



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

IN RE: SEARS HOLDINGS  
CORPORATION STOCKHOLDER  
AND DERIVATIVE LITIGATION

Consolidated  
C.A. No. 11081-VCL

**STIPULATION AND AGREEMENT OF  
SETTLEMENT, COMPROMISE AND RELEASE**

This Stipulation and Agreement of Settlement, Compromise and Release (the “Stipulation”) is entered into between and among the following parties, by and through their respective counsel, in the above-captioned, consolidated derivative action (the “Action”): (i) plaintiffs Ryan Flanagan, Jacob Rossof, John Solak, and Shiva Stein (collectively, “Plaintiffs”), individually and derivatively on behalf of Sears Holdings Corporation; (ii) defendants Cesar L. Alvarez, Paul G. DePodesta, Kunal S. Kamlani, William C. Kunkler III, Edward S. Lampert, Steven T. Mnuchin, Ann N. Reese, and Thomas J. Tisch (collectively, the “Individual Defendants”); ESL Investments Inc. (“ESL”), Seritage Growth Properties (“Seritage”), Fairholme Capital Management, L.L.C. and Fairholme Funds, Inc. (collectively, “Fairholme,” and with the Individual Defendants, ESL, and Seritage, “Defendants”); and (iii) Nominal Defendant Sears Holdings Corporation (“Sears,” and together with Plaintiffs and Defendants, the “Parties”). This Stipulation sets forth the terms and conditions of the settlement and resolution of the Action (the “Settlement”), and is intended by the Parties to fully, finally and forever resolve, discharge and settle all Released Claims (as defined below) as against the Released

Parties (as defined below), subject to the approval of the Court of Chancery of the State of Delaware (the “Court”).

**WHEREAS:**

A. On November 7, 2014, Sears announced that it was exploring the potential monetization of a portion of its owned real estate, through a potential sale-leaseback transaction, with the selected properties to be sold to a newly-formed real estate investment trust (“REIT”).

B. On or about November 10, 2014, Plaintiff Jacob Rossoff made a demand to inspect certain books and records of Sears pursuant to 8 *Del. C.* § 220, and Sears produced documents in response to such demand (the “Section 220 Production”).

C. On April 1, 2015, Sears announced that it was proceeding with the transaction and began publicly filing with the U.S. Securities and Exchange Commission (the “SEC”) the documents necessary to commence and complete a rights offering by Seritage to finance, in part, the transaction (the “Rights Offering”). To that end, Sears caused Seritage, a REIT formed by Sears, to file a registration statement on Form S-11 with the SEC (together with all amendments thereto, the “Registration Statement”) setting forth the terms of a potential transaction between Seritage and Sears (the “Seritage Transaction”), as well as the Rights Offering. Through the Rights Offering, each stockholder of Sears was

given the right to purchase an interest in Seritage economically proportionate to the interest the stockholder owned in Sears at the time the Rights Offering commenced. The exercise price of these rights was the same for all stockholders.

D. Between May 29, 2015 and June 19, 2015, Plaintiffs filed complaints in the Court asserting direct and derivative claims against Defendants relating to the Seritage Transaction and/or the Rights Offering: *Solak v. Lampert et al.*, C.A. No. 11081-VCL (filed May 29, 2015); *Stein v. Lampert et al.*, C.A. No. 11173-VCL (filed June 18, 2015); *Rossof v. Lampert et al.*, C.A. No. 11178-VCL (filed June 19, 2015); *Flanagan v. Lampert et al.*, C.A. No. 11180-VCL (filed June 19, 2015) (the “Original Complaints”). The Original Complaints alleged that ESL and members of Sears’s Board of Directors breached fiduciary duties to stockholders in connection with the Seritage Transaction and that certain other Defendants aided and abetted such breaches.

E. Between May 2015 and June 2015, the parties to the *Solak* action engaged in expedited discovery. After entering into a confidentiality stipulation which the Court approved on June 19, 2015, certain Defendants produced certain non-public documents to Plaintiffs related to the Seritage Transaction, including, among other things, minutes of meetings of Sears’s Board of Directors and data regarding Sears’s real estate assets (the “Expedited Production”).

F. On June 9, 2015, Seritage filed a final prospectus concerning the Seritage Transaction and the Rights Offering.

G. On July 7, 2015, Sears announced that the Seritage Transaction and the Rights Offering had closed, with approximately 97% of the rights having been exercised.

H. Pursuant to the Seritage Transaction, Sears sold to Seritage 235 Sears- and Kmart-branded stores, along with Sears's 50 percent interests in joint ventures with each of Simon Property Group, Inc., General Growth Properties, Inc., and The Macerich Company, which joint ventures together hold an additional 31 Sears properties.

I. On July 28, 2015, the Court entered an Order for Consolidation and Leadership consolidating the actions filed by Plaintiffs into the Action and appointing as Co-Lead Counsel the law firms of Labaton Sucharow LLP, Girard Gibbs LLP, and Robbins Arroyo LLP (collectively, "Plaintiffs' Co-Lead Counsel").

J. On October 14, 2015, Plaintiffs filed a Verified Consolidated Stockholder Derivative Complaint (the "Consolidated Complaint"), which incorporated information from documents that Plaintiffs had obtained through the Section 220 Production and the Expedited Production, as well as other investigation conducted by Plaintiffs' Co-Lead Counsel. The Consolidated

Complaint asserted derivative claims on behalf of Sears challenging, among other things, the consideration paid to Sears in the Seritage Transaction, the valuation of the stores sold in connection with the Seritage Transaction, and the process relating to the foregoing. The Consolidated Complaint alleged that Mr. Lampert and ESL breached their fiduciary duties as alleged controlling stockholders, that the other Individual Defendants breached their fiduciary duties, and that Seritage and Fairholme aided and abetted these alleged breaches. The Consolidated Complaint did not assert any direct claims on behalf of Sears stockholders, as Plaintiffs and their counsel concluded that claims challenging the Seritage Transaction are properly pleaded only as derivative claims.

K. Beginning in January 2016, certain of the Parties engaged in arm's-length discussions to assess whether a settlement of the Action could be achieved. On January 12, 2016, counsel for certain of the Parties met in person in New York City to discuss the allegations set forth in the Consolidated Complaint and Defendants' defenses. Subsequently, the Parties entered into a series of stipulations, approved by the Court, deferring Defendants' date to respond to the Consolidated Complaint in order to allow the Parties to explore their respective settlement positions.

L. In connection with such discussions, certain Defendants produced on a rolling basis additional documents to Plaintiffs (the "Additional Productions"),

Plaintiffs retained commercial real estate industry and valuation and appraisal experts to review such documents and evaluate the fairness of the Seritage Transaction, and counsel for Plaintiffs and certain Defendants held a number of in-person and telephonic meetings. In connection with the Parties' discussions, on May 2, 2016, Plaintiffs sent Defendants a confidential settlement demand. On May 3, 2016, Plaintiffs' Co-Lead Counsel and their valuation experts met with counsel for certain of the Defendants in New York City, to further discuss the Parties' respective positions.

M. On July 12, 2016, Plaintiffs filed a Verified Consolidated Amended Stockholder Derivative Complaint (the "Consolidated Amended Complaint"), which incorporated information that Plaintiffs had obtained through the Additional Productions, as well as the information previously obtained through the Section 220 Production and the Expedited Production and the investigation conducted by Plaintiffs' Co-Lead Counsel.

N. During the summer of 2016, certain Parties continued to explore settlement and scheduled a mediation with the Honorable Layn R. Phillips (Ret.) ("Judge Phillips"), a former United States District Court Judge. Certain Parties submitted mediation statements on July 15, 2016, and on August 9, 2016, Plaintiffs' Co-Lead Counsel, certain Defendants and their counsel, and certain of Defendants' insurance carriers and their counsel participated in an in-person

mediation before Judge Phillips. The mediation session ended without an agreement being reached.

O. Between August 9, 2016 and September 23, 2016, Plaintiffs' Co-Lead Counsel, certain Defendants and their counsel, and certain of Defendants' insurance carriers and their counsel continued to engage in settlement discussions with the assistance of Judge Phillips.

P. On September 23, 2016, Plaintiffs' Co-Lead Counsel, certain Defendants and their counsel, and certain of Defendants' insurance carriers and their counsel participated in a second in-person mediation before Judge Phillips.

Q. Following the second mediation, Judge Phillips made a recommendation for settlement of the Action for a total payment of \$40,000,000 to Sears (inclusive of any attorneys' fees and expenses that would be sought by Plaintiffs' Counsel as a result of an approved settlement) to be paid by Defendants and/or their insurers. The Parties subsequently accepted the mediator's recommendation, and agreed to settle the Action on the terms set forth herein.

R. Plaintiffs, having thoroughly considered the facts and law underlying the Action, and based upon their investigation and prosecution of the Action and the mediation that led to the Settlement, and after weighing the risks of continued litigation, have determined that it is in the best interests of Sears and its stockholders that the Action be fully and finally settled in the manner and upon the

terms and conditions set forth in this Stipulation, and that these terms and conditions are fair, reasonable, and adequate to Sears and its stockholders. Plaintiffs and their counsel have concluded that claims challenging the Seritage Transaction are properly pleaded only as derivative claims.

S. Defendants, who believe they have substantial defenses to the claims alleged against them in the Action, have denied and continue to deny the allegations of wrongdoing, liability, and violation of any laws and the existence of any damages asserted in or arising from the Action, but have nevertheless concluded that further litigation in connection with the Action would be time consuming and expensive, and after weighing the costs, disruption, and distraction of continued litigation, have determined that the Action should be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation.

**NOW THEREFORE, IT IS STIPULATED AND AGREED**, by and among the Parties, through their undersigned counsel, and subject to the approval of the Court, that the Action shall be fully and finally compromised and settled, that the Released Claims shall be released as against the Released Parties, and that the Action shall be dismissed with prejudice, upon and subject to the terms and conditions of the Settlement, as follows:



## **DEFINITIONS**

1. In addition to the terms defined above, as used in this Stipulation, the following additional terms have the meanings specified below:

(a) “Attorneys’ Fees and Expenses Award” means the amount of attorneys’ fees and expense reimbursement awarded by the Court in response to an application by Plaintiffs’ Co-Lead Counsel, as described in paragraph 15 of this Stipulation.

(b) “Effective Date” means the first date by which all of the conditions precedent set forth in paragraph 12 of this Stipulation have been met and occurred or have been waived in writing by the Parties.

(c) “Final” with respect to the judgment approving this Settlement or any other court order means: (i) if no appeal from an order or judgment is taken, the date on which the time for taking such an appeal expires, or (ii) if any appeal is taken, the date on which all appeals, including petitions for rehearing or reargument, have been finally disposed of (whether through expiration of time to file, denial of any request for review, by affirmance on the merits or otherwise) in a manner that does not result in any material alteration of the order or judgment. Notwithstanding the foregoing, the Court’s ruling or failure to rule on any application for attorneys’ fees and expenses or any modification or reversal of the

Attorneys' Fees and Expenses Award shall not preclude any judgment approving the Settlement from becoming Final.

(d) "Final Order and Judgment" means the Final Order and Judgment of the Court, substantially in the form attached hereto as Exhibit A, approving the Settlement and dismissing the Action with prejudice without costs to any Party (except as provided in this Stipulation).

(e) "Notice" means the Notice of Pendency of Derivative Action, Proposed Settlement of Derivative Action, Settlement Hearing and Right to Appear, substantially in the form attached hereto as Exhibit B.

(f) "Person" means any individual, corporation, professional corporation, limited-liability company, partnership, limited partnership, limited-liability partnership, association, joint-stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors, representative or assignees.

(g) "Plaintiffs' Counsel" means, collectively, Plaintiffs' Co-Lead Counsel, the law firms Andrews & Springer LLC, Barrack Rodos & Bacine, and Wexler Wallace LLP, and any other counsel representing Plaintiffs in the Action.

(h) "Released Claims" means all Released Defendants' Claims and all Released Plaintiffs' Claims.

(i) “Released Defendants’ Claims” means any and all manner of claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys’ fees, actions, potential actions, causes of action, suits, judgments, defenses, counterclaims, offsets, decrees, matters, issues and controversies of any kind, nature or description whatsoever, whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, including Unknown Claims (defined below), arising out of or relating to the commencement, prosecution, or settlement of the Action; provided, however, for the avoidance of doubt, the Released Defendants’ Claims shall not include the right to enforce this Stipulation or the Settlement.

(j) “Released Defendant Parties” means, whether or not each or all of the following persons or entities were named, served with process, or appeared in the Action, (i) Cesar L. Alvarez, Paul G. DePodesta, Kunal S. Kamlani, William C. Kunkler III, Edward S. Lampert, Steven T. Mnuchin, Ann N. Reese, Thomas J. Tisch, ESL Investments Inc., Seritage Growth Properties, Fairholme Capital Management, L.L.C., Fairholme Funds, Inc., and Sears Holdings Corporation; (ii) all past and present officers and directors of Sears; and (iii) for each and all of the Persons identified in the foregoing clauses (i) and (ii) (but only to the extent

such Persons are released as provided above), any and all of their respective past or present family members, spouses, heirs, trusts, trustees, executors, estates, administrators, beneficiaries, distributees, foundations, agents, employees, fiduciaries, insurers, reinsurers, partners, partnerships, general or limited partners or partnerships, joint ventures, member firms, limited-liability companies, corporations, parents, subsidiaries, divisions, direct or indirect affiliates, associated entities, stockholders, principals, officers, managers, directors, managing directors, members, managing members, managing agents, predecessors, predecessors-in-interest, successors, successors-in-interest, assigns, financial or investment advisors, advisors, consultants, investment bankers, entities providing any fairness opinion, underwriters, brokers, dealers, lenders, commercial bankers, attorneys, personal or legal representatives, accountants and associates.

(k) “Released Plaintiffs’ Claims” means any and all manner of claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys’ fees, actions, potential actions, causes of action, suits, judgments, defenses, counterclaims, offsets, decrees, matters, issues and controversies of any kind, nature or description whatsoever, whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, suspected or unsuspected, liquidated or not liquidated, fixed or

contingent, including Unknown Claims (defined below), which Plaintiffs asserted in any of the Original Complaints, the Consolidated Complaint, or the Consolidated Amended Complaint, or which could have been asserted on behalf of Sears, or which Sears could have asserted directly, in any court, tribunal, forum or proceeding, whether based on state, local, foreign, federal, statutory, regulatory, common or other law or rule, and which are based upon, arise out of, relate in any way to, or involve, directly or indirectly, (i) the Seritage Transaction; (ii) the Rights Offering; (iii) the Registration Statement; (iv) the actions, inactions, deliberations, discussions, decisions, votes or any other conduct of any kind of any director, officer, employee, or agent of Sears relating to the Seritage Transaction, the Rights Offering, any related disclosures or non-disclosures in connection therewith (including, without limitation, the Registration Statement or any amendments or supplements thereto), or any other transaction, occurrence, fact, disclosure or non-disclosure alleged or set forth in any of the Original Complaints, the Consolidated Complaint, or the Consolidated Amended Complaint; or (v) the aiding and abetting by any other Person of any of the foregoing conduct; provided, however, for the avoidance of doubt, the Released Plaintiffs' Claims shall not include (x) the right to enforce this Stipulation or the Settlement, or (y) Sears's or any of its affiliates' rights (1) to enforce or defend the terms, covenants, or provisions of, or rights relating to, any contract or agreement with Seritage or any

of its affiliates, or (2) to bring or defend any claims or counterclaims relating to the performance of the landlord-tenant or contractual relationship between Sears or any of its affiliates, on the one hand, and Seritage or any of its affiliates, on the other hand.

(l) “Released Parties” means the Released Defendant Parties and the Released Plaintiff Parties.

(m) “Released Plaintiff Parties” means Plaintiffs, Plaintiffs’ Counsel, and any and all of their respective past or present family members, spouses, agents, attorneys, fiduciaries, employees, assigns, partners, corporations, direct or indirect affiliates, consultants, bankers, representatives, estates, insurers, reinsurers, and advisors.

(n) “Releases” means the releases set forth in paragraphs 5 and 6 below.

(o) “Scheduling Order” means the scheduling order to be entered pursuant to Rule 23.1 of the Rules of the Court of Chancery, substantially in the form attached hereto as Exhibit C.

(p) “Sears Stockholder(s)” means any and all persons and entities who hold of record, or beneficially own, common stock of Sears as of the close of business on the date that the Stipulation is filed with the Court.

(q) “Settlement Hearing” means a hearing required under Rule 23.1 of the Rules of the Court of Chancery, at or after which the Court will review the adequacy, fairness and reasonableness of the Settlement and determine whether to issue the Final Order and Judgment.

(r) “Unknown Claims” means any Released Claims that a Person granting a Release hereunder does not know or suspect to exist in his, her or its favor at the time of the Release, including without limitation those which, if known, might have affected the decision to enter into or object to the Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that upon the Effective Date, Plaintiffs and Defendants shall have expressly waived, and Sears and each of the other Sears Stockholders shall be deemed to have, and by operation of the Final Order and Judgment by the Court shall have, waived, relinquished and released any and all provisions, rights and benefits conferred by or under California Civil Code § 1542 or any law or principle of common law of the United States or any state or territory of the United States which is similar, comparable or equivalent to California Civil Code § 1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Plaintiffs and Defendants acknowledge, and Sears and all other Sears Stockholders by operation of law shall be deemed to have acknowledged, that they may discover facts in addition to or different from those now known or believed to be true with respect to the Released Claims, but that it is the intention of Plaintiffs, Defendants, Sears and all other Sears Stockholders by operation of law, to completely, fully, finally and forever extinguish any and all Released Claims, known or unknown, suspected or unsuspected, which now exist, heretofore existed or may hereafter exist, and without regard to the subsequent discovery of additional or different facts. Plaintiffs and Defendants acknowledge, and Sears and all other Sears Stockholders by operation of law shall be deemed to have acknowledged, that this waiver and the inclusion of “Unknown Claims” in the definition of “Released Claims” was separately bargained for and was a material element of the Settlement and was relied upon by each and all of the Parties in entering into the Stipulation and agreeing to the Settlement.

### **SETTLEMENT CONSIDERATION**

2. In consideration of the full settlement, satisfaction, compromise and release of the Released Plaintiffs’ Claims and the dismissal with prejudice of the Action, Defendants and/or their insurers will pay the total amount of \$40,000,000 (forty million dollars) (the “Settlement Amount”) into an interest-bearing escrow account to be established by Plaintiffs’ Co-Lead Counsel (the “Escrow Account”).



The Settlement Amount shall be paid into the Escrow Account within twenty (20) calendar days of the date on which the Final Order and Judgment becomes Final.

3. Within five (5) business days of the Effective Date, Plaintiffs' Co-Lead Counsel shall cause the Settlement Amount and any and all interest earned thereon, less the costs of providing the Notice pursuant to paragraph 9, any Attorneys' Fees and Expenses Award, and any incentive awards to be paid from the Escrow Account to Sears.

4. Apart from the payment of the Settlement Amount in accordance with Paragraph 2, Defendants shall have no further monetary obligations to Plaintiffs, Plaintiffs' Counsel, or Sears in connection with the Action, the Settlement, or the Released Claims.

### **RELEASES**

5. Upon the Effective Date, Sears, Plaintiffs, and each and every Sears Stockholder derivatively on behalf of Sears, and their respective heirs, executors, administrators, predecessors, successors, and assigns, in their capacities as such only, by operation of this Stipulation and the Final Order and Judgment and to the fullest extent permitted by law, shall completely, fully, finally and forever release, relinquish, settle and discharge each and all of the Released Defendant Parties from any and all of the Released Plaintiffs' Claims, and shall forever be barred and enjoined from commencing, instituting or prosecuting any of the Released

Plaintiffs' Claims against any of the Released Defendant Parties. In addition, Plaintiffs agree not to initiate, prosecute, assist in, or facilitate the prosecution of any other claims arising out of the same nucleus of operative facts giving rise to the Action.

6. Upon the Effective Date, Defendants and their respective heirs, executors, administrators, predecessors, successors, and assigns, in their capacities as such only, by operation of this Stipulation and the Final Order and Judgment and to the fullest extent permitted by law, shall completely, fully, finally and forever release, relinquish, settle and discharge each and all of the Released Plaintiff Parties from any and all of the Released Defendants' Claims, and shall forever be barred and enjoined from commencing, instituting or prosecuting any of the Released Defendants' Claims against any of the Released Plaintiff Parties.

#### **SCHEDULING ORDER; STAY OF PROCEEDINGS**

7. Promptly after the execution of this Stipulation, the Parties shall jointly request entry of the Scheduling Order (i) approving the form and manner of notice to Sears Stockholders of the pendency of this Action, the Settlement, and their right to object; (ii) establishing the procedure and schedule for the Court's consideration of the Settlement, dismissal of the Action with prejudice and Plaintiffs' Co-Lead Counsel's application for attorneys' fees, expenses, and

incentive awards; and (iii) staying all further proceedings in this Action except as may be necessary to implement the Settlement.

### **NOTICE**

8. The Scheduling Order will provide that Sears shall mail, or cause to be mailed, the Notice to each Person who was a stockholder of record of Sears common stock as of the date that the Stipulation was submitted to the Court (other than Defendants) at his, her or its last known address appearing in the stock transfer records maintained by or on behalf of Sears. A copy of the Notice shall also be posted to each of the respective firm websites of Plaintiffs' Co-Lead Counsel through the Effective Date.

9. All costs of providing the Notice incurred by Sears or any of its agents ("Notice Costs") shall be reimbursed from the Escrow Account as soon as sufficient funds have been deposited into the Escrow Account pursuant to Paragraph 2. In the event that sufficient funds to reimburse Sears or its agents for the Notice Costs are not deposited into the Escrow Account, whether because the Final Order and Judgment does not become Final or otherwise, the Defendants who would otherwise have funded the Settlement Amount shall promptly reimburse Sears for the Notice Costs.

## **FINAL ORDER AND JUDGMENT; DISMISSAL OF THE ACTION**

10. If the Court approves the Settlement (including any modification thereto made with the consent of the Parties as provided for herein) following the Settlement Hearing as fair, reasonable, adequate and in the best interests of Sears and Sears's stockholders, the Parties shall jointly and promptly request that the Court enter the Final Order and Judgment in the Action.

11. Upon entry of the Final Order and Judgment, the Action shall be dismissed in its entirety and with prejudice, with Plaintiffs, Defendants, and Sears each to bear his, her, or its own fees, costs, and expenses, except as expressly provided in this Stipulation.

## **CONDITIONS OF SETTLEMENT AND TERMINATION**

12. The Effective Date of the Settlement shall be deemed to occur on the occurrence or waiver in writing of all of the following events:

(a) the Court has entered the Scheduling Order, substantially in the form attached hereto as Exhibit C, as required by paragraph 7 above;

(b) the Final Order and Judgment is entered by the Court without material alteration or, in the event of material alteration, such alteration is consented to by the Parties in writing;

(c) the Final Order and Judgment becomes Final;

(d) the Action is dismissed with prejudice; and

(e) the full Settlement Amount is deposited into the Escrow Account in accordance with the provisions of paragraph 2 above.

13. Plaintiffs (provided they unanimously agree) and Defendants shall each have the right to terminate the Settlement and this Stipulation by providing written notice of their election to do so (“Termination Notice”), through counsel, to all other Parties hereto within thirty (30) calendar days of: (a) the Court’s final refusal to enter the Scheduling Order in any material respect; (b) the Court’s refusal to approve the Settlement or any material part thereof; (c) the Court’s refusal to enter the Final Order and Judgment in any material respect (other than as to the Attorneys’ Fees and Expenses Award) or to dismiss the Action with prejudice; or (d) the date upon which an order vacating, modifying, revising or reversing the Final Order and Judgment becomes Final. In addition, Plaintiffs shall have the right to terminate the Settlement if the Settlement Amount is not deposited into the Escrow Account in accordance with the provisions of paragraph 2 above. In addition, prior to the Effective Date, Defendants may, but are not obligated to, terminate the Stipulation and render the Settlement null and void in the event that any claim relating to the subject matter of the Action or the Seritage Transaction is commenced and prosecuted against any of the Released Parties and (subject to a motion by such Released Party(ies)) such claims are not dismissed with prejudice or stayed in deference to the Action.

14. In the event the Settlement is terminated pursuant to paragraph 13 above, then: this Stipulation and the Settlement (including the Releases given pursuant to the terms of this Stipulation) shall be cancelled and shall become null and void and of no force and effect, except as specifically provided herein; and the Parties shall be restored to their respective positions in the Action immediately prior to the execution of the Stipulation, and shall promptly agree on a new scheduling order to govern further proceedings in the Action, and all amounts in the Escrow Account shall be promptly returned to the Defendants and/or insurers who funded such amounts. In the event of such termination, this Stipulation shall not be admissible for any purpose in any proceedings before any court or tribunal and any judgments or orders entered by the Court in accordance with the terms of this Stipulation shall be treated as vacated *nunc pro tunc*.

**ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS**

15. Plaintiffs' Co-Lead Counsel, on behalf of themselves and all other Plaintiffs' Counsel, intend to apply to the Court for an award of attorneys' fees and reimbursement of their litigation expenses to be paid solely from (and out of) the Settlement Amount, and from no other source (the "Fee and Expense Application"). Plaintiffs' Co-Lead Counsel intend to apply for an award of attorney's fees, inclusive of expenses, in an amount not to exceed 20 percent of the Settlement Amount. The Fee and Expense Application shall be the only petition

for attorneys' fees and expenses filed by or on behalf of Plaintiffs, Plaintiffs' Counsel, or counsel purporting to represent any other Sears stockholder in connection with the Action or the Settlement.

16. Plaintiffs' Co-Lead Counsel also intend to apply for incentive awards for each Plaintiff in an amount not to exceed \$10,000 each, payable from the fees and expenses awarded by the Court.

17. Any Attorneys' Fees and Expenses Award and/or incentive awards shall be paid from the Escrow Account to Plaintiffs' Co-Lead Counsel within five (5) business days of the Effective Date.

18. Neither Defendants nor Sears shall have any responsibility or liability whatsoever with respect to the allocation of any Attorneys' Fees and Expenses Award among Plaintiffs' Counsel, or any other counsel representing Plaintiffs or any other Sears stockholder or any other counsel asserting a right to recover any portion of the Attorneys' Fees and Expenses Award. Any dispute regarding any allocation of fees or expenses among Plaintiffs' Counsel shall have no effect on the Settlement.

19. Neither Defendants nor Sears shall be liable for or obligated to pay any fees, expenses, costs, or disbursements, or to incur any expense on behalf of, Plaintiffs, Plaintiffs' Counsel, or any counsel purporting to represent any other

Sears stockholder, directly or indirectly, in connection with the Action or the Settlement, except as expressly provided for in this Stipulation.

20. It is not a condition of this Stipulation, the Settlement, or the Final Order and Judgment that any attorneys' fees and/or expenses be awarded by the Court to Plaintiffs' Counsel. In the event that attorneys' fees and/or expenses are not awarded by the Court or are awarded in an amount that is unsatisfactory to Plaintiffs' Counsel, or in the event that an attorneys' fee and expense award is vacated or reduced on appeal, this Stipulation and the Settlement, including the effectiveness of the Releases and other obligations of the Parties under the Settlement, nevertheless shall remain in full force and effect.

### **COOPERATION**

21. In addition to the actions specifically provided for in this Stipulation, the Parties agree to use their best efforts from the date hereof to take, or cause to be taken, all actions, and to do, or cause to be done, all things reasonably necessary, proper or advisable under applicable laws, regulations or agreements, to consummate and make effective this Stipulation and the Settlement. The Parties and their attorneys agree to cooperate fully with one another in seeking the Court's approval of the Settlement and to use their best efforts to effect the consummation of this Stipulation and the Settlement, including, but not limited to, resolving any objections raised with respect to the Settlement. Without further order of the



Court, the Parties may agree to reasonable extensions of time not expressly set by the Court in order to carry out any of the provisions of this Stipulation.

22. If, before the Court's approval of the Settlement becomes Final, any action was or is filed in any court asserting claims that are related to the subject matter of the Action, the Parties agree to take any and all necessary actions to prevent, stay, or seek dismissal of such action, and to oppose entry of any interim or final relief in any other litigation against any of the Parties that challenges the Settlement or otherwise involves a Released Claim.

#### **STIPULATION NOT AN ADMISSION**

23. It is expressly understood that neither this Stipulation nor any act or omission in connection therewith is intended or shall be deemed to be a presumption, concession or admission by: (i) any of the Defendants or any of the other Released Defendant Parties as to the validity of any claims, causes of action or other issues raised, or which might be or have been raised, in the Action or in any other litigation, or to be evidence of or constitute an admission of wrongdoing or liability by any of them, and each of them expressly denies any such wrongdoing or liability; or (ii) Plaintiffs as to the infirmity of any claim or the validity of any defense, or to the amount of any damages. The existence of the Stipulation, its contents or any negotiations, statements or proceedings in connection therewith, shall not be offered or admitted in evidence or referred to,

interpreted, construed, invoked or otherwise used by any Person for any purpose in the Action or otherwise, except as may be necessary to effectuate the Settlement. This provision shall remain in force in the event that the Settlement is terminated for any reason whatsoever. Notwithstanding the foregoing, any of the Released Parties may file the Stipulation or any judgment or order of the Court related hereto in any other action that may be brought against them, in order to support any and all defenses or counterclaims based on *res judicata*, collateral estoppel, good-faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

#### **NO WAIVER**

24. Any failure by any Party to insist upon the strict performance by any other Party of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and such Party, notwithstanding such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions in this Stipulation by such other Party.

25. No waiver, express or implied, by any Party of any breach or default in the performance by any other Party of its obligations under this Stipulation shall be deemed or construed to be a waiver of any other breach, whether prior, subsequent or contemporaneous, under this Stipulation.

### **AUTHORITY**

26. This Stipulation will be executed by counsel to the Parties, each of whom represents and warrants that he or she has been duly authorized and empowered to execute this Stipulation on behalf of such Party, and that it shall be binding on such Party in accordance with its terms.

### **SUCCESSORS AND ASSIGNS**

27. This Stipulation is, and shall be, binding upon, and inure to the benefit of, the Parties and their respective agents, executors, administrators, heirs, successors and assigns; provided, however that no Party shall assign or delegate its rights or responsibilities under this Stipulation without the prior written consent of the other Parties.

### **BREACH**

28. The Parties agree that in the event of any breach of this Stipulation, all of the Parties' rights and remedies at law, equity or otherwise, are expressly reserved.

### **GOVERNING LAW AND FORUM**

29. This Stipulation shall be governed by, and construed in accordance with, the laws of the State of Delaware, without regard to conflict of laws principles. Any action relating to this Stipulation will be filed exclusively in the Court. Each Party: (i) consents to personal jurisdiction in any such action (but no other action) brought in the Court; (ii) consents to service of process by registered

mail upon such Party and/or such Party's agent; and (iii) waives any objection to venue in the Court and any claim that Delaware or the Court is an inconvenient forum.

### **REPRESENTATIONS AND WARRANTIES**

30. Plaintiffs and Plaintiffs' Counsel represent and warrant that: (i) Plaintiffs are stockholders of Sears and were stockholders of Sears at all relevant times for purposes of maintaining standing in the Action; (ii) none of the Released Plaintiffs' Claims has been assigned, encumbered or in any manner transferred in whole or in part by Plaintiffs or Plaintiffs' Counsel; and (iii) neither Plaintiffs nor Plaintiffs' Counsel will attempt to assign, encumber or in any manner transfer, in whole or in part, any of the Released Plaintiffs' Claims.

31. Each Party represents and warrants that the Party has made such investigation of the facts pertaining to the Settlement provided for in this Stipulation, and all of the matters pertaining thereto, and has been advised by counsel, as the Party deems necessary and advisable.

### **ENTIRE AGREEMENT**

32. This Stipulation and the attached exhibits constitute the entire agreement among the Parties with respect to the subject matter hereof and supersede all prior or contemporaneous oral or written agreements, understandings or representations. All Parties agree that no representations, warranties or

inducements have been made to any Party concerning the Stipulation or its exhibits other than the representations, warranties and covenants contained and memorialized in such documents. All Parties further agree that they are not relying on any representations, warranties or covenants that are not expressly contained and memorialized in the Stipulation or its exhibits. All of the exhibits hereto are material and integral parts hereof and are fully incorporated herein by reference.

### **INTERPRETATION**

33. This Stipulation will be deemed to have been mutually prepared by the Parties and will not be construed against any of them by reason of authorship.

34. Section and/or paragraph titles have been inserted for convenience only and will not be used in interpreting the terms of this Stipulation.

35. The terms and provisions of this Stipulation are intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and it is not the intention of the Parties to confer third-party beneficiary rights or remedies upon any other Person, except with respect to (a) any attorneys' fees and expenses to be paid to Plaintiffs' Counsel pursuant to the terms of this Stipulation; and (b) the Released Parties who are not signatories hereto, who shall be third-party beneficiaries under this Stipulation and entitled to enforce it in accordance with its terms.

### **AMENDMENTS**

36. This Stipulation may not be amended, changed, waived, discharged or terminated (except as explicitly provided herein), in whole or in part, except by an instrument in writing signed by the Parties to this Stipulation.

### **COUNTERPARTS**

37. This Stipulation may be executed in any number of actual, telecopied or electronically mailed counterparts and by each of the different Parties on several counterparts, each of which when so executed and delivered will be an original. This Stipulation will become effective when the actual or telecopied counterparts have been signed by each of the Parties to this Stipulation and delivered to the other Parties. The executed signature page(s) from each actual, telecopied or electronically mailed counterpart may be joined together and attached and will constitute one and the same instrument.

### **CONTINUING JURISDICTION**

38. The consummation of this Settlement as embodied in this Stipulation shall be under the authority of the Court, and the Court shall retain jurisdiction for the purpose of enforcing the terms of this Stipulation.

### **NOTICE TO PARTIES**

39. If any Party is required to give notice to any other Party under this Stipulation, such notice shall be in writing and shall be deemed to have been duly

given upon receipt of hand or courier delivery, or facsimile transmission with confirmation of receipt. Notice shall be provided as follows:

If to Plaintiffs:

Labaton Sucharow LLP  
Attn: Ned Weinberger  
300 Delaware Avenue, Suite 1340  
Wilmington, Delaware 19801  
Telephone: (302) 573-2530

Girard Gibbs LLP  
Attn: Daniel C. Girard  
601 California Street, 14th Floor  
San Francisco, California 94108  
Telephone: (415) 981-4800

Robbins Arroyo LLP  
Attn: Stephen J. Oddo  
600 B Street, Suite 1900  
San Diego, California 92101  
Telephone: (619) 525-3990

If to Defendants Alvarez, DePodesta,  
Kamlani, Kunkler, Mnuchin, Reese, or  
Tisch, or Nominal Defendant Sears:

Richards, Layton & Finger, P.A.  
Attn: Gregory V. Varallo  
920 North King Street  
Wilmington, Delaware 19801  
Telephone: (302) 651-7700

Wachtell, Lipton, Rosen & Katz  
Attn: Graham W. Meli  
51 West 52nd Street  
New York, NY 10019  
Telephone: (212) 403-1000

If to Defendants Lampert or ESL:

Potter Anderson & Corroon LLP  
Attn: Donald J. Wolfe, Jr.  
1313 N. Market Street  
Hercules Plaza, 6th Floor  
Wilmington, Delaware 19899  
Telephone: (302) 984-6000

Cleary Gottlieb Steen &  
Hamilton LLP  
Attn: Meredith Kotler  
One Liberty Plaza  
New York NY 10006  
Telephone: (212) 225-2000

If to Defendant Seritage:

Morris Nichols Arsht & Tunnell LLP  
Attn: William M. Lafferty  
1201 N. Market Street, 18th Floor  
Wilmington, Delaware 19801  
Telephone: (302) 658-9200

Fried, Frank, Harris, Shriver &  
Jacobson LLP  
Attn: Scott B. Luftglass  
One New York Plaza  
New York, New York 10004  
Telephone: (212) 859-8000

If to Defendants Fairholme Capital  
Management, L.L.C. or Fairholme  
Funds, Inc.:

Abrams & Bayliss LLP  
Attn: A. Thompson Bayliss  
20 Montchanin Road, Suite 200  
Wilmington, Delaware 19807  
Telephone: (302) 778-1000

IN WITNESS WHEREOF, the Parties hereto have caused this Stipulation to  
be executed by their duly authorized counsel, as of February 8, 2017.



*Of Counsel:*

Daniel C. Girard  
Adam E. Polk  
Girard Gibbs LLP  
601 California Street, 14th Floor  
San Francisco, California 94108  
(415) 981-4800

Brian J. Robbins  
Stephen J. Oddo  
Nichole T. Browning  
Robbins Arroyo LLP  
600 B Street, Suite 1900  
San Diego, California 92101  
(619) 525-3990

*Of Counsel:*

Paul K. Rowe  
Graham W. Meli  
Wachtell, Lipton, Rosen & Katz  
51 West 5nd Street  
New York, New York 10019  
(212) 403-1000

*/s/ Ned Weinberger*

Ned Weinberger (#5256)  
Labaton Sucharow LLP  
300 Delaware Ave., Suite 1340  
Wilmington, Delaware 19801  
(302) 573-2530

*Co-Lead Counsel and  
Liaison Counsel for Plaintiffs*

*/s/ Gregory V. Varallo*

Gregory V. Varallo (#2242)  
Kevin M. Gallagher (#5337)  
Richards, Layton & Finger, P.A.  
920 North King Street  
Wilmington, Delaware 19801  
(302) 651-7700

*Attorneys for Defendants Cesar L.  
Alvarez, Paul G. DePodesta, Kunal S.  
Kamlani, William C. Kunkler III, Steven  
T. Mnuchin, Ann N. Reese, and Thomas J.  
Tisch, and Nominal Defendant Sears  
Holdings Corp.*

*Of Counsel:*

Meredith Kotler  
Cleary Gottlieb Steen & Hamilton LLP  
One Liberty Plaza  
New York NY 10006  
(212) 225-2000

*/s/ Matthew E. Fischer*

Donald J. Wolfe, Jr. (#285)  
Matthew E. Fischer (#3092)  
Potter Anderson & Corroon LLP  
1313 N. Market Street  
Hercules Plaza, 6th Floor  
Wilmington, Delaware 19899  
(302) 984-6000

*Attorneys for Defendants ESL Investments  
Inc. and Edward S. Lampert*

*Of Counsel:*

Scott B. Luftglass  
Fried, Frank, Harris, Shriver &  
Jacobson LLP  
One New York Plaza  
New York, New York 10004  
(212) 859-8000

*/s/ John P. DiTomo*

William M. Lafferty (#2755)  
John P. DiTomo (#4850)  
Morris, Nichols, Arsht & Tunnell LLP  
1201 North Market Street  
Wilmington, DE 19801  
(302) 658-9200

*Attorneys for Defendant  
Seritage Growth Properties*

*/s/ A. Thompson Bayliss*

A. Thompson Bayliss (#4379)  
Abrams & Bayliss LLP  
20 Montchanin Road, Suite 200  
Wilmington, Delaware 19807  
(302) 778-1000

*Attorneys for Defendants Fairholme  
Capital Management, L.L.C. and  
Fairholme Funds, Inc.*