

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
FOREVER 21, INC., <i>et al.</i> , ¹)	Case No. 19-12122 (MFW)
)	
Debtors.)	(Jointly Administered)
)	
)	Objection Deadline: TBD
)	

**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**

F21 OpCo, LLC (the “Buyer”)² respectfully states as follows in support of this motion for entry of an order (the “Order”) modifying the Sale Order and granting certain other relief relating to going out of business sales and store closings (this “Motion”)³:

Preliminary Statement

1. In late January, 2020, faced with the prospects of an immediate shut-down and liquidation of the Debtors, the Debtors’ and the Buyer’s undertook extraordinary efforts to negotiate and implement a going-concern sale transaction on an expedited basis. Thereafter, on February 13, 2020, this Court approved the sale of substantially all of the Debtors’ assets to the

¹ The debtors in these chapter 11 cases, along with the last four digits of each debtor’s federal tax identification number, include: Forever 21, Inc. (4795); Alameda Holdings, LLC (2379); Forever 21 International Holdings, Inc. (4904); Forever 21 Logistics, LLC (1956); Forever 21 Real Estate Holdings, LLC (4224); Forever 21 Retail, Inc. (7150); Innovative Brand Partners, LLC (7248); and Riley Rose, LLC (6928) (collectively referred to herein as the “Debtors”). The location of the Debtors’ service address is: 3880 N. Mission Road, Los Angeles, California 90031.

² Capitalized terms used but not otherwise defined in this Motion shall have the meanings given to them in the Sale Order (as defined below).

³ The Buyer provided a copy of this Motion to counsel for the Debtors prior to filing and the Debtors advised that they support this Motion.

Buyer. Because the sale was accomplished in such an expedited timeframe, as a critical part of the transaction, the Buyer was given until April 26, 2020 (the Designation Rights Period)⁴, to determine and designate which executory contracts and unexpired leases the Buyer wanted to have assumed and assigned to it or rejected. Pursuant to the Asset Purchase Agreement and Sale Order, the Buyer purchased all of the Debtors' inventory and, as an essential term and condition of the sale transaction, the Buyer was authorized to conduct GOB Sales and Store Closings to sell the inventory and other assets in stores subject to leases to be rejected. The sale transaction closed less than a week later on February 19, 2020.

2. Less than a month after closing, the global coronavirus (COVID-19) pandemic became our new reality. The COVID-19 pandemic is an unprecedented event in modern human history. As each of us heeds the advice of doctors and government officials to avoid physical interaction, the gears of the global economy have come to an abrupt halt.

3. In light of the COVID-19 pandemic, and the impacts of social distancing and other protective health measures, the Buyer has been compelled, because of government mandate, closings of malls and shopping centers or otherwise, to temporarily close all of its stores and cease selling or moving any of the inventory in its stores.⁵ Further, to stop the spread of COVID-19, and to support social distancing for the safety of its employees and customers, the Buyer voluntarily ceased operations at all of its stores effective March 19, 2020. At this time, it is not known how long this closure will last. Even when the Buyer is able to re-open stores,

⁴ April 26, 2020 is also the date that the Debtors' nonresidential real property leases that are not assumed and assigned to the Buyer will be deemed rejected pursuant to section 365(d)(4) of the Bankruptcy Code.

⁵ See e.g., Cal. Exec. Order N-33-20 (Mar. 19, 2020); D.C. Mayor's Order 2020-053 (March 24, 2020); Fourth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Mar. 22, 2020); Ill. Exec. Order 2020-10 (Mar. 20, 2020); Mass. Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces and Prohibiting Gatherings of More Than 10 People (Mar. 23, 2020); N.J. Exec. Order 107 (Mar. 21, 2020); N.Y. Exec. Order 202.8 (Mar. 20, 2020); WA Proclamation By the Governor Amending Proclamation 20-05, Stay Home - Stay Healthy (Mar. 23, 2020).

customer foot traffic will likely be slow and there could be mandates about the number of customers allowed in a store at one time. It is likely that the stores will not be up and running again in any meaningful way until after April 26, 2020, when leases that have not otherwise been assumed and assigned or rejected will be deemed rejected pursuant to the terms of the Asset Purchase Agreement and by operation of law pursuant to the Bankruptcy Code.

4. As a result, the Buyer now seeks relief from this Court to (a) modify paragraph 10 of the Sale Order to provide that (i) all inventory, fixtures and other property remaining in a store that is subject to a rejected lease is not deemed abandoned and may not be used or disposed of by the applicable landlord until after the Buyer has had a reasonable opportunity to either sell such property pursuant to a GOB Sale or otherwise remove and dispose of the property in an orderly fashion in a reasonable period of time and (ii) the Debtors' rejection of a lease is effective notwithstanding the Debtors' inability to remove the inventory, fixtures and other property and consequent failure to deliver possession of the premises to the landlord due to its failure to deliver keys, key codes, and/or security codes, as applicable, to such landlord, or, if not delivering such keys and codes, then by providing notice to the landlord that the landlord may re-let the premises; and (b) authorize the Buyer to conduct GOB Sales and Store Closings at the store locations subject to rejected leases for a period of time commencing when the Buyer has regained the ability to open and operate such stores and hold such sales. The Buyer recognizes that, as of now, it is impossible to predict when the COVID-19 pandemic will be resolved and when it will be safe and practical for the Buyer to re-open stores and for customers to return to the store locations. Therefore, the Buyer proposes that as more information becomes available, and no later than 60 days after entry of the Order, the Buyer will file a notice setting forth proposed procedures and timing for removal and disposal of the Buyer's property or GOB Sales

at each of its store locations for which the applicable lease has been rejected; provided that the Buyer may seek further extensions of this 60 day period in light of the circumstances. Such procedures would be consistent with the procedures previously approved by the Court in the Sale Order, as modified to address current circumstances and the changing landscape of retail and social interaction. Notwithstanding the rejection of the leases, at such time as the Buyer is able to reopen its stores and conduct GOB Sales, Buyer will pay rent to landlords for the period of time that it is conducting the GOB Sales.

5. Prior to the outbreak of COVID-19, the Buyer had been working diligently with its landlords to obtain extensions of time to negotiate amended lease terms and/or conduct GOB Sales. For 37 of the 64 leases that have been rejected, the Buyer had obtained consensual extensions from landlords to conduct GOB Sales and Store Closings beyond the April 26, 2020 deadline. However, none of the extensions contemplated the current circumstances presented by the COVID-19 pandemic and the relief request in this Motion.

6. Absent the relief requested in this Motion, for stores the Buyer determines to permanently close, the Buyer will be prevented from conducting GOB Sales and Store Closings as contemplated in the Sale Order or otherwise remove its inventory and other property from its stores. The right and ability of the Buyer to conduct GOB Sales and liquidate inventory at Store Closings was a cornerstone of the sale transaction with the Debtors. Without it, the Buyer would not have agreed to buy all of the Debtors' inventory, which purchase accounted for a substantial majority of the cash purchase price paid to the Debtors.

7. The Buyer has provided notices to reject 64 leases effective as of March 31, 2020 (each such lease is also subject to a notice of GOB Sale) and the Buyer may reject additional leases before the April 26, 2020 deadline (when all leases will be deemed rejected absent

assumption or the Buyer and applicable landlord entering into an agreement for an extension). However, due to the impact of COVID-19, the stores have not been open, and in most cases have not even been accessible, for some time and the Buyer is therefore unable to remove its inventory from the stores as contemplated by the Sale Order without violating applicable law or putting its employees in harm's way. The Buyer simply cannot access nor employ the manpower in a safe or legal manner to do so. Absent a modification to the Sale Order, the Buyer will be deprived of its property, including the inventory, fixtures and other assets currently sitting in closed stores that the Buyer will not be able to sell or remove before such property is deemed abandoned upon rejection of a lease under the current form of the Sale Order. This forfeiture will result in great economic harm to the Buyer and a perceived but not realizable windfall to landlords.⁶

Jurisdiction and Venue

8. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. The Buyer confirms its consent, pursuant to rule 7008 of the Bankruptcy Rules and rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

9. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

⁶ The inventory and certain other property in the stores would not have value upon which the landlords could realize because the Buyer's intellectual property rights prohibit the landlords from selling it to third parties. Instead, the landlords would incur additional costs associated with the removal and disposal of the property.

10. The statutory bases for the relief requested herein are sections 105, 363, and 365 of title 11 of the United States Code (the “Bankruptcy Code”), Bankruptcy Rules 2002 and 6006, and Local Rules 2002-1 and 9006-1.

Background⁷

11. On February 2, 2020, the Debtors and the Buyer entered into an Asset Purchase Agreement (such agreement together with all schedules and exhibits attached thereto and the Related Agreements, the “Asset Purchase Agreement” and the transactions contemplated therein, collectively, the “Sale Transaction”).

12. Under the terms of the Asset Purchase Agreement, during the Designation Rights Period, the Buyer may designate the Debtors’ unexpired leases of nonresidential real property and executory contracts listed on Schedule 2.7(a) of the Asset Purchase Agreement for assumption and assignment to Buyer or rejection. In addition, under Section 6.13 of the Asset Purchase Agreement, during the Designation Rights Period, the Buyer, in its sole discretion, has the right to close stores and conduct GOB Sales to sell the inventory purchased from the Debtors, including for stores subject to leases that Buyer elects to reject in accordance with the Asset Purchase Agreement.

13. On February 13, 2020, the Court entered an *Order (I) Authorizing (A) Entry Into and Performance Under the Asset Purchase Agreement, (B) The Sale of the Debtor’s Assets to the Buyer, and (C) the Buyer to Conduct Store Closings and Going Out of Business Sales, and (II) Granting Related Relief* [Docket No. 927] (the “Sale Order”).

⁷ A detailed description of the Debtors and their business, and the facts and circumstances supporting the Debtors’ chapter 11 cases, are set forth in greater detail in the *Declaration of Jonathan Goulding, Chief Restructuring Officer of Forever 21, Inc., in Support of Chapter 11 Petitions and First Day Motions* filed contemporaneously with the Debtors’ voluntary petitions for relief filed under chapter 11 of the Bankruptcy Code on September 29, 2019.

14. The Sale Order authorized the sale of substantially all of the Debtors' assets to the Buyer, including all inventory, pursuant to the terms of conditions of the Asset Purchase Agreement. The Sale Order also authorized the Buyer to conduct GOB Sales and Store Closings in accordance with the process and procedures set forth in the Sale Order and the Store Closing Order (as modified by the Sale Order). In addition, with respect to rejected leases, paragraph 10 of the Sale Order provides that "[a]ny property remaining in the leased premises on the Rejection Effective Date shall be deemed abandoned and may be used or disposed of by the applicable landlord without notice or liability to any party claiming an interest in such abandoned property."

15. On February 19, 2020, the Debtors and Buyer closed the Sale Transaction and the Debtors filed a *Notice of Occurrence of Closing of Sale of Substantially all of the Debtors' Assets to F21 OpCo, LLC* [Docket No. 960].

16. The Buyer has filed and served five *Notice of Going Out of Business Sales* stating its intention to conduct GOB Sales at a total of 64 store locations [Docket Nos. 1062, 1066, 1073 1080 and 1109]. For the same 64 store locations, the Buyer directed the Debtors to file concurrently with this Motion, the *Ninth Notice of Rejection of Unexpired Non Residential Real Property Leases* rejecting each of the leases effective as of March 31, 2020 [Docket No. 1110].

Relief Requested

17. By this Motion, the Buyer seeks an Order (a) modifying paragraph 10 of the Sale Order to provide that (i) all inventory, fixtures and other property remaining in a store that is subject to a rejected lease is not deemed abandoned and may not be used or disposed of by the applicable landlord until after the Buyer has had a reasonable opportunity to either sell such property pursuant to a GOB Sale or otherwise remove and dispose of the property in an orderly fashion in a reasonable period of time and (ii) the Debtors' rejection of a lease is effective

notwithstanding the Debtors' inability to remove the inventory, fixtures and other property and consequent failure to deliver possession of the premises to the landlord due to its failure to deliver keys, key codes, and/or security codes, as applicable, to such landlord, or, if not delivering such keys and codes, then by providing notice to the landlord that the landlord may re-let the premises; and (b) authorizing the Buyer to conduct GOB Sales and Store Closings for a period of time commencing when the Buyer has re-gained the ability to open and operate such stores and hold such sales pursuant to a safe and reasonable process generally consistent with the process set forth in the Sale Order, as modified by any later orders of this Court or by agreement among the Buyer and the applicable lease counterparty.

Basis for Relief

18. The Buyer seeks relief from the Court in the exercise of its inherent equitable powers and the express power conferred under section 105(a) of the Bankruptcy Code to allow the Buyer access to its stores so that the Buyer may keep its inventory and fixtures in the store locations until such time as the COVID-19 pandemic has passed and it is safe to conduct going out of business sales or otherwise dispose of the Buyer's inventory, fixtures and other property. Bankruptcy courts are "courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process." *Schwartz v. Aquatic Dev. Group, Inc. (In re Aquatic Dev. Group, Inc.)*, 352 F.3d 671, 680-81 (2d Cir. 2003) (citation omitted). As courts of equity, bankruptcy courts are empowered to "craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003).

19. Section 105(a) of the Bankruptcy Code provides a bankruptcy court with the equitable power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) (noting that section 105(a) is “consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships”). The Third Circuit has described section 105(a) as a “powerful, versatile tool.” *In re Joubert*, 411 F.3d 452, 455 (3d Cir. 2005).

20. In response to the COVID-19 pandemic, courts as well as federal and state legislatures and administrative bodies have entered orders and adopted statutes postponing or otherwise suspending dates and deadlines. For example, in *In re Modell’s Sporting Goods, Inc., et al.*, the Bankruptcy Court for the District of New Jersey granted the debtors request for a suspension of its chapter 11 cases due to the COVID-19 pandemic; at the time of the suspension, the debtors were engaged in a full chain liquidation of all of the debtors’ retail locations. Case No. 20-14179 at Docket No. 166 (Bankr. D. N.J. March 27, 2020). As further evidence of the unprecedented times, the Internal Revenue Service postponed the federal income tax filing deadline by 90 days; and many state legislatures have suspended statutes of limitation. *See Relief for Taxpayers Affected by Ongoing Coronavirus Disease 2019 Pandemic*, I.R.S. Notice 2020-18, (Mar. 21, 2020); N.Y. Exec. Order 202.8 (Mar. 20, 2020); Conn. Exec. Order 7G (Mar. 20, 2020); La. Proclamation No. JBE 2020-30 (Mar. 16, 2020).

21. For the Buyer, the COVID-19 pandemic has frozen its business operations. Customers and employees are staying home, landlords have closed their malls and state and local governments have ordered the closure of all “non-essential” businesses to protect the public health. While the Buyer continues to negotiate with the vast majority of landlords on terms for

assumption and assignment of the Debtors' leases, the Buyer has served rejection notices and notices of its intention to conduct GOB Sales for 64 store locations. For the reasons stated herein, and in particular the closure of the Buyer's stores and the "social distancing" and "shelter in place" mandates or guidance that have become the norm for everyday life, it is impossible for the Buyer to conduct those GOB Sales at this time or remove its property.

22. As noted above, if on or before closing the Debtors' sale transaction the Buyer would have known that it would be unable to conduct GOB Sales and Store Closings that are expressly contemplated in section 6.13 of the Asset Purchase Agreement, the Buyer would not have agreed to buy all of the Debtors' inventory on the terms set forth in the Asset Purchase Agreement. Additionally, as a result of the store closures caused by the COVID-19 pandemic, for rejected leases, the Buyer is not able to remove its inventory, fixtures and other property from the store locations as contemplated by the Sale Order. Under the terms of the Sale Order, the Buyer's property will be abandoned to the landlords on the effective date of rejection of the Debtors' leases, which, for leases that have not otherwise been assumed and assigned or rejected, will occur by operation of law pursuant to the Bankruptcy Code on April 26, 2020.

23. Absent the relief requested herein, the Buyer will suffer significant economic prejudice as it will not be able to conduct the GOB Sales that were a critical component to the Buyer's purchase of the Debtors' assets and all of the Buyer's inventory and property in the store locations will be abandoned to the landlords. The landlords, on the other hand, will not be significantly prejudiced by the relief because we are in the midst of a global crisis that currently prevents most retail stores in this country from being open and landlords cannot at this time re-let the closed stores and spaces that are subject to the leases that have been rejected. In addition, when malls and stores reopen, absent the relief requested in this Motion, the landlords will incur

the expense of disposing of the Buyer's inventory because Buyer's intellectual property rights prohibit the landlords from selling the inventory to third parties. Further, notwithstanding rejection of the leases, the Buyer will maintain insurance on each of the store locations until such time as a GOB Sale is completed for the store location and/or the premises is turned over to the landlord.

24. To be clear, at this time, the Buyer is not seeking to change the process and procedures for rejection of leases or for GOB Sales that were previously approved by the Court in the Sale Order. Rather, the Buyer is seeking relief to prevent a forfeiture of its property and permit a short suspension of the GOB Sales process for the health and welfare of its customers and employees. When more information is available, and no later than 60 days (as may be extended by this Court and which the Buyer reserves the right to seek such extension) the Buyer will file a notice to propose a time period for removing and disposing of the Buyer's property or commencing GOB Sales and any necessary modifications to the process and procedures in light of the circumstances of the COVID-19 pandemic. As noted above, for each location where by the Buyer conducts a GOB Sale, the Buyer will pay rent to the landlord for such period that it is conducting a GOB Sale.

25. 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.

Notice

26. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for the Debtors; (b) the U.S. Trustee for the District of Delaware; (c) the landlords affected by the relief requested in this Motion; (d) counsel to the

Official Committee of Unsecured Creditors appointed in this case; and (e) any party that requests service pursuant to Bankruptcy Rule 2002. The Buyer submits that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

27. No prior request for the relief sought in this Motion has been made to this or any other court.

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WHEREFORE, the Buyer respectfully request entry of the order, substantially in the forms attached hereto as Exhibit A granting the relief requested herein and such other and further relief that this Court deems appropriate.

**MORRIS, NICHOLS, ARSHT & TUNNELL
LLP**

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