IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FOREVER 21 INC., *et al.*,[1]	Case No. 19-12122 (MFW)
Debtors.	(Jointly Administered)
	Obj. Deadline: April 14, 2020
	RE: Docket No. 1115

OBJECTION OF BROOKS SHOPPING CENTERS, LLC TO THE MOTION OF F21 OPCO, LLC FOR ENTRY OF AN ORDER MODIFYING THE SALE ORDER AND GRANTING CERTAIN OTHER RELIEF RELATING TO GOING OUT OF BUSINESS SALES AND STORE CLOSINGS

Brooks Shopping Centers, LLC (the "Landlord"), Cross County Shopping Center, Yonkers, NY, Store No. 774, which is detrimentally impacted by the relief requested in the Motion of F21 Opco, LLC (the "Buyer") for Entry of an Order Modifying the Sale Order and Granting Certain Other Relief Relating to Going Out of Business Sale and Store Closings [Dkt. 1115] (the "Motion"), by and through its attorneys, respectfully submits this objection (the "Objection") to the Motion. In support of this Objection, the Landlord represents as follows.

Preliminary Statement

The Buyer is attempting to create, out of thin air, and to graft into the Sale Order (as hereinafter defined), a *force majeure* escape clause provision so that the Buyer can realize the optimal solution to its problems in the face of the Covid-19 pandemic. However, such an escape clause does not exist in the Sale Order and this Court cannot make such a change to the Sale Order simply because the Buyer believes that equity demands such a change.

[1] The Debtors in these chapter 11 cases are: Forever 21, Inc., Alameda Holdings, LLC, Forever 21 International Holdings, Inc., Forever 21 Logistics, LLC, Forever 21 Real Estate Holdings, LLC, Forever 21 Retail, Inc., Innovative Brand Partners, LLC, and Riley Rose, LLC (collectively, the "Debtors").

The Buyer's proposed changes to the Sale Order are significant, extreme, and prejudicial to one group of parties-in-interest – landlords -- but landlords received no value in connection with the sale. The Buyer seeks to convince this Court that the Buyer should be relieved from, or compensated for, its failure to adequately prepare for and/or negotiate remedies in anticipation of the potential pandemic that was in the news months before entry of the Sale Order. The remedy requested by the Buyer is misplaced - rescission, a refund, or other adjustment to the purchase price should have been requested, so that the parties that reaped benefits from the Sale Order, such as secured creditors, share equitably with the Buyer in the costs. Targeting landlords to bear the brunt of Buyer's failure to protect itself adequately makes no sense and has no support in the law.

The Buyer requests that this Court: authorize the Buyer not to pay rent, prevent Landlord from repossessing its premises, and authorize Buyer to conduct GOB sales at some undetermined point in the future. Relief along these lines may very well be available to the Buyer -- but not in *this* bankruptcy case. The relief the Buyer seeks would require the Buyer to have the benefit of its own *Order for Relief* - the Buyer would have to file its own bankruptcy case and seek to "mothball" its bankruptcy case. In the absence of the Buyer commencing its own bankruptcy case, the relief requested by the Buyer is inappropriate, unavailable and must be denied.

Background

1. On September 29, 2019 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the Court.

2. The Landlord and one of the Debtors are parties to an unexpired lease of nonresidential real property (the "Lease) for the Debtor's store located at Cross County Shopping Center in Yonkers, New York (the "Premises").

3. The Premises is located within a "shopping center" as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

4. On February 13, 2020, the Court entered the Order (I) Authorizing (A) Entry Into and Performance Under the Asset Purchase Agreement, (B) the Sale of the Debtors' Assets to the Buyer, and (C) the Buyer to Conduct Store Closings and Going Out of Business Sales, and (II) Granting Related Relief (the "Sale Order").

5. Pursuant to the Sale Order and the Lease, Buyer was required to pay $100,862.33 in April rent to the Landlord on or before April 1, 2020 ("April Rent"). Landlord has not received payment of April Rent from Buyer.

6. Late on March 31, 2020, the Debtors, at the direction of the Buyer, filed the Ninth Lease Rejection Notice, purportedly rejecting the Lease as of March 31, 2020, notwithstanding the admitted and deliberate failure to comply with the lease rejection procedures outlined in the Sale Order. The Landlord has, contemporaneously herewith and based on the substance of this Objection, objected to the effectiveness of the purported rejection of the Lease.

7. On April 1, 2020, the Debtors filed the Motion.

Objection

8. "It is well-settled that a bankruptcy court retains jurisdiction to interpret and enforce its prior orders." *In re NE Opco, Inc.*, 513 B.R. 871, 875 (Bankr. D. Del. 2014). The Buyer here,

however, doesn't seek Court interpretation or enforcement of the Sale Order. Instead, it asks the Court to re-write one paragraph of the final Sale Order for the purpose of re-selling inventory that is no longer property of the Debtors' bankruptcy estate. Buyer cites one statute section and four cases for general propositions about the statute as the "Basis for Relief" in the Motion.

9. The sole statutory basis cited in the Motion in support of the relief requested is section 105(a) of the Bankruptcy Code. The Motion must be denied because Court modification of a Sale Order that has not been timely appealed is possible only via a motion under Rule 60(b) of the Federal Rules of Civil Procedure.

10. "[A] Rule 60(b) motion is the only proper way to challenge a final sale order outside the time to appeal such order." *In re Sindesmos Hellinikes-Kinotitos of Chi.*, 607 B.R. 898, 910 (Bankr. N.D. Ill. 2019) ("[W]e hold that confirmed sales—which are final judicial orders—can be set aside only under Rule 60(b).") (citing *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989); *see also S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Auto. Grp., LLC)*, Nos. 05-40913-BKC-LMI, 07-01574-LMI, 2008 Bankr. LEXIS 812, at *12 (Bankr. S.D. Fla. Mar. 17, 2008) ("In the absence of an appeal of a final sale order, the only manner in which a sale order may be challenged is through Rule 60(b).").

11. Courts have denied such Rule 60(b) motions in the context of sale orders even in extreme circumstances, due to, among things, the importance of finality to the section 363 sale process in bankruptcy cases. For example, in *In re Lehman Bros. Holdings Inc.*, 445 B.R. 143 (Bankr. S.D.N.Y. 2011) aff'd in part and rev'd in part on other grounds, 478 B.R. 570 (S.D.N.Y. 2012), aff'd, 761 F.3d 303 (2d Cir. 2014), the court declined to grant Rule 60(b) relief as to a

sale order even though significant information regarding the sale was not provided to the court. The court in *Lehman Bros.* said that it:

> views final sale orders as falling within a select category of court order that may be worthy of greater protection from being upset by later motion practice. Sale orders ordinarily should not be disturbed or subjected to challenges under Rule 60(b) unless there are truly special circumstances that warrant judicial intervention and the granting of relief from the binding effect of such orders").

Id. at. 149; *see also In re Motors Liquidation Co.*, No. 09-50026 (REG), 2015 Bankr. LEXIS 4445, at *199 (Bankr. S.D.N.Y. June 1, 2015) (enforcing sale order for a number of reasons, including: "when a large number of transactions have taken place in the context of then-existing states of facts, changing the terrain upon which they foreseeably would have relied makes changing that terrain inequitable. Thus, understandably, the caselaw has evidenced a strong reluctance to modify that terrain.").

12. The Buyer has not sought relief under Rule 60(b), presumably because it recognizes that it cannot meet the high bar for relief thereunder. Because Rule 60(b) relief is the sole avenue available to modify a final sale order, and Buyer has not requested relief under the Rule 60(b), the Motion must be denied.

13. In support of its request for relief under section 105, Buyer quotes three cases for the general propositions that (a) "bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationship," (b) bankruptcy courts can "craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain, and (c) section 105 is a powerful, versatile tool. Motion ¶¶ 18-19. Landlord does not dispute that bankruptcy courts are courts of equity, who can modify creditor-debtor relationships, and craft flexible remedies that effect the result the Code was designed to obtain. Those general

propositions, however, do not provide a basis for the relief requested in the Motion, as the relief requested will not "effect the result the Code was designed to obtain" under any circumstances.

14. And while section 105 may be powerful and versatile, a bankruptcy court's use of section 105, as universally recognized by federal courts around the country, is very limited. The Third Circuit in *In re Morristown & E. R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989), declared:

> Section 105(a) gives the court general equitable powers, but only insofar as those powers are applied in a manner consistent with the Code. *See* Lawrence P. King, Collier on Bankruptcy para. 105.04 at 105-15 & n. 5 (15th ed. 1989). Nor does section 105(a) give the court the power to create substantive rights that would otherwise be unavailable under the Code. *See Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985) (holding that a bankruptcy court does not have the authority under § 105 to create a lien to secure payment of environmental cleanup costs when the contract obligating the debtor to pay such costs did not provide for such a lien).

Id.

15. The only other case cited in the Motion by Buyer was the Second Circuit's decision in *Schwartz v. Aquatic Dev. Gp., Inc. (In re Aquatic Dev. Gp., Inc.)*, 352 F.3d 671, 680-81 (2d Cir. 2003). Buyer cited *Aquatic* for the proposition that "bankruptcy courts are 'courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.'" Motion at ¶18. Two sentences after Buyer's quote, however, the *Aquatic* court stated:

> Nonetheless, this Court has repeatedly cautioned that § 105(a) "does not 'authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.'" *Id.* (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)). While perhaps expansive, "[t]he equitable power conferred on the bankruptcy court by section 105(a) is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code" not the broader power to invoke equity "to further the purposes of the Code generally, or otherwise to do the right thing." *Id.* (emphasis in original); *see also In re Barbieri*, 199 F.3d 616, 620-21 (2d Cir. 1999) (warning that the "equitable powers emanating from § 105(a) . . . are not

> a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules") (alteration in original; internal quotation marks omitted).
>
> Thus, the general grant of equitable power contained in section 105(a) cannot trump specific provisions of the Bankruptcy Code, but must instead be exercised within the parameters of the Code itself. *See generally Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 99 L. Ed. 2d 169, 108 S. Ct. 963 (1988) ("Whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); *see also In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 2003 WL 22860275 at *5.

Aquatic, 352 F.3d 671 at 680-81.

16. The relief requested in the Motion – including authorizing the Buyer not to pay rent, preventing Landlord from repossessing its premises, authorizing Buyer to conduct GOB sales at some undetermined point in the future, and Court-authorized occupancy of the Premises after the effective rejection date of Lease – if granted -- would create substantive rights in favor of the Buyer that are unavailable under the Code, especially to a non-debtor, and which harm the Landlord.[2]

17. Accordingly, the Motion cannot be granted pursuant to section 105.

18. The relief requested in the Motion is also entirely inconsistent with the parties' post-rejection rights in and to the Premises. In *In re Tri-Glied, Ltd.*, 179 B.R. 1014, 1019 (Bankr. E.D.N.Y. 1995), the court observed that "all of the cases which have addressed a debtor-lessee's post-rejection rights under a rejected lease have held that the debtor-lessee's possessory right under the lease terminated upon the lease being deemed rejected." *See also In re The Great Atl.*

[2] The statutory deadline under Bankruptcy Code section 365(d)(4) for the Debtors to assume or reject the Lease is April 26, 2020 (the "Assumption Deadline"). To the extent Buyer is asking the Court to extend the Assumption Deadline for the Lease without written consent from the Landlord, that request must be denied. Section 365(d)(4)(B)(ii) states that a further extension of the Assumption Deadline beyond 210 days, can be granted "*only upon prior written consent of the lessor* in each instance." *See* 11 U.S.C. § 365(d)(4)(B)(ii) (emphasis added). The purpose of the subsection was "to limit the discretion of judges to extend time to assume or reject certain commercial contracts and to provide landlords with greater certainty as to such tenancies." *In re Eastman Kodak Co.*, 495 B.R. 620 (Bankr. S.D.N.Y. 2013); H.R. Rep. No. 109-31, at 153 (2005) ("[The amendment] is designed to remove the bankruptcy judge's discretion to grant extensions of the time for the retail debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of entry of the order of relief").

& Pac. Tea Co., Inc., 544 B.R. 43 (Bankr. S.D.N.Y. 2016) ("11 U.S.C. § 365(d)(4) protects non-debtor lessors upon rejection, to enable the lessors to once again rent the premises and to earn income from the demised premises.") (internal quotations omitted); *In re Surtronics, Inc.*, 2014 Bankr. LEXIS 2515, at *12 (Bankr. E.D.N.C.) (a Landlord's post-rejection "right to repossess the Property derives solely from the operation of 11 U.S.C. § 365 and has no immediately equivalent remedy under state law."); *In re Elm Inn, Inc.*, 942 F.2d 630, 633 (9th Cir. 1991) ("By operation of law, the debtor's possessory interest in the lease terminated [on the date the lease was deemed rejected], and the lessor's right to immediate surrender of the property simultaneously accrued."); *In re BSL Operating Corp.*, 57 Bankr. 945, 947 (Bankr. S.D.N.Y. 1986) (the court held that upon a lease being deemed rejected "the tenant's leasehold right to possession of the premises [had] legally expired" and there was no longer a landlord-tenant relationship based on the lease); *In re Re-Trac Corp.*, 59 Bankr. 251, 257 (Bankr. Minn. 1986) (upon a lease being deemed rejected under 11 U.S.C. § 365(d)(4), "the lessee no longer has a possessory interest in the unexpired lease …").

19. "To hold otherwise and say that a debtor-lessee retains the right to possess the leased premises following the deemed rejection of said lease would not only fly in the face of the plain meaning of 11 U.S.C. § 365(d)(4) but also would be in clear conflict with the purpose of the section." *Tri-Glied, Ltd.*, 179 B.R. at 1019.

20. The Landlord also objects to any rejection effective date that is earlier than the date when the Premises are actually vacated and surrendered to the Landlord in accordance with the terms of the Sale Order. Given the Buyer's admitted and deliberate non-compliance with the Sale Order requirements for the rejection of leases, the Lease has not been rejected and thus the Debtors

and, by virtue of the Sale Order and the purchase agreement, the Buyer, remain liable under the Lease.

21. Courts agree that when determining the effective date of the rejection of a lease, the "more appropriate [rejection effective] date is the day the Debtors surrendered the premises to the Landlords." *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004). Buyer cites none, and there is no statutory basis or precedent for a bankruptcy court to order or authorize a nondebtor party to remain in real property when the sole combined interest held by the debtor and nondebtor in the real property is a bare possessory interest.

22. In the Objection, Buyer cites to *In re Modell's Sporting Goods, Inc., et al.* (Bankr. D.N.J.) as an example of a court that has suspended a group of jointly administered bankruptcy cases due to COVID-19 while "the debtors were engaged in a full chain liquidation of all of the debtors' retail locations." Motion, ¶ 20. In *Modell's*, however, the motion to suspend the cases was **filed by the debtors** to protect and preserve inventory and other property that **constitutes property of the debtors' bankruptcy estates**. The debtors in Modell's did not ask the Court to **rewrite a final, heavily negotiated sale order** to do so. This Court is presented with a motion **filed by the Buyer** that is seeking to protect and preserve inventory and other property that **does not constitute property of the Debtors' bankruptcy estates**. The Buyer here is asking this Court to **rewrite a final, heavily negotiated sale order** to protect its own property.

23. Paragraph 10 of the Sale Order provides, in relevant part, as follows:

> For any Designated Contract or Designated Lease subject to a Rejection Notice, the rejection of such Designated Contract or Designated Lease shall be effective without further order of the Court pursuant to the terms of this Order as of: … (ii) for any Designated Lease, the later of (a) the date on which the Debtors file the Rejection Notice with the Court (unless the applicable Designation Counterparty timely files and serves an objection as set forth herein, in which case the Rejection

> Effective Date will be determined by further order of the Court or written agreement of the Debtors, the Buyer, and the Designation Counterparty); and (b) *the date the Debtors deliver possession of the premises subject to the Lease to the applicable landlord by delivering keys, key codes, and/or security codes, as applicable, to such landlord or, if not delivering such keys and codes, providing notice to the landlord that the landlord may re-let the premises*; and (iii) for any Designated Contract or Designated Lease that is not assumed and assigned or rejected before the expiration of the Designation Rights Period, the date on which the Designation Rights Period expires (each of (i), (ii), and (iii) above and the date specified in a Consensual Rejection Notice, the "Rejection Effective Date").

(Emphasis added).

24. The Buyer wants this Court to completely undo the part of the Sale Order protecting the Landlord by allowing the Lease to be rejected but permitting the Buyer to store its inventory at the Premises without paying rent and to conduct GOB Sales at some point in the future. The Buyer concludes (seemingly reasonably):

> With the global shutdown caused by COVID-19, these are unprecedented times and *the Buyer is seeking for this Court to use its equitable powers to ensure that parties get the benefit of their bargain under the transaction that was negotiated and approved by the Court*.

Motion ¶ 25 (emphasis added).

25. However, the Buyer really wants the court to rewrite the Sale Order so that the Buyer can preserve the value of its bargain at the expense of the Landlord. The provisions of paragraph 10 of the Sale Order are consistent with existing court decisions and were included to balance the interests and rights of the Landlord. Indeed, the provisions of paragraph 10 of the Sale Order are fairly standard provisions governing the rejection of leases that were negotiated and approved by the Court.

26. Much like a lease that is being assumed in a bankruptcy case, the Sale Order cannot be cherry picked for the benefit of the Buyer. The Sale Order should remain unchanged and enforced as it was originally entered by this Court.

27. The Buyer has not paid the April rent and is seemingly intent on continuing to occupy space at the center owned by the Landlord without paying any rent.

28. The Buyer makes much of the hardships it faces due to the COVID-19 pandemic and the mandates of social distancing in executive orders issued throughout the United States. However, the Landlord is also subject to the same executive orders and must face the same issues as the Buyer. Although limited relief with respect to residential rents may have been included in some executive orders, the COVID-19 pandemic does not excuse retail tenants from paying rent due to their landlords. If a retail tenant has the ability to pay the rent, it should do so. Given the financial strength of the Buyer's members, any claimed "inability" to pay the rent is more properly understood as "unwillingness" to pay.

29. Buyer makes much of the impact of the executive orders on their ability to retrieve their inventory, but the executive orders are evidently not uniform[3] and the executive orders were issued on a rolling basis such that the Buyer had a week or two where, with proper planning, it could have safely retrieved its inventory from many of its stores. The Buyer's inaction during the last two weeks of March does not make their inventory issues a problem that the Landlord should have to pay to solve.

30. The Buyer also asserts that there would be no prejudice to the Landlord if the Court were to grant the Motion. Even if "lack of prejudice to the landlords" was the applicable standard for granting relief (which it is not), the relief sought could not be granted. The lack of certainty as to the ability of the Landlord to deliver the Premises is highly prejudicial to concluding possible deal for one or more replacement tenants.

[3] See *Objection Of Linton Delray, LLC To Motion Of F21 Opco, LLC For Entry Of An Order Modifying The Sale Order And Granting Certain Other Relief Relating To Going Out Of Business Sales And Store Closings And Joinder In Objections Of Other Landlords*, filed April 10, 2020 and assigned Docket No. 1158.

31. Pursuant to Rule 6006(a) of the Federal Rules of Bankruptcy Procedure, among others, the Motion initiated a contested matter under Rule 9014. See Fed. R. Bankr. P. 6006(a) ("[a] proceeding to assume, reject, or assign an . . . unexpired lease, other than as part of a plan, is governed by Rule 9014"). Rule 9014(c) contemplates the applicability of most of the discovery-related rules that govern adversary proceedings. See Fed. R. Bankr. P. 9014(c).

32. Additionally, pursuant to Rule 9014(e) of the Federal Rules of Bankruptcy Procedure, the Court "shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses will testify." Fed. R. Bankr. P. 9014(e).

33. Before an evidentiary hearing on the Motion, the Landlord may wish to take discovery of the Debtors and the Buyer regarding, *inter alia*, all communication between the Buyer and the Debtors regarding the timing and extent of their respective knowledge regarding the COVID-19 pandemic, their respective actions flowing therefrom, Buyer's present financial condition and operating performance, any other options Buyer has considered to resolve the issues it sets forth in the Motion, and Buyer's calculation of the respective losses it will suffer will under the each of the options it has considered.

34. The Landlord reserves its rights to supplement this Objection and to make such other and further objections as they may deem necessary or appropriate, including, but not limited to, objecting to any other rejection, rent, store closing sale, or other relief related to the Premises, the Lease, and/or the property located therein, whether in the form of one or more further proposed orders, motions, or notices, including any further attempts to modify existing final orders in this bankruptcy case.

35. Landlord hereby joins in the objections of other landlords of the Debtors to the extent such objections are not inconsistent with this Objection.

WHEREFORE, the Landlord respectfully requests that the Court enter an order denying the relief requested in the Motion in full, and granting such other and further relief as this Court deems just and proper.

Dated: April 14, 2020
Wilmington, Delaware

Respectfully submitted,

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