

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

-----X  
 In re: : Chapter 11  
 :  
 FOREVER 21, INC., et al.,<sup>1</sup> : Case No. 19-12122 (KG)  
 :  
 Debtors. : Jointly Administered  
 :  
 : **Objection Deadline: April 14, 2020, at 4:00 p.m. ET**  
 : **Hearing Date: April 21, 2020, at 2:00 p.m. ET**  
 : **Related to Docket No. 1115**  
 -----X

**OBJECTION OF CENTENNIAL REAL ESTATE COMPANY, LLC, CENTERCAL PROPERTIES, LLC, CRVI SBP LLC, DIMOND CENTER HOLDINGS LLC, EASTVIEW MALL, LLC, FEDERAL REALTY INVESTMENT TRUST, GALLERIA MALL INVESTORS LP, GS PACIFIC ER LLC, INGRAM NORTH LOOP SHOPPING CENTER, L.P., KRE BROADWAY MALL OWNER LLC, MAJESTIC SQUARE, LLC, MEMORIAL CITY MALL LP, MONTEBELLO TOWN CENTER INVESTORS, LLC, PGIM REAL ESTATE, RETAIL PROPERTIES OF AMERICA, INC., STARWOOD RETAIL PARTNERS LLC, THE FORBES COMPANY, THE MACERICH COMPANY, TRADEMARK PROPERTY COMPANY, UBS REALTY INVESTORS LLC, URBAN EDGE PROPERTIES, WHITE PLAINS GALLERIA LIMITED PARTNERSHIP, AND YTC MALL OWNER, 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**

Centennial Real Estate Company, LLC, CenterCal Properties, LLC, CRVI SBP LLC, Dimond Center Holdings LLC, Eastview Mall, LLC, Federal Realty Investment Trust, Galleria Mall Investors LP, GS Pacific ER LLC, Ingram North Loop Shopping Center, L.P., KRE Broadway Mall Owner LLC, Majestic Square, LLC, Memorial City Mall LP, Montebello Town Center Investors, LLC PGIM Real Estate, Retail Properties Of America, Inc., Starwood Retail Partners LLC, The Forbes Company, The Macerich Company, Trademark Property Company, UBS Realty Investors LLC, Urban Edge Properties, White Plains Galleria Limited

---

<sup>1</sup> Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: 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). The location of the Debtors’ service address is: 3880 N. Mission Road, Los Angeles, California 90031.

Partnership, and YTC Mall Owner, LLC (collectively, the “Landlords”) hereby file this objection (the “Objection”) 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* [D.I.1115] (the “Motion”),<sup>2</sup> and respectfully represent as follows:

**I. INTRODUCTION**

Everyone is facing unprecedented challenges due to the COVID-19 pandemic. The effects are not limited to any one sector of the populace, and the financial impact is not limited to a single section of the economy. In the retail world, both tenants and landlords are suffering from store closures from the necessary lockdowns that are in place to stop the spread of this horrible virus. This is a situation and time in our country where parties should be working together to find reasonable solutions to the challenges that we are all facing. Rather than seeking a cooperative solution, the Buyer (a non-debtor) instead asks this Court to force a draconian remedy on the Landlords that not only violates the Bankruptcy Code, this Court’s prior orders, and general principles of property law, but seeks to put all of the cost, expense and risk of the store closures on the Landlords. A rejection of the Leases without surrender of the Premises is not a rejection, and a solution that puts all of the cost and risk of loss on one party is not an equitable solution.

**II. BACKGROUND FACTS**

1. Forever 21, Inc., and their affiliated debtor entities (the “Debtors”), filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on

---

<sup>2</sup> Terms not otherwise defined here shall have the meanings ascribed to them in the Motion, the Sale Motion, the Sale Order, and accompanying documents.

September 29, 2019. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.<sup>3</sup>

2. The Debtors lease retail space (the “Premises”) from the Landlords pursuant to unexpired leases of nonresidential real property (individually, a “Lease,” and collectively, the “Leases”) at the locations (the “Centers”) set forth on the attached Schedule A.

3. Each Lease is a lease “of real property in a shopping center” as that term is used in Section 365(b)(3). *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

4. On January 30, 2020, the Debtors filed a *Motion for Entry of an Order (A) Approving Bidding Procedures and Bid Protections in Connection with the Sale of Substantially All of the Debtors’ Assets, (B) Approving the Form and Manner of Notice Thereof, (C) Scheduling an Auction and Sale Hearing, (D) Approving Procedures for the Assumption and Assignment of Contracts, (E) Approving the Sale of the Debtors’ Assets, and (F) Granting Related Relief* (the “Sale Motion”) [D.I. 802].

5. On February 4, 2020, the Court conducted a hearing on the bidding procedures portion of the Sale Motion, and following the hearing, it entered an *Order (A) Approving Bidding Procedures and Bid Protections in Connection with the Sale of Substantially all of the Debtors’ Assets, (B) Approving the Form and Manner of Notice Thereof, (C) Scheduling an Auction and Sale Hearing, (D) Approving the Sale of the Debtors’ Assets, and (E) Granting Related Relief* (the “Bidding Procedures Order”) [D.I. 854].

---

<sup>3</sup> Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

6. On February 11, 2020, Landlords filed a limited objection to the sale portion of the Sale Motion [D.I. 901] to address adequate assurance and designation rights issues, among other things.

7. 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 Debtors' Assets to the Buyer, (C) the Buyer to Conduct Store Closings and Going Out of Business Sales, And (II) Granting Related Relief* (the "Sale Order") [D.I. 927]. The Sale Order authorized the sale of the Debtors' assets identified in the Asset Purchase Agreement as Acquired Assets to F21 OpCo, LLC (together with its designees, if any, the "Buyer").

8. As a result of the COVID-19 pandemic, on April 1, 2020, the Buyer filed the instant Motion seeking, *inter alia*, to modify paragraph 10 of the Sale Order to provide that: (1) all inventory, fixtures, and other property remaining at a store that is subject to a rejected lease is not deemed abandoned and that the applicable landlord may not use or dispose of the property until after the Buyer has had an opportunity to sell or otherwise remove or dispose of it; (2) the Debtors' rejection of a lease will continue to be effective notwithstanding the inability to remove property from the premises or to surrender the property (by delivering keys and codes); and (3) the Buyer is authorized to conduct GOB Sales and Store Closings at the store locations subject to the rejected leases for a period of time after the Buyer has regained the ability to operate at the stores.

9. Buyer further requests 60 days following entry of an order to file a notice of proposed procedures and timing for removal and disposal of the property at each of the stores, which it may extend even further under the circumstances. Buyer offers only to pay rent for the period of time that it is conducting the GOB Sales. It does not appear to offer to pay rent

between the date of rejection and the date that the GOB Sales are conducted, or other associated expenses or damages as set forth herein.

10. Landlords recognize the extraordinary and unprecedented nature of the COVID-19 epidemic, and they are sympathetic to the Buyer's concerns, but Landlords are facing equally difficult setbacks and uncertainty. Landlords do not oppose practical, reasonable, and narrowly tailored measures to protect the interests of the Buyer, the Debtors and their creditors given the difficult circumstances facing all parties, but the Motion exceeds those limits and goes well beyond what the Bankruptcy Code allows. Under the Buyer's scenario, Landlords bear all of the risk without any protection or other way to mitigate losses. No authority permits this type of open-ended and far-reaching relief. Rejection cannot occur without the surrender of the Premises to the Landlords, and to the extent any relief is granted by this Court, Landlords must receive adequate protection of their rights under the Leases.

### **III. ARGUMENT**

#### **A. The Buyer Cannot Override Provisions of the Bankruptcy Code to Reject the Leases Without Immediately Surrendering the Premises to Landlords.**

11. The Motion seeks authority to reject the Leases, while having possession and control of the Premises remain in possession of the Buyer. This is not a rejection, and the Court should not entertain any remedy that effectively terminates the contractual relationship created by Leases while leaving another party in possession and control of the Premises. Putting aside for a moment the inequitable request by the Buyer that they should receive the benefit of secure storage of their property for an indefinite period at the Landlords' cost, the rejection of the Leases cannot occur without returning possession of the Premises to the Landlords. Nothing in the Bankruptcy Code, the current Sale Order, or applicable non-bankruptcy law permits this type of extraordinary relief against a non-consenting party. The Debtors cannot "reject" their leases

while retaining possession and control of the Premises and forcing Landlords to carry the costs of storing their property and bear the risk of loss to the Premises and Buyer's property during this period.

12. Putting aside the question of whether the Buyer even has standing to seek this type of relief, the Buyer presents no authority that permits the vast relief requested in the Motion. Landlords are continuing to perform all obligations under their Leases to secure and maintain their Premises during this troubling time, even while many tenants are not able (or simply refusing) to pay current rent and charges. The Buyer remains obligated to pay all rents, costs, and damages until the Premises are unequivocally surrendered to Landlords, and they cannot abandon the obligations under the Sale Order while forcing Landlords to act as involuntary bailees of their property for an indefinite period regardless of the circumstances. The Buyer is essentially asking this Court to approve their request that their obligations under the Leases are terminated immediately, but the Landlords obligations will remain in effect (at Landlords sole cost, expense, and risk) until such time as the Buyer decides to reopen and recommence store closing sales for their own benefit. Contrary to the Motion, there is nothing equitable in the relief sought by the Buyer and any remedy approved by the Court should not include a premature rejection of the Leases and should take into account the rights and obligations of both parties.

13. The Buyer bases the request for such extraordinary relief on the Court's inherent powers pursuant to Section 105(a). Landlords recognize that Section 105(a) authorizes a court to issue any order, process, or judgment necessary to carry out the provisions of the Bankruptcy Code. Nonetheless, the Supreme Court has made clear that a court may not exercise either its statutory power under section 105(a) or its inherent equitable powers in contravention of any statutory provision. *See Law v. Siegel*, 571 U.S. 415, 421 (2014) ("It is hornbook law that

§105(a) “does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.” (*citing* 2 Collier on Bankruptcy ¶105.01[2], p. 105-6 (16th ed. 2013)); *In re Prosser*, 2018 U.S. Dist. LEXIS 101919, \*20, 2018 WL 3041067 (D.V.I. June 19, 2018) (“*Law’s* holding is straightforward: a bankruptcy court cannot use its equitable powers under § 105(a) or its inherent authority in a manner that violates an express provision of the Code.”); *see also Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987) (finding that the equitable powers of § 105(a) are not “a license for a court to disregard the clear language and meaning of the bankruptcy statute and rules.”); *In re Rose*, 512 B.R. 790, 795 (Bankr. W.D.N.C. 2014) (“While bankruptcy courts have fashioned relief under Section 105(a) in a wide variety of situations, this provision does not allow courts to alter the substantive rights of the parties. Rather, the powers granted by this section must be exercised in a manner consistent with the provisions of the Code and other applicable law.” (internal citations omitted)).

14. The Bankruptcy Code provides for the immediate surrender of property upon rejection. *See* 11 U.S.C. § 365(d)(4)(A) (“the trustee shall immediately surrender that nonresidential real property to the lessor”); *In re Scarborough-St. James Corp.*, 2015 Bankr. LEXIS 3258, \*9-10, 2015 WL 5672628 (Bankr. D. Del. Sept. 24, 2015) (“[U]pon rejection of a lease of nonresidential real property, the trustee shall ‘immediately surrender that nonresidential real property to the lessor.’” (*quoting* 11 U.S.C § 365(d)(4)(A))). Paragraph 10 of the Sale Order likewise requires the immediate surrender of property upon rejection, with turnover of the Premises and removal or abandonment of remaining property. In regard to property remaining on the Premises, the Sale Order expressly provides: “Any 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.” Sale Order ¶10.

15. Rejection involves much more than merely an accounting entry for the payment of rent. It impacts a panoply of property rights with respect to the Premises, including but not limited to which party has an insurable interest in the property and bears the risk of loss in the event of damages to the Premises or property located therein. The Debtors and Buyer cannot abdicate these obligations by seeking to reject leases without surrendering the Premises, thereby cutting off the insurable interest in the property, while still utilizing the Premises for their benefit and putting the risk of loss for any damage to the Premises and any property therein solely on the Landlords.

16. For instance, the rejection of the Leases terminates a number of obligations under the Leases, including the Buyer’s insurance coverage with respect to the Premises. Landlords cannot be tasked with paying for and securing the Debtors’ or Buyer’s property, as well as bearing the risk of loss, while the Debtors and/or Buyer retain possession and control over the property. During this time, Landlords have to bear the costs of storing the Debtors’ property.

**B. The Buyer Cannot Require Landlords to Store the Debtors’ Property Indefinitely Until the Buyer Can Return to the Premises to Conduct GOB Sales at an Uncertain Future Date.**

17. The fact of the matter is that Landlords are currently providing the Buyer secured storage of its property without receipt of minimum rent, and while coming out-of-pocket for real estate taxes, common area maintenance (including security), and other charges that are the direct responsibility of tenants under shopping center leases. As a result, Landlords are both involuntary lenders and involuntary bailees for the Debtors and the Buyer. There is no basis in law or equity to require that Landlords bear the entire cost of risk associated with the current



store closures, and the Court should not order the Landlords to provide rent-free use, occupancy, and storage to a non-debtor entity.

18. Although the Buyer states that it will pay rent to Landlords for the period that it is conducting the GOB Sales, that is not what is required under the Leases, and it is insufficient protection. That does not account for any rents between the date of purported “rejection” and the unknown date of the GOB Sales. During this time, in addition to base rent, Landlords have to bear all other costs associated with the Premises, including common area maintenance fees (“CAM”), taxes, insurance and security costs associated with the Centers that are the direct responsibility of tenants as additional rent under the Leases. Moreover, although the Buyer points out that the IRS has postponed federal tax filings, and some states have suspended statutes of limitation, this does not hold true for all states. For example, for Centers in California, real estate taxes were due on April 10th and those amounts were paid by the Landlords, even though they are the responsibility of the tenants. Moreover, where Landlords have not agreed to an extension of the deadline to assume or reject leases, the Court also lacks the authority to extend the statutory deadline to assume or reject leases beyond April 26, 2020, absent Landlord consent. Section 105 does not give the Debtors (and certainly not the non-debtor Buyer) authority to act in contravention of the Bankruptcy Code.

19. The Buyer claims that other courts have granted suspensions of chapter 11 cases in light of the epidemic. But the Buyer’s Motion goes well beyond the temporary stays requested in other cases requesting, for instance, rent deferments. It involves a request to completely ignore principles of the Bankruptcy Code, as well as principles of property law. It seeks to create an obligation of the Landlords to provide not only free and secure storage to the Buyer, but to also bear the risk of loss for any damage to the Premises and Buyer’s property when Landlords have neither possession nor control of the Premises. In other cases involving

relief based on the COVID-19 pandemic, the courts have agreed to provide certain limited relief that balances the interests of all parties, which is far from the exceptionally broad and damaging relief that the Buyer seeks in the Motion.<sup>4</sup> The Buyer’s use of Section 105 directly violates the express provisions of Section 365, which is impermissible.

**C. Neither the Buyer Nor the Debtors Have Provided the Landlords With Adequate Protection for Bearing the Risk**

20. While rejection is inappropriate until the Buyer surrenders the Premises to Landlords, the Landlords are not opposed to a fair remedy that protects all parties. Such a remedy must provide some form of adequate protection to Landlords. Buyer seeks to have Landlords bear the costs of storing the property on the Premises (including lost rents between the date of rejection and the uncertain GOB Sales, payment of taxes, CAM, insurance and security costs), without adequate protection and with a great risk of administrative insolvency. Section 363(e) of the Bankruptcy Code provides that, “at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest . . . .” 11 U.S.C. § 363(e); *see In re Continental Airlines*, 154 B.R. 176, 180 (D. Del. 1993) (finding that adequate protection is available under section 363(e) for a decrease in value due to the use, sale or lease of an entity’s interest in property); *see also In re P.J. Clarke’s Rest. Corp.*, 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (providing that a “landlord’s right to adequate protection seems to follow clearly from the language of section 363(e)”; *In re D.M. Kaye & Sons Transp.*, 259 B.R. 114, 121-22, fn.12 (Bankr. D.S.C. 2001) (“the

---

<sup>4</sup> Landlords respectfully request the Court to take judicial notice, pursuant to Federal Rules of Evidence 201, as made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9017, of the orders temporarily suspending the bankruptcy cases in *In re Modell’s Sporting Goods, Inc., et al.* (Case No. 20-14179) on March 27, 2020 at Dkt. 166, and in *In re CraftWorks Parent, LLC* (Case No. 20-10475) on March 30, 2020 at Dkt. 217.

amendment [to Section 363(e) of the Bankruptcy Code] suggests that such a lessor may obtain protection of its interest in the property leased to the debtor, such as protection of the value of the property or enforcement of the debtor's obligation to make rental payments under section 365(d)(1)" (internal citations and quotations omitted)).

21. Adequate protection may take the form of a requirement that the Debtors "make a cash payment" to cover the additional costs and liability accruing to Landlords. 11 U.S.C. § 361(1); *see In re Kellstrom Indus., Inc.*, 282 B.R. 787, 787-94 (Bankr. D. Del. 2002). Adequate protection also may take the form of insurance or a bond under the Court's power to "grant[] such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361(3). The Buyer or the Debtors should be required make cash payments to Landlords in amounts sufficient to cover all rents and expenses, to obtain insurance against any liability or damage resulting from removal of the property post-rejection, and/or to obtain a bond in the amount of one year's worth of rent and all expenses to cover costs and liabilities for the unforeseen future.

22. The present climate is fraught with uncertainty, and it is unclear when the property will be removed from the Premises, or whether the Debtors will have the ability to pay current or any deferred administrative claims. Moreover, a deferred administrative payment would be inadequate, as Section 361(3) makes it clear that adequate protection may not take the form of a deferred administrative claim. 11 U.S.C. § 361(3). The administrative solvency of the Debtors is, at best, questionable, and the Buyer recognizes the uncertainty surrounding the timing and conduct of the GOB Sales on the Premises. Until there is more clarity, any relief should be narrowly tailored only to that which is necessary and essential to preserve the Debtors' estates without prejudicing any party. At the very least, if any relief is granted to the Buyer, Landlords must be adequately protected.

**D. The Buyer is Contractually Obligated to Cover Costs to Landlords During the Designation Period**

23. The Leases are subject to the designation rights of the Buyer, which has a contractual obligation to cover payment of all liabilities of the Buyer and the Debtors. *See* Section 2.7(e) of the Asset Purchase Agreement (“APA”). Landlords generally did not object to the designation rights to provide time for the Buyer and Debtors to evaluate the assumption and assignment of further Leases, but that was based on the plain terms of the APA that require the Buyer to cover expenses during the designation rights period. Buyer has provided no basis now to avoid paying these expenses by directing rejections of leases while still seeking the benefit of access and control of the Premises at an indefinite date in the future.

24. Landlords did object to ensure that appropriate procedures were established for the operation of the stores during the designation period, including, among other things, the guaranty of the payment of all Section 365(d)(3) obligations of the Debtors directly to the Landlords during that period, given the Debtors’ limited assets and the possibility of administrative insolvency (which is even greater now), and insurance coverage as required by the affected Leases. The Court entered the Sale Order with these objections and concerns in mind, and only upon the terms of the APA. Now the Buyer seeks to circumvent these without sufficient cause or authority.

25. Landlords emphasize that they are sensitive to the demands of the current market and landscape, but all parties are suffering during these very unfortunate times, not just the Buyer and Debtors. The Landlords should not have to bear all of the risks and costs for an indeterminate period of time, in violation of agreements entered into in this bankruptcy case and governing statutory authority.

**IV. RESERVATION OF RIGHTS**

26. The Landlords reserve their 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, any proposed order on the Motion.

**V. JOINDER IN OBJECTIONS RAISED BY OTHER LANDLORDS**

27. To the extent consistent with the objections expressed herein, Landlords join in the objections to the Motion of other landlords. Additionally, this Objection is without prejudice to Landlords' ability to raise further objections at the hearing hereon.

**VI. CONCLUSION**

Based on the foregoing, the Landlords respectfully request that the Court deny any request to reject the Leases without a complete surrender of the Premises and abandonment of all remaining property in accordance with the previous orders of this Court; grant relief consistent with the foregoing objections; and grant such other and further relief as may be just and proper under all of the circumstances.

Dated: April 14, 2020  
Wilmington, Delaware

Respectfully submitted,

/s/ Leslie C. Heilman

---

Leslie C. Heilman, Esquire (No. 4716)  
Laurel D. Roglen, Esquire (No. 5759)  
BALLARD SPAHR LLP  
919 N. Market Street, 11th Floor  
Wilmington, DE 19801  
Telephone: (302) 252-4465  
Facsimile: (302) 252-4466  
E-mail: heilmanl@ballardspahr.com  
roglenl@ballardspahr.com

and

Dustin P. Branch, Esquire  
BALLARD SPAHR LLP  
2029 Century Park East, Suite 800  
Los Angeles, CA 90067-3012  
Telephone: (424) 204-4354  
Facsimile: (424) 204-4350  
E-mail: branchd@ballardspahr.com

*Counsel to Centennial Real Estate Company, LLC, CenterCal Properties, LLC, CRVI SBP LLC, Dimond Center Holdings LLC, Eastview Mall, LLC, Federal Realty Investment Trust, Galleria Mall Investors LP, GS Pacific ER LLC, Ingram North Loop Shopping Center, L.P., KRE Broadway Mall Owner LLC, Majestic Square, LLC, Memorial City Mall LP, Montebello Town Center Investors, LLC PGIM Real Estate, Retail Properties Of America, Inc., Starwood Retail Partners LLC, The Forbes Company, The Macerich Company, Trademark Property Company, UBS Realty Investors LLC, Urban Edge Properties, White Plains Galleria Limited Partnership, and YTC Mall Owner, LLC*