Transform Holdco LLCs Brief in Opposition to the Debtors  
17 Third Motion to Enforce the Asset Purchase Agreement  
18 (related document(s)9395) (ECF #9427)

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20 HEARING re Declaration of Jennifer Brooks Crozier in Support  
21 of Debtors' Third Motion to Enforce the Asset Purchase  
22 Agreement (related document(s)9395) filed by Jacqueline  
23 Marcus on behalf of Sears Holdings Corporation. (ECF #9396)

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1 HEARING re Declaration of Enrique Acevedo in Support of  
2 Debtors' Reply in Further Support of Third Motion to Enforce  
3 the Asset Purchase Agreement (related document(s)9436) filed  
4 by Jacqueline Marcus on behalf of Sears Holdings  
5 Corporation. (ECF #9437)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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P R O C E E D I N G S

THE COURT: Good morning. This is Judge Drain.  
We're here on In re. Sears Holdings Corporation, et al.

This is a completely telephonic hearing. You should introduce yourself and your client the first time that you speak, and you should state your name if you speak later so that the Court Reporter and I can put together your voice with your name.

There's one authorized recording of these hearings. It's taken by Court Solutions, which provides a copy to our clerk's office on a daily basis. If you want a transcript of your hearing, you should contact the clerk's office to arrange for the production of one.

Because the hearings today are completely telephonic, you need to keep your phone on mute unless you're speaking, at which point, of course, you need to unmute yourself.

So with that introduction, I have the agenda for today's calendar and I'm happy to go down that agenda. As I see it, there's only -- there are only two matters on the agenda, the first being a status conference and the second being the Debtors' third motion to enforce the asset purchase agreement.

MR. FAIL: Thank you, Your Honor. Garrett Fail, Weil Gotshal & Manges, for the Debtors. Are you able to

1 hear me?

2 THE COURT: Yes, I can hear you fine, thanks.

3 MR. FAIL: Thank you very much, Your Honor. We'll  
4 take the hearing then in the order of the agenda, which for  
5 parties' reference is filed at Docket 9440.

6 The status conference listed as agenda item one is  
7 in accordance with paragraph 14 of the Court's confirmation  
8 order. The report that I'll provide today is an update to  
9 the report my partner, Sunny Singh, gave on January 21st,  
10 which was an update to ones that I'd previously provided.

11 We filed the presentation online prior to the  
12 start of the hearing, and that's at Docket No. 9445 for  
13 parties that want to follow along or to refer to it later.

14 Your Honor, do you have it available?

15 THE COURT: Yes, I have a copy of it in front of  
16 me.

17 MR. FAIL: Thank you. So the presentation  
18 highlights the continued progress that the Debtors have made  
19 in reconciling administrative claims. They reconciled more  
20 than 3,970 to date, up from 3,942 that was at the time of  
21 our last report. The Debtors have eliminated more than \$1.3  
22 billion in claims asserting entitlement to administrative or  
23 priority status, and the Debtors have allowed 1,669 claims  
24 in the process.

25 The chart on the bottom of page 2 of the

1 presentation shows the positive updates from the last  
2 report, a reduction in the Debtors' estimate of allowed opt-  
3 out claims by \$10 million and an overall reduction in the  
4 estimate of remaining administrative claims from \$90.1  
5 million in January to \$75.8 million today.

6 Page 3 of the presentation shows the continued  
7 progress on post-confirmation distribution, essentially  
8 catchup payments for parties that have settled subsequent to  
9 the last update. The total now is \$42.8 million has been  
10 made to creditors post-confirmation pursuant to the program.

11 Page 4 highlights a reduction in the difference  
12 between estimated cash available and projected uses of cash  
13 prior to a plan effective date, and the progress is down  
14 from \$97.3 million difference to \$80.8 million.

15 Page 4 also shows on the source or asset side of  
16 the balance sheet a slight reduction in cash on hand as a  
17 result of payments that were made since our last report, a  
18 decrease in non-cash assets as a result of assets that were  
19 monetized, so it's really a reclassification. On the uses  
20 side of the balance sheet, Your Honor, we show a reduction  
21 in claims estimates and a reduction in other expenses, both  
22 positive developments.

23 The sources are broken out in the same level of  
24 detail as we provided in our last report on page 5 of this  
25 presentation.

1 In summary, sources, excluding recoveries from  
2 avoidance actions, increased by \$2 million since the last  
3 report. We'll also note that there's an increase from  
4 confirmation date estimates, again, exclusive preference  
5 recoveries, and the increase from that is \$62.8 million.

6 Page 6 of the presentation provides a breakdown of  
7 the projected uses, again, in the same level of detail as  
8 we've previously provided. Actual uses to date remain below  
9 confirmation date estimates, despite the extended time pre-  
10 effective date. In addition, projected uses through the end  
11 of the year would remain within the confirmation date  
12 estimate range.

13 Page 7 of the report shows progress on the  
14 avoidance action front: 35 percent in number of actions have  
15 been settled, up from 33 percent in the last report; \$43.2  
16 million in cash and administrative claim waivers have been  
17 achieved, up from \$40 million in the last report. And as  
18 stated in our last update, emergence remains contingent on  
19 the successful outcomes of litigation.

20 Your Honor, that would conclude the status update  
21 portion of today's agenda. And unless you have any  
22 questions, which I'm happy to answer or try to answer, I'll  
23 turn the virtual lectern over to Jennifer Crozier, who will  
24 be handling item two on the agenda.

25 THE COURT: Okay. Well, before we do that, do any

1 of the parties on the phone have any questions on the case  
2 update? Okay.

3 MR. SARACHEK: Your Honor?

4 THE COURT: I'm sorry, go ahead.

5 MR. SARACHEK: Sorry. This is Joe SARACHEK. How  
6 are you?

7 THE COURT: Okay.

8 MR. SARACHEK: I represent numerous creditors, and  
9 I just need to convey to the Court a widespread feeling  
10 among the creditor body, which is they're going broke  
11 waiting for this money, the administrative creditors. They  
12 don't understand, as you'll recall at one point, we filed a  
13 motion for mediation. They don't understand why there can't  
14 be a sit down and basically, you know, the matters with ESL  
15 can't be resolved.

16 And I just need to, if the Court wants me to  
17 formally reintroduce a motion for mediation again, I'll do  
18 it. But it's almost a weekly basis where I get asked about  
19 this from one or another one of my clients. And I'm not  
20 pointing fingers at anyone, it just defies logic. That's  
21 it.

22 THE COURT: Well, your focus is then on the  
23 sources of cash going forward?

24 MR. SARACHEK: Yes.

25 THE COURT: Okay. I mean, obviously there is a

1 built-in mediation feature in the preference litigation, and  
2 having seen a number of scheduling orders, it's clear to me  
3 that that is being used. So I think your focus again is  
4 really on the litigation against ESL and other defendants in  
5 the now-consolidated adversary proceedings.

6 The issue there is that your clients are not the  
7 plaintiffs in those proceedings and the plan and  
8 confirmation order contemplate, you know, how the claims  
9 representation will be handled through the Debtors, but more  
10 importantly, the committee.

11 So I guess -- I don't know if you've raised this  
12 with committee counsel, with plaintiffs' counsel in that  
13 litigation. I owe the parties a ruling on multiple motions  
14 to dismiss the Complaints or portions of the Complaints,  
15 which now are consolidated, the most recent motions to  
16 dismiss being heard fairly recently.

17 So I guess you can make the motion, but it would  
18 be more effective if it came from one of the parties to the  
19 litigation.

20 MR. SARACHEK: Okay. I'll reach out to the  
21 committee counsel.

22 THE COURT: Yeah. I think you should talk with  
23 plaintiffs' counsel about it. Obviously, they cannot waive  
24 privilege issues, but I think that's what should be  
25 considered here, or that's the avenue you should take here.

1 MR. SARACHEK: Okay. Thank you, Your Honor.

2 THE COURT: Okay. All right, anyone else?

3 MR. CHAFETZ: Yes, Your Honor. Eric CHAFETZ, I  
4 represent -- of Lowenstein Sandler. I represent one of the  
5 admin claimants who opted into the consent program, GTM  
6 Europe Limited.

7 Just curious if there's any update as to when  
8 creditors should expect the next installment payments to be  
9 made on account of settled admin claims?

10 THE COURT: Okay, good question. Mr. Fail, can  
11 you answer that or perhaps counsel for the admin creditors  
12 group under the admin settlement.

13 MR. FAIL: I can answer it, Your Honor. It's  
14 Garrett Fail again for the record.

15 We are in contact and coordination with counsel  
16 for the creditors' committee and counsel for the  
17 administrative claims representative. We don't -- we aren't  
18 prepared to announce, you know, anything with respect to a  
19 next distribution yet. The information we've provided today  
20 shows the assets that we have today, the projected assets in  
21 the future, and the Court's aware of other parties that have  
22 asserted secured claims in the case.

23 So we will, as we did before, provide advance  
24 notice before any other distribution, but we don't have an  
25 update today in terms of the next distribution.

1 THE COURT: Okay. Well, it seems to me given the  
2 cash on hand, you have on here, unless I'm reading it  
3 incorrectly, secured claims of, although they are subject to  
4 review and objection, I think 17 million. Do those  
5 claimants assert claims to the cash?

6 MR. FAIL: Yes, Your Honor, some of them -- yes,  
7 Your Honor.

8 THE COURT: Okay. And in that full amount or a  
9 much smaller amount?

10 MR. FAIL: I think the largest claim in there --  
11 and don't hold me to this, Your Honor -- but I think the  
12 largest claim is the one that was filed by the relator for  
13 the qui tam action that you may recall, which has a  
14 replacement lien that was granted, so I think that's the  
15 largest. And then I think that there are a couple of other  
16 smaller claims that haven't been allowed or reconciled yet,  
17 but I think the material asserted that hasn't yet been  
18 allowed is the qui tam relator action.

19 THE COURT: Okay. Well, that may well be an  
20 appropriate focus sooner rather than later, given I think a  
21 legitimate desire to have available cash, subject to  
22 reserves of course, continue to be distributed under the  
23 administrative claims settlement.

24 MR. FAIL: Yes, Your Honor. We obviously have our  
25 eyes on that in terms of the amount of cash that's available

1 and in terms of who's in line to receive it. We are also  
2 focused on end-of-case strategies, and so, we're examining  
3 all options and nothing's off the table, so we want to make  
4 sure that, you know, the cases continue to be handled in the  
5 appropriate professional manner that they have.

6 THE COURT: And those discussions include the  
7 administrative claims representative?

8 MR. FAIL: Yes, Your Honor.

9 THE COURT: As well as the committee.

10 MR. FAIL: Yes, Your Honor.

11 THE COURT: All right. Well, I think we should  
12 adjourn this conference no later than the omnibus date after  
13 the next one and we'll see where we are at that point, so I  
14 guess that would be the June omnibus date.

15 MR. FAIL: Your Honor, the confirmation order  
16 provides for quarterly updates, so that may be like one  
17 more, but whatever Your Honor prefers, we're available.

18 THE COURT: Well, I don't know how early in July  
19 it is, but I think we can put it in July; that's fine.

20 MR. FAIL: Thank you, Your Honor. And obviously,  
21 if there are material updates, we'll be happy to provide the  
22 Court with updates and we remain available for questions.

23 THE COURT: All right. And then both for Mr.  
24 SARACHEK and Mr. CHAFETZ and any other people representing  
25 administrative, you can certainly, in addition to speaking

1 to the Debtors' counsel and the committee counsel, reach out  
2 to the administrative claims representative about moving --  
3 steps that could be taken to move along an interim  
4 distribution at least in the meantime.

5 MR. FAIL: Certainly, Your Honor. And again,  
6 Garrett Fail for the record. To the extent that parties,  
7 you know, have suggestions or would like to make  
8 concessions, we're available to hear them. And I know the  
9 administrative claim representative has received contacts  
10 and is unfortunately somewhat hamstrung by the  
11 confidentiality provisions, so we've provided these updates  
12 to provide everybody with the same basis of information.

13 THE COURT: Right. Well clearly, that person  
14 though can be a source of information for the other -- for  
15 the parties who are subject to the confidentiality  
16 agreement. So if counsel for individual creditors have  
17 ideas or proposals, they could certainly make them.

18 MR. FAIL: Of course.

19 THE COURT: It may not be a two-way dialogue, but  
20 they can certainly make those proposals. Okay. Anyone else  
21 on the case conference? All right, thank you.

22 Why don't we turn then to the second and last  
23 matter on the agenda, which again, is the Debtors' third  
24 motion for an order enforcing the asset purchase agreement.  
25 On that matter, I have reviewed the motion and supporting

1 papers, Transform Holdco's memorandum in opposition and the  
2 supporting declaration of Mr. Allen, and finally, the  
3 Debtors' reply in further support of the motion and the  
4 declaration of Mr. Acevedo attached to it. I've also  
5 reviewed the declaration of Ms. Crozier that was attached to  
6 the original motion.

7 So I'm happy to hear oral argument. Let me ask  
8 you first, have there been any developments on the motion?

9 MS. CROZIER: Good morning, Your Honor, and may it  
10 please the Court. This is Jennifer Crozier, Weil Gotshal &  
11 Manges, for the Debtors -- on behalf of the Debtors rather.

12 There have not been further developments, and so  
13 should it please the Court, the Debtors are prepared to go  
14 forward with oral argument this morning.

15 THE COURT: Okay, that's fine. I have a question  
16 or an observation that I want to get out on the table first  
17 before we do that. The order granting the Debtors' motion  
18 for approval of the Transform transaction and approving the  
19 asset purchase agreement was dated and entered February 8,  
20 2019.

21 It provides in paragraph 53 that, "If there's a  
22 conflict between the sale order or the asset purchase  
23 agreement and any documents executed in connection  
24 therewith, the provision in the sale order and the asset  
25 purchase agreement and any such documents shall govern in

1 that order," in that sequence in other words.

2 Paragraph 54 states that "The asset purchase  
3 agreement and related agreements, documents or other  
4 instruments executed in connection therewith may be  
5 modified, amended, or supplemented by the parties thereto in  
6 a writing signed by each party and in accordance with the  
7 terms thereof without further order of the Court, provided  
8 that any such modification, amendment, or supplement does  
9 not materially change the terms of the asset purchase  
10 agreement or related agreements, documents, or other  
11 instruments."

12 And then if you go back to page 2 of the order --  
13 the sale order, that is -- which is a carryover of recitals  
14 describing the context of the order, the order refers to,  
15 quote, "The Court having reviewed and considered, (i) the  
16 sale motion and the exhibits thereto, (ii) the asset  
17 purchase agreement dated as of January 17, 2019 by and among  
18 the buyer and the seller's party thereto, including each  
19 Debtor and certain of the subsidiaries of Sears Holding  
20 Corporation, the defined term sellers," and then it has a  
21 parenthetical, "(as maybe amended and restated from time to  
22 time, including pursuant to that certain amendment no. 1 to  
23 asset purchase agreement by and among the buyer and the  
24 sellers," then it's the defined term, "the asset purchase  
25 agreement)," closed parenthesis, a copy of which is attached

1 hereto as Exhibit B.

2 As far as I can tell, neither the docket nor the  
3 order that I sent to the clerk of the court to be entered on  
4 February 8th of 2019 attach Exhibit B. When I sent the  
5 order to be entered, I instructed the clerk to attach the  
6 exhibits that were sent to me and they are, in fact,  
7 attached to the order, but there's no Exhibit B, so it's  
8 hard to say that I reviewed it.

9 And yet, I believe it is Exhibit B that the  
10 parties are currently addressing in this motion, since it  
11 changed the terms of the original asset purchase agreement,  
12 the execution version that was attached to the sale order as  
13 Exhibit A, in particular, in paragraph 2.13 dealing with  
14 foreign assets.

15 So am I missing something here?

16 MS. CROZIER: Your Honor, Jennifer Crozier for the  
17 record again on behalf of the Debtors. No, we don't believe  
18 Your Honor is missing anything. By arguing as Transform  
19 would have you believe that the parties intended in the  
20 first amendment to give Transform the power to take millions  
21 of dollars otherwise distributable to creditors for itself  
22 and that they intended to give Transform that power without  
23 explicitly seeking the Court's approval of what would be a  
24 material change.

25 And as you yourself have pointed out, Your Honor,

1 the sale order at paragraph 54 requires Court approval of  
2 any modification, amendment, or supplement that would amount  
3 to a material change. And it's one of the very reasons,  
4 Your Honor, why the Debtors argue today that under Section  
5 2.13(a) of the asset purchase agreement, Transform could  
6 acquire nothing more than acquired foreign assets. The  
7 amendment could not have made the deal any worse for the  
8 Debtors or its creditors.

9 THE COURT: Okay. I was going to say I'm happy to  
10 hear something just on this point or Transform's counsel can  
11 wait until it makes it, you know, responsive argument. It's  
12 up to you.

13 MR. WEAVER: Your Honor, it's Andrew Weaver of  
14 Cleary Gottlieb on behalf of Transform. Just on this point,  
15 Your Honor, we know that on February 7th, 2019 at ECF 2599,  
16 that the parties filed a substantially final draft of the  
17 first amendment of the APA, and that document itself -- it's  
18 a redline -- includes the language that's at issue today,  
19 and that's found at pages 355 to 56 of the redline.

20 And so that was submitted to the Court prior to  
21 the final day of the sale hearing. And then on the sale  
22 hearing, the final day on February 8 -- I'm sorry -- on  
23 February 7th, the parties during the hearing discussed the  
24 scope and discussed the first amendment, and that's found on  
25 page 648 line 8 of the February 7th hearing transcript.

1 So, Your Honor, it's our position --

2 THE COURT: Well, no one -- that's the first I've  
3 heard of this, of that point. How is it discussed?

4 MR. WEAVER: Your Honor, I don't have the  
5 specifics as to the discussion at that point. I don't  
6 believe necessarily this particular language itself was  
7 discussed. But the language itself had been submitted to  
8 the Court and was before the Court prior to conclusion of  
9 the sale hearing.

10 MS. CROZIER: Your Honor, this is Jennifer Crozier  
11 again on behalf of the Debtors, if I may. The first  
12 amendment was filed with the Court after the close of  
13 evidence. It was just referenced, as Mr. Weaver himself  
14 points out, there was no discussion of the substance of this  
15 language.

16 At no point, did the parties say, oh and by the  
17 way, Your Honor, under Section 2.13 of the asset purchase  
18 agreement, Transform is now entitled to take millions of  
19 dollars' worth of cash otherwise distributable to creditors,  
20 which in the Debtors' view weighs in favor of the Debtors'  
21 argument here that the amendments to Section 2.13(a) of the  
22 asset purchase agreement were not, in fact, intended to  
23 affect a material change as Transform argues today.

24 MR. WEAVER: Your Honor, again, it's Andrew Weaver  
25 on behalf of Transform.

1 I know we're getting into more of the substance  
2 here and happy to hold my comments in more detail as we get  
3 into the actual argument on the motion. But, Your Honor,  
4 again, the idea that this is some change as it relates to  
5 the acquired foreign assets, you know, there was a  
6 negotiation between the parties and the parties entered into  
7 this deal granting Transform this option.

8 You know, we know that the Debtors have made a big  
9 deal here about how their own employees within their own  
10 subsidiaries felt there wasn't really much cash to be had,  
11 there wouldn't be necessarily excluded assets. I can't  
12 explain their motivation for entering into the transaction,  
13 but that was the deal in plain language that they entered  
14 into.

15 THE COURT: No, but deals in bankruptcy cases are  
16 not two-party transactions.

17 MR. WEAVER: Understood, Your Honor.

18 THE COURT: They're subject to notice and Court  
19 approval, particularly with deals with insiders. And this  
20 deal was quite strenuously opposed by, among other parties,  
21 the unsecured creditors committee, and a material change  
22 that would have been made to the deal after the hearing in  
23 which that objection was overruled, I think would require  
24 more notice than simply being filed on the docket and  
25 actually not provided as an attachment to the Court's order.

1 I don't really review the dockets in my cases. If  
2 I did, I would never do any other work. As we heard in the  
3 presentation earlier today and as is evidenced by the agenda  
4 today, we are now up to docket item 9427 in these cases.  
5 And even at the time of the sale hearing, we were up almost  
6 to docket item 1000.

7 So I do have a serious concern about the context  
8 of this, and I appreciate that Ms. Crozier's argument is  
9 largely one of interpretation in that context, i.e., how  
10 could we have agreed to this if it involved a material  
11 change.

12 But again, it's not just a two-party agreement,  
13 and the order itself defines asset purchase agreement as an  
14 exhibit that isn't attached; what is attached is the January  
15 17 asset purchase agreement, and then it has paragraph 54,  
16 which says you can make changes, but only they're not  
17 material, so I find that troubling.

18 But anyway, why don't we -- is it clear? I just  
19 do want to make one -- I want to make sure I understand two  
20 points. First, is it clear that the draft of amendment  
21 number one that was filed after the close of the sale  
22 hearing; that's question number one, or perhaps during the  
23 sale hearing as opposed to before the sale hearing? And  
24 question number two is, is it clear that when it was  
25 mentioned at the sale hearing, there was no discussion of

1 its material terms as it pertains to this dispute that's now  
2 before me?

3 MS. CROZIER: Your Honor, Jennifer Crozier on  
4 behalf of the Debtors. The proposed first amendment to the  
5 asset purchase agreement was filed (sound drops) on February  
6 7th after the close of evidence but before closing  
7 arguments. And yes, there was a mention of the first  
8 amendment, but no discussion of its material terms.

9 THE COURT: Okay. And Mr. Weaver, do you agree  
10 with that?

11 MR. WEAVER: Your Honor, again, Mr. Weaver, Andrew  
12 Weaver for Transform. It was filed, as I said, on the 7th.  
13 Just looking very quickly here, it was given -- my  
14 understanding from looking at the transcript, it was given  
15 to Your Honor at the sale hearing at page 648. But the  
16 actual discussion of this particular language, Your Honor,  
17 no, we're not suggesting that this particular language was  
18 discussed during the hearing.

19 THE COURT: Okay. And it was provided after the  
20 evidence and before or during oral argument?

21 MR. WEAVER: Yes, Your Honor. It would be day  
22 three of the sale hearing.

23 THE COURT: Okay. So it wasn't introduced into  
24 evidence at the sale hearing.

25 MR. WEAVER: Your Honor, I have to -- I'll be

1 honest, I need to confirm specifically that question.

2 THE COURT: Okay, all right. Well, you have the  
3 transcript there. It was actually provided to me during  
4 oral argument or (sound glitch) some other time with the  
5 rest of that stuff?

6 MR. WEAVER: Again, Andrew Weaver, Your Honor.  
7 I'm sorry, I'm just looking at the transcript in real time  
8 here.

9 THE COURT: Sure.

10 MR. WEAVER: Yeah, I see it at, again, page 648 of  
11 the transcript, a copy of the amended APA was provided of  
12 the language, the change, and there's a discussion about a  
13 number of changes and the redline being provided. But  
14 again, I don't see a specific reference of introducing it  
15 into evidence, but it was discussed and specifically was  
16 raised by counsel for the restructuring subcommittee.

17 THE COURT: Okay. But is that during oral  
18 argument?

19 MR. WEAVER: Yes.

20 THE COURT: Okay. All right, thanks. Okay, Ms.  
21 Crozier, why don't you go ahead then.

22 MS. CROZIER: Thank you, Your Honor, and may it  
23 please the Court.

24 There was no discussion of any material change to  
25 the asset purchase agreement in connection with the first

1 amendment simply because there wasn't one and the plan and  
2 unambiguous language of the contract makes that clear. I  
3 will try to be brief, Your Honor.

4 The question presented to the Court today is a  
5 very simple one: If Transform determined in its sole  
6 discretion that it was necessary or desirable to acquire the  
7 foreign subsidiaries through an equity acquisition, instead  
8 of an asset acquisition, did Transform somehow get more than  
9 acquired foreign assets as that term is defined in Section  
10 213(a), and the answer is no.

11 Section 213(a) makes indisputably clear that if  
12 Transform elected to pivot to an equity acquisition, that  
13 the equity interest it acquired would be, quote, "deemed to  
14 be acquired foreign assets."

15 In other words, those equity interests would be  
16 treated as if they were and as if they had the qualities of  
17 acquired foreign assets; that is to exclude excluded assets  
18 and to include only assets of the type that would have been  
19 acquired assets had they been owned by the sellers as of the  
20 closing date.

21 Now there is no dispute here today that the  
22 foreign subsidiary cash is an excluded asset, that's 2.2(s)  
23 of the asset purchase agreement, and is not an asset of the  
24 type that would have been an acquired asset had it been  
25 owned by the sellers as of the closing dated; that's Section

1 2.1(ee) of the asset purchase agreement. And so, Transform  
2 did not acquire it under Section 2.13(a) and it continues to  
3 belong to the Debtors.

4 Now Transform attempts to evade this outcome by  
5 pointing the Court away from the four corners of the asset  
6 purchase agreement and toward all kinds of extrinsic  
7 evidence, but this cannot succeed because the parties agree  
8 that the language of Section 2.13(a) is clear and  
9 unambiguous.

10 Accordingly, under governing Delaware law, the  
11 Court must give the provision its plain and ordinary meaning  
12 and enforce it as written without reference to all of that  
13 extrinsic evidence with which Transform fills the pages of  
14 its opposition.

15 Now Transform also argues that the Debtors are  
16 barred by the doctrine of acquiescence or are equitably  
17 estopped from recovering the foreign subsidiary cash. But  
18 these arguments fail for all of the reasons set forth in our  
19 papers, and I won't belabor them here. But I will simply  
20 say in short, there was no, quote, "considerable period  
21 during which the Debtors failed to act despite some  
22 purported knowledge that millions and millions of dollars in  
23 cash was sitting in the Indian and Hong Kong bank accounts  
24 as of February 11th, 2019.

25 In fact, quite the opposite is true. The Debtors

1 have been acting ceaselessly, in fact, as Your Honor well  
2 knows, to recover excluded assets from Transform since just  
3 after the closing date, despite having had considerably less  
4 information concerning the nature and existence of some of  
5 those assets than Transform.

6 Accordingly, Your Honor, we respectfully request  
7 that the Court grant the Debtors' third motion to enforce  
8 and enter an order compelling Transform to transfer to the  
9 Debtors \$6,307,656 in foreign subsidiary cash.

10 I'm prepared to answer any further questions that  
11 Your Honor may have; otherwise, I will yield the virtual  
12 podium to Mr. Weaver.

13 THE COURT: Okay. Both sides, I think do, in  
14 fact, assert that amendment number one is unambiguous as far  
15 as the meaning of Section 2.13, but I think that it's pretty  
16 clear that they each assert that it's unambiguous in favor  
17 of their interpretation.

18 And I guess the point there that I would like to  
19 focus you on is that the language itself says that the  
20 shares will be treated as acquired foreign assets, and it  
21 doesn't say anything about the assets of the companies  
22 themselves. Does that -- I guess what you're asking me to  
23 read into this document is that the equity interest would  
24 somehow being press with the definition of acquired foreign  
25 assets, which means that the seller would still own the

1 exempt assets even though the shares were transferred?

2 MS. CROZIER: Yes, that's right, Your Honor. The  
3 phrase, "deemed to be" operated, practically speaking, to  
4 carve those excluded assets out of what was being  
5 transferred under Section 2.13(a) precisely to ensure that  
6 if Transform elected in its sole discretion and for its  
7 convenience to pivot to an equity acquisition, the Debtors  
8 and their creditors could be no worse off, and the language  
9 deemed to be has that effect.

10 Again, it's defined in Blacks and all of the cases  
11 that we've made reference to in our papers show that deemed  
12 to be means to treat something as if it is and as if it had  
13 the qualities of some other thing. And it's not only the  
14 cases or Blacks that uses deemed in that way; the parties  
15 themselves used deemed in that way in other places in the  
16 asset purchase agreement.

17 For example, in Section 4.1 of the asset purchase  
18 agreement, the parties agreed that the closing date would be  
19 deemed to be 12:01 a.m. New York City time on the date on  
20 which the closing actually occurs. Well, the closing didn't  
21 actually occur at 12:01 a.m. New York City time, but the  
22 parties decided that they would treat the closing date to  
23 have occurred for purposes of the parties' interactions or  
24 relationship going forward, and that's precisely what  
25 happened here.

1 THE COURT: So, in essence, what you're saying is  
2 that all the parties really needed to say was that the  
3 sellers shall transfer the equity interests. So this extra  
4 clause really has to have a separate meaning, which is that  
5 the equity interests are, in essence, limited by the  
6 definition of acquired foreign assets?

7 MS. CROZIER: Yes, Your Honor.

8 THE COURT: I mean, I guess that ultimately is a  
9 question for Mr. Weaver. Why have that extra clause in  
10 there if, in fact, the Debtors are selling the assets  
11 already, i.e., the equity interest, which are their assets,  
12 so they're allowed to sell them.

13 Okay. I think I don't have any questions other  
14 than that at this point, but obviously something else may  
15 come up. So why don't I hear from Transform then.

16 MS. CROZIER: Thank you, Your Honor.

17 MR. WEAVER: Thank you, Your Honor. Andrew Weaver  
18 on behalf of Transform. Your Honor, I think there are two  
19 issues. I'd like to try to address the first issue.

20 We have the issue of what the contract language  
21 means, so I want to talk about that. But you've raised this  
22 other issue about Court approval, and I want to put that  
23 aside just for a moment if I can and have initial discussion  
24 just as to what the contract says and what it means.

25 And if I may, Your Honor, I can answer the

1 question you just asked kind of in the context of our  
2 argument to you today. There is really no question about  
3 what the definitions of the two key phrases here means,  
4 right. In lieu of means in place of or instead of. There  
5 were two options that were given to Transform: an asset  
6 purchase or an equity transfer, an equity purchase. And  
7 then the language, deemed to be, and then what does that  
8 language actually mean as it relates to these terms.

9 And, Your Honor, I oftentimes hesitate to do  
10 simple analogies for contract cases, but I think here it's  
11 informative because I think it demonstrates kind of the  
12 legal fiction aspect of deemed to be and what that really  
13 means in the context of a contract.

14 It's just by way of a very simple example: If you  
15 have a contract where you are going to have an obligation to  
16 create a three-sided structure that will define as a  
17 triangle, to have the option also to create a circle, which  
18 isn't defined, but everyone knows is round, and you shall  
19 deem that circle to be a triangle, you've created a legal  
20 fiction. It's still a round object; the nature of the  
21 object doesn't change. It's just that you satisfy your  
22 obligations under the contract if you make a circle as well.  
23 You've made a triangle for purposes of the contract.

24 And the idea that the legal fiction somehow  
25 actually changes the thing is not what the case law says and

1 it's not what the definition means. It's still, in our  
2 example, it's still a round shape even though we're going to  
3 call it a triangle and by building it, we've satisfied the  
4 agreement. And if the contract requires us to paint every  
5 triangle green, I have to paint the circle as well.

6 Here in this instance, the thing is an equity  
7 transaction, which is a standard understood commercial  
8 transaction. It is the transfer of all assets and liability  
9 as part of the transaction. The deemed to be legal fiction  
10 doesn't take that item and make it into the definition of  
11 acquired foreign asset, it doesn't.

12 What it does is it means wherever in the APA,  
13 however it's used where we're talking about acquired foreign  
14 assets, this equity transaction, this thing, will count as  
15 that and we referred to that. And for instance, in this  
16 agreement under 2.1 in the amendment, there was an addition  
17 of section (dd) of 2.1 says that Transform would be  
18 acquiring free of any encumbrances acquired foreign assets,  
19 and by having the equity transaction be deemed as such, that  
20 is picked up by that provision. That is why you're required  
21 to have this additional comment, additional language within  
22 the agreement.

23 And the cases, Your Honor, that the Debtors cite,  
24 they cite in their reply, even though this is the core of  
25 their argument, they cite on the reply, so we didn't get a

1 chance to distinguish. But the cases they cite are fully  
2 supportive of this very straightforward process.

3 Just two quick examples, Your Honor. In the Lucas  
4 case, which they rely on most -- I mean, they cite the  
5 general premise, but they don't talk about how the legal  
6 fiction is applied to the case. And in that instance, there  
7 was a consent judgment and there was an amount due under the  
8 consent judgment and the agreement said that that amount due  
9 will be deemed to be in trust; that was the legal fiction,  
10 there wasn't a trust created.

11 And the Court was specifically asked to determine  
12 whether or not there was, in fact, a trust because it was  
13 deemed to be a trust, and the Court found it wasn't; it  
14 didn't change the thing. The thing was still money owed  
15 under the terms of a consent judgment, but it didn't  
16 actually create the trust.

17 And here in our situation, this language does not  
18 mean an equity transaction shall now become an asset sale,  
19 an affected asset sale. And even I think more tellingly in  
20 another case that the Debtors cite, the Wahl v. Owen case;  
21 it's a very simple case. It's a lease agreement where  
22 there's a living space provided; it's deemed to be 660  
23 square feet and, in fact, it's less than that. And by  
24 making the living space being deemed to be 660 feet, it  
25 didn't create additional living space; it was still a

1 smaller living space.

2 But what that language meant was that, as the  
3 Court found, the tenant could not claim a misrepresentation  
4 because they received less than 660 square feet. It was  
5 deemed to be, the legal fiction was, well, going to act like  
6 it was, but the living space was still the living space; it  
7 was still less than 660 feet, and that's the situation here,  
8 Your Honor.

9 And we know that, we know that because we had an  
10 equity transfer; it's exhibit to the Allen declaration, Your  
11 Honor, specifically Exhibit B. But in that equity transfer,  
12 the parties were very clear about what was being  
13 transferred; it was all the shares. There was no carveout,  
14 there was no mention of anything related to excluded assets.  
15 It was an equity transfer; that was enforcing the thing that  
16 the parties agreed to under the APA.

17 The fact it was deemed to be an acquired foreign  
18 asset did not change that structure and, in fact, that  
19 transaction was effectuated as you would expect any  
20 transaction to be. And, in fact, in that purchase  
21 agreement, the language of liabilities, which was also added  
22 to the APA about Transform taking all of the liabilities for  
23 the avoidance of doubt, was specifically included in the SPA  
24 for the Hong Kong entity. So the parties brought in  
25 language from the APA about the liabilities, but they didn't

1 bring in anything about excluded assets, they didn't bring  
2 in anything about the definition of acquired foreign assets  
3 because it was a standard equity transaction.

4 And, Your Honor, we think it's -- you put your  
5 finger on it about how this is even supposed to work; how  
6 you're going to, in fact, have excluded assets that don't  
7 come over as part of the transfer. I think you would have  
8 done it in the SPA. And in the Hong Kong SPA, that wasn't  
9 done; there was never a mention of where are the excluded  
10 assets.

11 And frankly, Your Honor, you know, the idea that  
12 this might now be a material change, well, you know, under  
13 that amendment, Transform took all of the liabilities which  
14 was added as a part of the amendment to the AAPA. If that's  
15 not really what was to happen, why is that language included  
16 and how is that unwound if this, in fact, was not the deal  
17 that was struck and approved by the Court.

18 So Your Honor, on just -- setting aside your  
19 approval, but just on the issue of the language of this  
20 agreement being plain and straightforward, and what does it  
21 mean for this legal fiction. Your Honor, we think it would  
22 be very difficult to read into this agreement, as you said,  
23 some type of carveout of the equity transaction when it's  
24 very clear why you have the language deemed to be in the  
25 agreement.

1 I want to pause there, Your Honor, as to the  
2 language of the agreement and see if you have questions on  
3 that specific aspect.

4 THE COURT: Well, I actually have a question on in  
5 the in lieu of point.

6 MR. WEAVER: Sure.

7 THE COURT: Isn't in lieu of not really in  
8 substitution for, but just, in essence, supposed to be an  
9 exchange, one thing for another?

10 MR. WEAVER: Rather than doing option one, you can  
11 do option two instead of.

12 THE COURT: You think it's instead of, as opposed  
13 to just they're really the same things except for the form?

14 MR. WEAVER: Correct. It's an option, it's a  
15 choice; it's not the same thing. You wouldn't, I don't  
16 think --

17 THE COURT: Well, I know it's a choice. I guess  
18 the question I have though is whether the commonly  
19 understood meaning of in lieu of doesn't mean a completely  
20 different choice, but rather a choice that's basically the  
21 same as the original choice but for its form.

22 MR. WEAVER: Your Honor, respectfully, I don't  
23 think that's the case. And, you know, we cite to the  
24 definition in our papers in place of/instead of, and I don't  
25 think that that definition has been questioned by the

1 Debtors. Instead of means you're not doing the first thing,  
2 you're doing something else, it's in placed of. We're  
3 developing a mechanism to sell, to transfer these foreign  
4 assets. And here is an asset purchase structure; instead of  
5 that, we might do an equity transfer.

6 And, Your Honor, I would just add -- and again, I  
7 know it's the four corners, but, you know, it's not -- it's  
8 a little bit surprising, Your Honor, that when the Debtors  
9 first made this demand of Transform. This wasn't their  
10 interpretation of the agreement. They didn't cite to the  
11 deemed of language. And then the second time they made a  
12 demand, they didn't cite to this language.

13 Transform's interpretation has been consistent  
14 throughout because, again, we think it is the plain reading  
15 of this language.

16 THE COURT: Okay.

17 MR. WEAVER: Your Honor, I'll -- I'm sorry.

18 THE COURT: Just going back to the point that I  
19 was discussing with the Debtors' counsel, you're saying that  
20 there is a use for the phrase deemed to be acquired assets  
21 because that term is used elsewhere in the agreement and so  
22 that would make sure that these shares would fall within  
23 that definition.

24 MR. WEAVER: Correct, Your Honor. On page 14 of  
25 our papers, we point to Section 2.1(dd), which was part of

1 the amendment; this was added as part of the amendment to  
2 the APA.

3 THE COURT: You mean 2.1(dd), right?

4 MR. WEAVER: It's 2.1(dd).

5 THE COURT: Right, okay. Let me just take a quick  
6 look at that. But this was -- I'm sorry, I guess I'm  
7 confused -- this was added in the amendment itself.

8 MR. WEAVER: Correct.

9 THE COURT: So it didn't incorporate -- I  
10 understood your argument to say that there were other  
11 provisions of the asset purchase agreement that had already  
12 been negotiated. I'm sorry, I'm looking at another  
13 provision. But it's self-referential. Acquired foreign  
14 assets shall have the meaning set forth in 2.13(a); that was  
15 what was in the original amendment -- I'm sorry, the  
16 original agreement.

17 MR. WEAVER: The original agreement.

18 THE COURT: Excuse me, the original agreement.

19 MR. WEAVER: Yes, Your Honor.

20 THE COURT: And then (dd) just says, "Subject to  
21 Section 213, any acquired foreign assets are acquired."

22 MR. WEAVER: Correct.

23 THE COURT: So how was the clause being added in  
24 amendment number one referring to any existing provision of  
25 the asset purchase agreement, as opposed to --

1 MR. WEAVER: Well, Your Honor -- sorry.

2 THE COURT: -- also added in the amendment.

3 MR. WEAVER: Well, Your Honor, I think the point  
4 is that although it was added as part of the amendment, this  
5 was all part of -- this is all one -- I know we talked about  
6 this amendment and we'll come to the other point -- this was  
7 one transaction. And as, you know, it's deemed to be makes  
8 clear that this non-defined transaction, this equity  
9 transaction, that counts as assets being acquired under  
10 Section 2.1, free and clear.

11 THE COURT: But where is acquired foreign assets  
12 otherwise used in the original asset purchase agreement?

13 MR. WEAVER: I believe pre-amendment, it's within  
14 the section of 2.13. But again, I guess, Your Honor, the  
15 point I'm trying to make is that everything -- this was an  
16 amendment, this was a change, and it all has to be read  
17 together. I wasn't trying to imply that this was only  
18 limited to instances prior to the amendment. This is all --

19 THE COURT: But your statement in paragraph 31 on  
20 page 14 of your objection says that the phrase deemed to be  
21 acquired foreign assets -- in essence, you say rather, but  
22 I'll put in the word merely -- merely establishes that when  
23 the defined term acquired foreign assets is used elsewhere  
24 in the APA, these equity interests will be included within  
25 that defined term.

1 But the only example given isn't elsewhere in the  
2 APA, it's the same use -- it's the use of the term in the  
3 amendment, not elsewhere in the APA.

4 MR. WEAVER: Apologies, Your Honor, I think I  
5 understand the confusion. The APA is defined to be the  
6 amendment, the first amendment. I think that's how  
7 typically the APA is defined.

8 THE COURT: I understand. But if the defined  
9 term, acquired foreign assets, was used in sections of the  
10 original APA and, therefore, you know, you wanted to make  
11 sure that the defined term as used throughout the APA would  
12 apply to the stock, I think I understand your argument.

13 But if it really wasn't used anywhere else, it's  
14 only used in the amendment, I don't understand the argument  
15 because then it doesn't seem to me that there's any use for  
16 that phrase because it's not being used elsewhere in the  
17 original APA.

18 MR. WEAVER: Well, I guess, Your Honor, just to  
19 point out the hypothetical. Let's say that language is not  
20 used and we have just the equity transaction, there could be  
21 a dispute -- I'm not saying this would happen -- there could  
22 be a dispute about whether or not we somehow, Transform  
23 somehow took those assets through the equity transaction  
24 were somehow encumbered where there was a claim against  
25 them.

1 If we don't have the amendment, but we just we  
2 don't use that deemed to be and include then in 2.1(dd),  
3 there's -- again, I'm not saying this necessarily would  
4 happen, but there is a gap there. There's an opportunity to  
5 say that we did not acquire those equity interests in the  
6 same manner as we acquired everything else laid out in 2.1.

7 THE COURT: Well, but if that's the case, then  
8 that was the problem with the original agreement because  
9 it's added to 2. -- let's see, let's go to the -- 2.1(dd) is  
10 a new term and that is the acquired foreign assets. In  
11 other words, even though it apparently was, it was defined  
12 as a defined term in the original APA, it was not listed  
13 specifically as an acquired asset, i.e., acquired foreign  
14 assets, although it did fit in, I think, the general rubric  
15 of acquired assets.

16 MR. WEAVER: Your Honor, you're correct. But even  
17 if you see that addition as a correction, that protection  
18 would not apply to the equity transactions unless it was  
19 included within that definition.

20 THE COURT: Well, actually, it would because it  
21 was assumed that it would when the parties entered into it  
22 in the first place because it was just an acquired asset.  
23 The definition of foreign acquired assets was only used in  
24 2.13 apparently in the original document.

25 MR. WEAVER: Correct, Your Honor.

1 THE COURT: So there was really no reason to add  
2 that deemed language to somehow include it in terms that  
3 were already being used in the original agreement because  
4 they weren't being used. The operative language of the 2.1,  
5 the acquired assets, just defines it generically in the  
6 original agreement, i.e., assets, properties, and rights  
7 related to the business, other than the excluded assets;  
8 that's 2.1, and then it lists the specific one, but those  
9 aren't the only ones.

10 So I guess if that's -- this point is a neutral  
11 one to me is between the Debtors and Transform. I did have  
12 another question related to this. Rather than saying, shall  
13 be deemed to be an acquired foreign asset, why didn't it  
14 just say shall be an acquired asset or an acquired foreign  
15 asset, the stock shall be. It didn't say that, and that's  
16 really what you're basically saying, right?

17 MR. WEAVER: Respectfully --

18 THE COURT: You need to say it needs to be.

19 MR. WEAVER: Your Honor, I apologize. I think  
20 frankly, the shall be would I think be more supportive of  
21 the Debtors' position because you're going to make that  
22 equity transaction be defined, actually meet that  
23 definition. But by saying shall be deemed to be, it's that  
24 legal fiction, it's creating the fiction; it never becomes  
25 the defines term. And none of the cases that the plaintiffs

1 or the Debtors cite have the item that's deemed to be, it  
2 doesn't change, it doesn't become the defined term.

3 And so, you know, if the parties wanted this to  
4 be, in fact, just a way to do an asset purchase with  
5 excluded assets, then you would want to make the equity  
6 transaction something different than an equity transaction.  
7 But by having it be deemed to be, you created this legal  
8 fiction. And again, it's not only the idea of a legal  
9 fiction, but we know it's what happened.

10 THE COURT: Well, that's a separate point. And  
11 frankly, again, what happens in a bankruptcy case is very  
12 different than what happens in another case when you have  
13 get approval of a material transaction.

14 MR. WEAVER: Understood, Your Honor.

15 THE COURT: But again, just to use a legal  
16 fiction, I think, makes this more of an acquired foreign  
17 asset, i.e., more of the definition in my mind than less. I  
18 don't understand why they just wouldn't -- you wouldn't just  
19 say it's an acquired asset, as opposed to an acquired  
20 foreign asset which has the carveout.

21 MR. WEAVER: Again, Your Honor, the idea of --  
22 reading the agreement as a whole and putting all the pieces  
23 together, you know, including also the idea that there's  
24 this explicit reference that Transform is now taking the  
25 liabilities. You know, if this was attempting to just

1 replicate what was as defined an acquired foreign asset in  
2 that process, there'd be no reason to vary from that process  
3 and you would include excluded liabilities as well. The  
4 idea seems to us clear on its face in the agreement --

5 THE COURT: Well, I guess I would push back on  
6 that. You can certainly take liabilities; that doesn't  
7 necessarily mean you take assets. I mean, it's convenient--

8 MR. WEAVER: Correct.

9 THE COURT: -- to take the stock. You could take  
10 the stock under a free and clear order, for example. Since  
11 these were non-debtor subs, you can't take the assets free  
12 and clear.

13 MR. WEAVER: Understood, Your Honor. But the  
14 point being that the makings of an equity transaction as you  
15 just described are understood and are consistent with the  
16 idea that we're going to acquire assets and we're going to  
17 acquire liabilities, and the deemed --

18 THE COURT: Well, it doesn't say you're going to  
19 acquire assets; it does say you're going to acquire  
20 liabilities.

21 MR. WEAVER: Well, for the avoidance of doubt.  
22 It's not as if it's saying they're creating something  
23 special; it was for the avoidance of doubt.

24 THE COURT: Well, it doesn't say for the avoidance  
25 of doubt, we're acquiring assets.

1 MR. WEAVER: No, it says we're acquiring the  
2 shares.

3 THE COURT: Right. And then it says for the  
4 avoidance of doubt, that also means we're acquiring the  
5 liabilities.

6 MR. WEAVER: Understood, but it's straightforward  
7 that we are, in fact, acquiring the shares. So the idea  
8 that --

9 THE COURT: I'm sorry to interrupt you. In the  
10 definition of acquired foreign assets, you don't have the  
11 liabilities. It just talks about the assets that you  
12 acquire and the assets that are excluded.

13 MR. WEAVER: Correct.

14 THE COURT: So I guess you think that you would  
15 actually need to clarify since you're clarifying the assets,  
16 which -- I mean, the liabilities that you'd also clarify the  
17 assets if you were going to get the assets, the excluded  
18 assets.

19 MR. WEAVER: Your Honor, you know, we're within  
20 the four corners here. And, you know, the idea that we're  
21 going to create this mechanism of somehow carving out assets  
22 from the equity transaction -- and again, trying to stay  
23 within the four corners -- but when there's never been any  
24 indication or any request for any such excluded assets or  
25 any mechanism for excluded assets.

1 THE COURT: I understand that they could have  
2 provided, or the parties could have provided that there be  
3 condition to the stock transfer, which is that all excluded  
4 assets will be transferred to the Debtor or you attain --  
5 well, yeah, will be transferred to the Debtor at the time of  
6 the stock transfer.

7 On the other hand, the Debtors says that's  
8 subsumed within the deeming language, deemed acquired for  
9 and assets, which also means that you don't need to pay any  
10 transfer tax on that transfer; it's just part of the deal.

11 MR. WEAVER: But, you know, Your Honor, at least  
12 from our opinion, it comes back to the fact that the idea of  
13 changing the thing, which is what really the Debtors are  
14 asking to do, to change this form of transaction, you know,  
15 we've not seen any precedent for that, any model for that  
16 type of understanding and no case that would provide for  
17 that type of mechanism.

18 THE COURT: Okay. Well, why don't we then go to  
19 the point that we started with, which is --

20 MR. WEAVER: Sure.

21 THE COURT: -- that assumes, I believe, that  
22 there's a significant change to the original agreement. Why  
23 should I assume that that change got proper approval?

24 MR. WEAVER: Your Honor, on that point, you know,  
25 as we've said, as I mentioned earlier that, you know, this

1 information was submitted and understood that it was a part  
2 of the docket and put in during oral argument. But to be  
3 honest, Your Honor, if that is a concern that you have about  
4 whether or not -- if this is -- you see it as a significant  
5 change that was perhaps -- if there's a question of whether  
6 it was given proper attention, frankly, Your Honor, we'd  
7 like the opportunity to kind of -- to brief that point.

8 It really wasn't raised by the Debtors and,  
9 therefore, I think we would like -- you know, there's a lot  
10 of history there, Your Honor, and I think we'd prefer to put  
11 it in a more organized kind of answer to that question.

12 THE COURT: Well, what more history is there than  
13 what we went through at the start of the hearing?

14 MR. WEAVER: Well, Your Honor, the idea of the  
15 full review of the transcript and what was said, what was  
16 done, what was discussed, all those types of things, Your  
17 Honor, I think, you know, we would like the opportunity to  
18 present it and do a more careful read. Frankly, this was  
19 not something that we'd understood was going to be an issue  
20 today, so therefore, I just would feel the opportunity to  
21 provide more description and perhaps even some precedents  
22 from where the situation may have arisen in other instances.

23 THE COURT: Okay. As far as the Debtors are  
24 concerned, what is your response to that, Ms. Crozier?

25 MS. CROZIER: Jennifer Crozier for the record on

1 behalf of the Debtors.

2 Your Honor, it is our position that the agreement  
3 unambiguously and, on its face, provides that, to the extent  
4 Transform pivoted to an equity acquisition, they could not  
5 acquire excluded assets.

6 And I will make a few points in response to Mr.  
7 Weaver's argument, if I may. First, Your Honor is correct:  
8 in lieu of means in place of. So all that was happening  
9 here, Transform could swap one type of transaction out for  
10 another; it could not unilaterally and in its sole  
11 discretion alter the economics of the deal in a manner that  
12 made the Debtors or their creditors worse off. So the use  
13 of in lieu of there actually supports the Debtors' position  
14 here and not Transform's.

15 The second point concerning the fact that deemed  
16 to be is merely meant to include the equity interests in the  
17 definition of acquired foreign assets. Mr. Weaver,  
18 Transform is wrong about that, Your Honor, and there are  
19 several places in the asset purchase agreement that make  
20 that clear, and the first is the addition of that last  
21 clause to Section 2.4 of the agreement in which the parties  
22 made clear that the liabilities of any entity that is an  
23 acquired foreign asset shall not be excluded liabilities.

24 The Debtors acknowledge that generally speaking an  
25 equity acquisition involves the acquisition of all of the

1 entities' assets and liabilities. Here, however, the  
2 parties, consistent with the economics of the entire deal,  
3 the parties made clear that if Transform chose to pivot to  
4 an equity acquisition, the excluded assets would be carved  
5 out. But we also wanted to make clear that we were not  
6 carving out excluded liabilities, which is precisely why we  
7 added that last clause to Section 2.4.

8 Another example in the APA of deemed to be being  
9 used is in Section 2.13(b) of the asset purchase agreement.  
10 I'm going to turn to it quickly, Your Honor, if I may.  
11 There, 2.13(b) relates to minority equity interests in non-  
12 US persons. And as you'll see at the very end of that  
13 paragraph -- or rather, it's on the first page of -- it's  
14 right below; it's right at the top of page 56 of the  
15 redline.

16 It says, "Buyer may elect to acquire other  
17 minority equity interests directly from the seller, it being  
18 agreed by the parties that such equity interests will be  
19 deemed to be acquired for and assets for the purposes of  
20 this agreement." Now that provision concerned primarily the  
21 Debtors' shares in a Mexico entity.

22 Sears held less than 50 percent of Sears Mexico  
23 and Transform wanted to take those shares. And so, the  
24 parties provided for a similar way of acquiring those  
25 shares; they would go through the same process for the same

1 reason. Those shares would form acquired foreign assets and  
2 the mechanisms of the asset purchase agreement would flow  
3 through and apply to those acquired foreign assets.

4 But here, because Sears held less than 50 percent  
5 of Sears Mexico, there were no assets or liabilities to be  
6 included or excluded. We were really just handing --  
7 transferring those shares to Transform.

8 So here, the parties said, "The equity interests  
9 will be deemed to be acquired foreign assets for the  
10 purposes of this agreement." Whereas, in Section 2.13(a),  
11 where we were carving out excluded assets, we said, "Those  
12 equity interests shall be deemed to be acquired foreign  
13 assets," full stop.

14 And then the two other points I'd like to make,  
15 Your Honor. First is concerning the authority we've  
16 referenced in our brief. It does support our argument here.  
17 I can point Your Honor specifically to Johnson against  
18 Rambo, which is a case in which the Court would deem a legal  
19 action to be against the United States.

20 Even though the United States was not a party to  
21 the action, the Court treated the government as though it  
22 were a party to the action and the government filed  
23 pleadings and, again, behaved in every respect as though it  
24 were a party to the agreement, and that's the point that the  
25 Debtors are making here, Your Honor.

1 By deeming the equity interests to be acquired  
2 foreign assets, that deeming changes or governs the  
3 relationship of the parties going forward and the nature of  
4 the assets, specifically to exclude excluded assets.

5 And then last but not least, I would point Your  
6 Honor to Section 2.1(ee) of the asset purchase agreement,  
7 which was also added in the first amendment. And that  
8 provision makes clear, Your Honor, that acquired assets  
9 include, "Any bank accounts of the sellers as may be agreed  
10 by buyer and sellers prior to the closing date, but for the  
11 avoidance of doubt, not including any cash in any such bank  
12 accounts."

13 And so, here, this was one of the means by which  
14 the parties made clear that Transform was under no  
15 circumstances going to acquire excluded assets that the cash  
16 or cash equivalents in those bank accounts or any bank  
17 accounts being transferred were going to remain with the  
18 Debtors.

19 And again, prepared to answer any questions Your  
20 Honor may have concerning those points. Otherwise, I will  
21 again yield the virtual podium.

22 THE COURT: Well, I just go back to my question of  
23 you, which is Transform has said it would like some  
24 additional time to review the transcript of the sale hearing  
25 and to consider whether there is any other response to the

1 point I began with, which is that at a minimum here, the  
2 context of this amendment would, I believe, require  
3 meaningful disclosure to the parties in interest and the  
4 Court if the agreement is to be interpreted the way that  
5 Transform asserts that it is.

6 And I guess my question of you is, what is your  
7 response to that request for additional time?

8 MS. CROZIER: Your Honor, the Debtors' position is  
9 that no further briefing is necessary. The history was laid  
10 out at the outset of the hearing today.

11 THE COURT: Well, you also say in your motion, you  
12 refer to paragraph 54 and to the amendments that were made.  
13 Let me ask you a related question. In one of the letters  
14 that's attached to the papers where the counsel had been  
15 talking to each other about this issue, obviously before  
16 this motion was filed, and one of the points that counsel  
17 for Transform makes is that Transform paid taxes on the cash  
18 in India.

19 And in the response, the letter from counsel for  
20 the Debtors says, well, we can -- we'll refund you the tax  
21 payment or you can deduct the tax payment from the money you  
22 owe us under the APA because that would have been our taxes.  
23 Is that still the Debtors' position?

24 MS. CROZIER: Yes, it is, Your Honor. Or I should  
25 be specific and say that any portion of that tax related to

1 the cash, the Debtors would agree to reimburse that to  
2 Transform.

3 THE COURT: To the cash on the sale date.

4 MS. CROZIER: That's right.

5 THE COURT: Okay. And I guess there's another  
6 point I'd like to clear up. I gather that the Indian  
7 transfer still hasn't occurred; is that true?

8 MS. CROZIER: Your Honor, Jennifer Crozier. It  
9 is, Your Honor. There has been -- there have been delays in  
10 connection with that transfer, largely associated with the  
11 global pandemic. But I can say that the transfer is now  
12 moving forward, and I believe it was in process as of April  
13 21st, 2021, so that is now moving forward.

14 THE COURT: Okay.

15 MR. WEAVER: Your Honor, Andrew Weaver for  
16 Transform, if I may. On the point on additional time, we  
17 really -- Transform really do believe it's necessary to have  
18 a chance to really present on this issue. As you noted, the  
19 Debtors in their motion, you know, were seeking to enforce  
20 the amendment as written as they read it.

21 And to the extent Your Honor has questions -- has  
22 raised a question about sufficient notice, we do believe we  
23 have a right to address that fully and properly if that may  
24 be a basis for the Court's decision.

25 THE COURT: Okay. I mean, they did in the first

1 couple of pages of their objection refer to the sale order,  
2 paragraph 54 of the sale order and the subsequent filing of  
3 the APA, so it did appear to me to be present, although  
4 honestly, not really addressed by either side.

5 And before I cover this, I want to go back to the  
6 original 2.13 and the amendment. Yeah, I guess that's fine.  
7 I think I understand both of your arguments on that point.

8 But what is the response on the argument that  
9 2.1(ee) specifies bank accounts of the sellers, but for the  
10 avoidance of doubt, not including any cash in any such bank  
11 accounts. I mean, the sellers include -- the sellers who  
12 are transferring equity interests.

13 MR. WEAVER: Your Honor, Andrew Weaver on behalf  
14 of Transform.

15 Your Honor, you know, the sellers -- to be clear,  
16 that language applies to the seller's bank accounts, which  
17 are not the foreign subs, they're not sellers. You know,  
18 that language becomes relevant if --

19 THE COURT: No, no, but I'm sorry, the sellers are  
20 selling the foreign subs.

21 MR. WEAVER: They're selling the foreign subs, but  
22 it's not the seller's bank accounts. They are the foreign  
23 subs bank accounts. They wouldn't be picked up by the  
24 definition, Your Honor.

25 THE COURT: I got you.

1 MR. WEAVER: And so, that only becomes relevant if  
2 we go through the definition of acquired foreign assets.

3 THE COURT: Right.

4 MR. WEAVER: So it doesn't change the analysis at  
5 all, Your Honor.

6 THE COURT: Okay. All right. I'm going to give  
7 you my preliminary ruling on this. I will give you a couple  
8 of weeks to address the context of the transaction, namely  
9 the motion for approval of the executed APA that was  
10 attached as Exhibit A to the sale order, and then the  
11 amendment that was filed and is the amendment that the  
12 parties have been addressing, dated February 14, six days  
13 after the sale order, filed at Docket No. 2599, as well as  
14 the draft proposed amendment number one that was apparently  
15 filed on the docket sometime on February 7th and provided to  
16 the Court during oral argument and after the evidence was  
17 closed on that day while the Court had turned to oral  
18 argument on approval -- on the Debtors' motion for approval  
19 of the sale agreement.

20 I am also assuming here that there was no  
21 discussion of this change that is the subject of this  
22 dispute during that oral argument or when it was provided to  
23 the Court or thereafter. And frankly, I don't believe it  
24 was provided to the Court as a proposed attachment to the  
25 sale order.

1           The parties dispute their intent in entering into  
2 amendment number one, and more specifically, the amendment  
3 to Section 2.13 of that amendment, as well as related  
4 amendments in Section 2.1(dd) and (ee) of the asset purchase  
5 agreement.

6           The parties agree on the applicable law for  
7 construing the parties' intent under a contract, namely  
8 Delaware law, which is the law that the parties chose for  
9 the agreement. The primary objective in construing a  
10 contract under Delaware law is to give effect of the intent  
11 of the parties. *Lorillard Tobacco Co. v. Legacy Foundation*,  
12 903 A.2d 728, 739 (Del. 2006).

13           To determine what contractual parties intended,  
14 Delaware courts start with the text of their agreement.  
15 *Sunline Commercial Carriers, Inc. v. Citgo Petroleum Corp.*,  
16 206 A.3d 836, 846 (Del. 2019). And it's clear under  
17 Delaware law that courts interpreting contracts will give  
18 effect to the plain meaning of the contract's terms and  
19 provisions to best indicate their intent. *Lorillard*  
20 *Tobacco*, 903 A.2d 739. See also, *Osborn Ex Rel. Osborn v.*  
21 *Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010).

22           Further, unless there is an ambiguity in the  
23 language of the agreement, Delaware courts interpret the  
24 contract terms according to their plain ordinary meaning.  
25 *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 318, 385,

1 (Del. 2012). In construing that plain meanings, the Court  
2 must construe the contract as a whole viewing each part in  
3 light of the others, which means that the intent of the  
4 parties may not be gathered from tax portions of the  
5 contract or from any clause or provision standing by itself  
6 and meaning which arises from particular portion of an  
7 agreement cannot control the meaning of the entire agreement  
8 if such inference runs counter to the agreement's overall  
9 scheme or plan. *EI Du Pont De Nemours v. Shell Oil Co.*, 498  
10 A.2d 1108, 1113 (Del. 1985).

11 Finally, a contract is not rendered ambiguous  
12 simply because the parties do not agree upon its proper  
13 construction. *Rhone-Poulenc v. American Motorists Insurance*  
14 *Co.*, 616 A.2d 1192, 1195 (Del. 1992). While a court under  
15 Delaware law, as noted just now, should not look to parol  
16 evidence or extrinsic evidence if the terms of an agreement  
17 are not ambiguous.

18 The Court should consider undisputed background  
19 facts to place the contractual provision in its historical  
20 setting. *S.I. Management LP v. Charlebois, C-H-A-R-L-E-B-O-*  
21 *I-S*, 707 A.2d 3743 (Del. 1998) and *Eagle Industries v.*  
22 *DeVilbiss Health Care*, 702 A.2d 1228, 1233 (Del. 1997).

23 In the former case, that is the Charlebois case,  
24 the setting was important to the Delaware Supreme Court in  
25 that the agreement was a multiparty agreement that the Court

1 said should be construed against the general partner to one  
2 part of that agreement, given that multiparty nature where  
3 the other parties were limited partners.

4 That latter point is important here because there  
5 is an important bankruptcy law based on the facts as I  
6 understand them today on the record of this hearing and the  
7 documents on the docket; namely, any transaction out of the  
8 ordinary course, including the asset purchase agreement, is  
9 not binding on a debtor-in-possession until after notice of  
10 hearing and court approval.

11 The asset purchase agreement here is no exception  
12 is subject to extensive notice, that is the original form of  
13 the agreement, and substantial objections, including by the  
14 Official Unsecured Creditors' Committee. One reason for  
15 that extensive notice and the creditors' committee's  
16 scrutiny of the agreement is that the agreement was with an  
17 insider of the Debtors, Transform, a company controlled by  
18 the controlling equity holder of the Debtors and that would,  
19 in large measure, take over the Debtors' employees and  
20 management.

21 The Debtors, to protect the estate in light of the  
22 foregoing, established a special board committee to  
23 negotiate the agreement with Transform and its principal.  
24 However, every step of the way, the committee was looking  
25 over that committee's shoulders, that board committee

1 shoulders, and casting a skeptical eye on the asset purchase  
2 agreement.

3 There is no doubt in my mind that Transform's  
4 interpretation of the relevant provision to the present  
5 dispute, namely Section 2.13 as amended in amendment number  
6 one, would materially and adversely to the Debtors' estate  
7 modify the agreement that had been noticed for approval and  
8 that, at least until the time that a substantially similar  
9 version of Docket 2599, namely the executed amendment number  
10 one dated February 14, 2019, was filed.

11 Again, I am assuming it was filed sometime during  
12 the highly contested sale hearing, and I believe never  
13 introduced into evidence and only generically as an  
14 amendment referenced in oral argument to the Court, did the  
15 agreement provide for, under Transform's interpretation of  
16 it, the ability of the buyer to retain what would otherwise  
17 have been clearly an excluded asset, namely the cash in the  
18 foreign subsidiaries bank accounts.

19 I believe there is no dispute that the original  
20 agreement and the one that was attached to the Court's order  
21 approving the Debtors' motion and that agreement as Exhibit  
22 A would have provided, based on the interaction of its  
23 Section 2.13 and the definition of the acquired assets in  
24 Section 2.1, that the cash in the foreign subsidiaries bank  
25 accounts would have been an excluded asset and not had gone

1 to Transform. It turns out that it appears that cash is in  
2 excess of \$6.3 million or was in excess of \$6.3 million on  
3 the closing date of the transaction.

4 The parties disagree as to the plain meaning of  
5 Section 2.13, and frankly, the arguments of both sides are  
6 reasonable counterbalanced against each other. The Debtor  
7 contends that given the clear exclusion of the cash in the  
8 foreign subsidiaries bank accounts under the original APA,  
9 that the option that the Debtors provided in the amendment  
10 to transfer instead of the assets of the foreign  
11 subsidiaries, but instead the stock of those subsidiaries  
12 was intended to exclude or impress upon that transferor the  
13 exclusion of the cash in the bank accounts.

14 And in addition to the context that I've already  
15 described, that was memorialized by the parties' actual  
16 language in the added toggle or option provision in 2.13(a),  
17 which provided not only that the sellers shall use  
18 reasonable best efforts to transfer such equity interests,  
19 but also provided which equity interests shall be deemed to  
20 be acquired foreign assets, namely shall be deemed to be  
21 governed by the definition of acquired foreign assets, which  
22 would exclude cash.

23 The Debtors also assert that the phrase embodying  
24 the option, which states that if at any time prior to the  
25 date, that it's 60 days after the closing date, the buyer

1 determines in its sole discretion and notice by the seller  
2 that may be necessary or desirable to acquire all of the  
3 equity interests in the foreign subsidiary in lieu of the  
4 acquisition of assets and assumptions and liabilities  
5 contemplated by the first sentence of this Section 2.13,  
6 i.e., the original provision of 2.13, then the seller shall  
7 use reasonable best efforts to transfer such equity  
8 interests, and then it adds, "which equity interests shall  
9 be deemed to be acquired foreign assets."

10 The Debtors assert that the phrase "in lieu of"  
11 should be construed as not simply a switch to a very  
12 different transaction that would capture the cash for  
13 Transform, but instead a transaction that, albeit in  
14 different form, would be in place of and substantially  
15 consistent with the original and exclusive right of  
16 Transform, which was to buy the assets and related  
17 liabilities.

18 Transform contends to the contrary that in lieu of  
19 means simply instead of, and that can be instead of and very  
20 different from, as opposed to instead of and similar to  
21 except different in form, and that the phrase shall be  
22 deemed to be acquired foreign assets merely incorporates the  
23 definition of acquired foreign assets as it applies to the  
24 sold equity interest that it has the option to buy under  
25 this amendment.

1           The problem with that interpretation, that latter  
2 interpretation, is that the phrase acquired foreign assets  
3 really had not meaning in the original agreement and only  
4 applies to terms in the amendment which are, in essence,  
5 self-referential to paragraph 2.13.

6           So while it is generally within the contemplation  
7 of people that when you buy stock, you get the underlying  
8 assets of the company whose stock has been sold to you,  
9 subject to any claims against that company, of course, which  
10 would have priority over the stock.

11           The context here would argue a more nuanced  
12 reading of this agreement and would accord more weight to  
13 the Debtors' interpretation of the phrase, "deemed to be  
14 acquired foreign assets," namely, that the parties put that  
15 provision in this agreement where they wouldn't have had to  
16 otherwise because they intended to exclude from the assets  
17 transferred the cash and other excluded assets from the  
18 businesses that were transferred.

19           Of course, one could have documented this to  
20 specifically provided for that and the parties did not do  
21 that. And one could have made it clearer than simply using  
22 the phrase, "in lieu of," which is often misused simply to  
23 reflect any change, even if it's a dramatic change, from  
24 what was supposed to be in its stead, although I believe the  
25 proper usage of the term contemplates a change in form and

1 not in value, i.e., X in lieu of salary, and they did not do  
2 so.

3           However, given the overall context here and,  
4 importantly, the fact that it does not appear to me that the  
5 material change that would be represented by Transform's  
6 reading of this provision was, in fact, ever described to  
7 the Court or in any meaningful way before parties in  
8 interest and the Court, and indeed was not approved by the  
9 Court when it entered into -- I'm sorry -- when it signed  
10 and entered the sale approval order, which did not attach  
11 the Exhibit B that was supposed to be the amendment and only  
12 attached the original agreement, and then provided in  
13 paragraph 54 that changes could be to the asset purchase  
14 agreement only if they were not material.

15           I find that the Debtors' interpretation is the  
16 better interpretation, and that any balance as between the  
17 two should be construed against Transform, given the  
18 circumstances of the submission of the amendment -- or non-  
19 submission rather -- to the Court and parties in interest in  
20 any way that would highlight the important change that  
21 Transform's interpretation would provide for.

22           It is in that context much more logical to assume  
23 that the Debtors' interpretation was correct and that it,  
24 therefore, believed that the Debtors and Transform therefore  
25 believed that disagreement really did not represent a

1 material change from the asset purchase agreement that was  
2 attached as Exhibit A to the sale order and that was before  
3 the Court and the parties in interest at the sale hearing.

4 Transform has argued that at this point, the  
5 Debtors should be equitably estopped from taking their  
6 position and/or be deemed to have acquiesced in Transform's  
7 interpretation, but I conclude that Delaware law on both of  
8 those equitable doctrines would not, in fact, apply here.

9 The doctrine of acquiescence is a doctrine that  
10 requires a showing of the acquiescence, which would then be  
11 binding on a party in interest, where that party has full  
12 knowledge of his rights and material facts at the time and  
13 remains inactive for a considerable period of time or freely  
14 give recognition to the act or conducts himself in a manner  
15 inconsistent with any subsequent repudiation of the act,  
16 thereby leading the other party to believe the act has been  
17 approved. *Cantera v. Marriott Senior Living Services, Inc.*,  
18 1999 WL 18823 at page 8 (indiscernible) Feb. 18, 1999.

19 Here, the facts which are uncontroverted as set  
20 forth in the declaration of Mr. Acevedo show that the Debtor  
21 did not have the critical fact of the dollar amount of cash  
22 in the Debtors' bank accounts -- again, I'm referring to the  
23 Acevedo declaration as to the circumstances why they did not  
24 have that knowledge -- until well after the stock transfer.  
25 And really rather shortly thereafter, albeit with an

1 exchange of correspondence where they made demand and tried  
2 to resolve the matter without the need for litigation,  
3 commenced this litigation. That set of facts does not fit  
4 into the acquiescence doctrine in Delaware.

5 Moreover, again given the notice requirements for  
6 such a change if Transform's interpretation is correct, the  
7 other party, i.e., Transform, should not reasonably have  
8 believed that merely the Debtors' inaction, even assuming  
9 there was inaction, was sufficient to really think that this  
10 material change had received the requisite approvals, i.e.,  
11 after due notice and Court approval.

12 Similarly, the doctrine of estoppel is applied  
13 under the law of Delaware would not apply here. The type of  
14 estoppel asserted by Transform is equitable estopped; that  
15 has been defined by the Delaware courts as, quote, "A narrow  
16 doctrine that is sparingly invoked." Hallisey, H-A-L-L-I-S-  
17 E-Y v. Arctic Intermediate, LLC (2020 Del. Chancery) Lexis  
18 331 at page 8 (Del. Chancery, Oct. 29, 2020). And according  
19 to the Hallisey Court, the party asserting equitable  
20 estoppel bears the burden of proof, which is clear and  
21 convincing evidence.

22 Here, there is not clear and convincing evidence  
23 that the elements of equitable estoppel have been  
24 established. Those are when a party by its conduct,  
25 intentionally or unintentionally, leads another in reliance

1 upon that conduct to change position to its detriment. Id,  
2 quoting American Family Mortgage Corp. v. Acierno, 1994  
3 Delaware Lexis 105 at page 14 (Del. Supreme Court, March 28,  
4 1994).

5 In addition, courts in Delaware require the party  
6 asserting estoppel to show that it, quote, "Lacked knowledge  
7 or the means of obtaining knowledge of the truth," in order  
8 to prevent parties who were willfully reckless  
9 (indiscernible) and blind to the truth and exploiting  
10 estoppel to their advantage. HC Companies v. Myers  
11 Industries, M-Y-E-R-S, 2017 Del. Chancery 833 at page 14  
12 (Del. Chancery, Dec. 5, 2019).

13 Here again, I believe the facts and circumstances  
14 whereby this amendment was entered into and, frankly, it  
15 appears not reasonably put before the Court and parties in  
16 interest, would show that Transform lacked -- has failed to  
17 show that it lacked knowledge or means of obtaining  
18 knowledge of the truth regarding the proper interpretation  
19 of this agreement, and that the issue remained open,  
20 notwithstanding the stock sale.

21 Indeed, the parties have disputed the consequences  
22 of the stock sale in interpreting Section 2.13. The Debtor  
23 is stating that the stock sale is not the end of the meaning  
24 of the provision, and it also includes a limitation on the  
25 stock sale, namely that cash and other excluded assets

1 should be carved out of it, which they only relatively  
2 recently learned such assets existed; whereas, Transform has  
3 said the interpretation ends with -- begins and ends with  
4 the stock sale.

5 So the conduct, namely the stock sale, to my mind  
6 does not constitute leading Transform to rely on that  
7 conduct to change its position to its detriment, which it  
8 also has not shown for equitable estoppel to be found here.

9 I will note that, consistent with the equities  
10 however, the Debtors continued to propose that Transform can  
11 set off from the cash that it would otherwise have to  
12 transfer to the Debtors based on my ruling, that portion of  
13 the taxes paid by them post-closing based on their holding  
14 the cash. To me, that is a proper equitable result and  
15 would be the only portion of equitable estoppel that would,  
16 in fact, apply here, and the Debtors have recognized it by  
17 permitting that deduction.

18 So that is my preliminary ruling. I will give  
19 Transform two weeks to file any declaration exhibit that I  
20 can take judicial notice of and/or a memorandum of law to  
21 address the facts and circumstances and legal effect of the  
22 Court and parties in interest not being apprised until after  
23 the record was closed at the sale hearing, and more  
24 specifically, not being apprised of any material change as  
25 provided for in amendment number one before the sale order

1 was entered into and the effect of the sale order not  
2 actually attaching amendment number one as an exhibit as  
3 referenced in the definition of the APA Exhibit B.

4 The Debtors will have a week if they choose to  
5 reply to any such pleadings that are filed within the two-  
6 week deadline, and I'll decide whether I will amend my  
7 ruling or instead make it my final ruling. If I make it my  
8 final ruling, I will ask the Debtors to submit an order  
9 consistent with the relief that they've requested, and  
10 direct them not to formally settle the order on counsel for  
11 Transform, but to copy them on it so that they could confirm  
12 that it's consistent with my ruling.

13 If I decide to modify my preliminary ruling, I may  
14 or may not need a hearing. I may simply, again, direct  
15 someone to submit an order.

16 So as far as a deadline is concerned, that would  
17 be the close of business on May 11th for any supplemental  
18 filing by Transform on that narrow issue and/or fact  
19 pattern, and the Debtors would have until May 18th to file  
20 and serve a response. Both sent to counsel should email  
21 those filings to chambers, and I would also ask you to email  
22 a copy of the transcript of today's hearing to chambers.

23 Does anyone have any questions?

24 MS. CROZIER: No, Your Honor, thank you.

25 MR. WEAVER: No, Your Honor.

1 THE COURT: All right, very well. So I think that  
2 concludes this morning's hearing, unless anyone has anything  
3 else that I missed on the agenda. Okay, thank you everyone.  
4 I'll go off at this point.

5 (Whereupon these proceedings were concluded at  
6 12:20 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski  
Hyde

Digitally signed by Sonya Ledanski  
Hyde  
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Sonya Ledanski Hyde

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Date: April 29, 2021