IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re FOREVER 21, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 19-12122 (MJW) (Jointly Administered) **Hearing Date: October 4, 2021 at 10:30 a.m.** **Objections Due: September 23, 2021 at 4 p.m.**

UNITED STATES TRUSTEE'S RENEWED MOTION FOR AN ORDER, PURSUANT TO 11 U.S.C. § 1112(b), CONVERTING THE DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

Andrew R. Vara, the United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned attorneys, hereby renews his motion for an Order Pursuant to 11 U.S.C. § 1112(b), Converting the Debtors' Chapter 11 Cases to Cases under Chapter 7 of the Bankruptcy Code (the "Motion"), and in support of the Motion states as follows:

PRELIMINARY STATEMENT

1. Cause exists under § 1112(b) of the Bankruptcy Code to convert the Debtors' chapter 11 cases to cases under chapter 7 of the Code because, as this Court has previously ruled, the Debtors' proposed plan "fails to satisfy section 1129(a)(9) of the Bankruptcy Code and is therefore patently unconfirmable." *See* Order Denying Debtors' Motion for Entry of an Order Approving the Disclosure Statement, Dkt. No. 2048. In addition, the Debtors' extreme

[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). The location of the Debtors' service address is: 3880 N. Mission Road, Los Angeles, California 90031.

administrative insolvency prevents them from being able to propose any other plan that could meet the requirements of section 1129(a)(9)(A) of the Code.

2. Because cause exists under § 1112(b) of the Code, and no exception to the same is applicable, these cases must be converted or dismissed. Conversion, rather than dismissal, is in the best interests of the creditors and the estates because the Debtors hold tens of millions of dollars in liquid assets that should be distributed under the priority scheme set forth under the Bankruptcy Code. Conversion would also provide for a chapter 7 trustee to investigate whether causes of action exist that could increase distribution to the Debtors' administrative creditors.

3. Nearly a year has passed since the Debtors filed their motion to reconsider this Court's granting of the U.S. Trustee's initial motion to convert these cases, and there has been no progress in that time towards resolving these cases, or getting administrative creditors paid. The U.S. Trustee's Motion to convert should be granted.

JURISDICTION AND STANDING

4. This Court has jurisdiction to hear this Motion.

5. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district and specifically authorized to seek conversion or dismissal of a case under § 1112. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys. Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

6. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing on this Motion.

BACKGROUND

7. On September 29, 2019 (the "Petition Date"), the Debtors filed voluntary chapter 11 petitions in this Court.

8. The Debtors continue to operate their business as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

8. The U.S. Trustee appointed an official committee of unsecured creditors in these cases on October 11, 2019.

9. On December 18, 2019, the Debtors filed their initial proposed plan of reorganization and related disclosure statement, as well as a motion that sought approval of that disclosure statement and solicitation procedures. *See* Dkt. Nos. 583, 584 and 585. No hearing on that disclosure statement ever took place.

10. In late January 2020, the Debtors changed course, seeking to sell substantially all of their assets. By Order dated February 13, 2020, this Court approved the sale. *See* Dkt. No. 927. At that time, the Debtors admitted they were administratively insolvent by approximately $100 million. *See* Transcript of hearing of February 11, 2020, Dkt. No. 935, Tr. 38:25 – 39:14; and Tr. 42:5-13.

11. By Order of July 17, 2020, the Court prohibited the Debtors from paying any fees to estate professionals until further order of the Court. *See* Dkt. No. 1444. An exception to that prohibition was later made by the Court for Deloitte Tax LLP, in connection with their services to assist the Debtors in seeking tax refunds. *See* Dkt. No. 1505.

The Original Motion to Convert

12. On August 19, 2020, the U.S. Trustee filed a motion under § 1112(b) of the Bankruptcy Code to convert the Debtors' chapter 11 cases to cases under chapter 7 of the Code (the "Original Motion to Convert"). At that time, the Debtors had already made it clear that they intended to propose a plan that would pay administrative creditors a fraction of that required under section 1129(a)(9) of the Code, and deem agreement to such treatment from any creditor that did not return an opt-***out*** form. *See* Dkt. No. 1467 (Debtors' motion for entry of an order authorizing payment of uncontested fees of Deloitte Tax LLP), ¶ 7.

13. At the September 16, 2020 hearing on the Original Motion to Convert, the Court made an oral ruling granting the motion. As part of the ruling, the Court stated, "[b]ased on my prior rulings, counsel for the debtor can tell I'm highly skeptical about whether a creditor can be deemed to have consented to a different treatment unless it fails to opt out -- excuse me -- unless it opts out. Failure to opt out is not consent to an agreement, as I held in Washington Mutual." *See* Transcript of September 16, 2020, Tr. 77:15-20.[2] The Court further directed that conversion of the cases be delayed until it was known whether the Debtors' tax refund requests would be granted. *Id.*, Tr., 79:10-12, and 80:4-9.

14. On September 25, 2020, before the Court entered an order on the Original Motion to Convert, the Debtors filed a Motion to Reconsider Ruling Granting U.S. Trustee's Motion to Convert (the "Motion to Reconsider"). Dkt. No. 1590. In their reply on that motion, the

[2] A copy of that transcript is Exhibit B to the Debtors' Motion to Reconsider Ruling Granting U.S. Trustee's Motion to Convert, Dkt. No. 1590. This transcript does not appear separately on the Court docket.

Debtors asserted that they "intend to solicit consent of administrative creditors ahead of plan confirmation through a motion and procedures under Bankruptcy Rule 9019." *See* Dkt No. 1603, p. 2. The Debtors attached the form of Notice of Administrative Claim Settlement, which was an opt-***in*** form. *See* Dkt No. 1603, Ex. A.

15. The hearing on the Debtors' Motion to Reconsider took place on October 21, 2020. At the hearing, the Court made an oral ruling granting the motion, indicating the following:

> ***I agree with the U.S. Trustee, however, that a failure to – an inability to confirm any plan of reorganization may be a basis to convert a case.*** But I agree with the debtor that my skepticism about the ability to confirm a plan that is not even on file and before the debtor has had the opportunity to negotiate with creditors over that plan is not a sufficient legal basis to prevent the debtors from trying to get a plan confirmed.

See Transcript of October 21, 2020 Hearing, Dkt. No. 1631, Tr. 26:6-13 (emphasis added).

16. By Order dated October 26, 2020, the Court granted the Debtors' Motion to Reconsider, and denied the U.S. Trustee's Original Motion to Convert, without prejudice. *See* Dkt. No. 1632.

The Motion To Approve Settlement Procedures Relating to Administrative Claims

17. In November of 2020, the Debtor filed a motion, seeking approval of procedures to settle the claims of administrative claimants for a small fraction of the approved amounts of such claims (the "Settlement Procedures Motion"). *See* Dkt. No. 1654. The Settlement Procedures Motion sought approval of a process by which the Debtors would send opt-***in*** forms to all administrative claimants regarding the proposed treatment of their claims under the plan. The Court granted Settlement Procedures Motion on December 22, 2020. *See* Dkt. No. No. 1724.

The Motion to Approve the Disclosure Statement

18. On June 11, 2021, the Debtors filed a notice of hearing for approval of their Disclosure Statement relating to the Third Amended Plan. *See* Dkt. No. 1960 (Notice), Dkt. No. 1956 (Third Amended Plan), and Dkt. No. 1957 (Disclosure Statement). Also filed at that time was a revised form of proposed order, solicitation procedures, ballots, notices, letters and various forms, redlined against what was filed on December 18, 2019. *See* Dkt. No. 1959.

19. The Debtors indicated, in the Disclosure Statement, that they had received opt-***in*** forms from approximately 90% of their administrative creditors, but not from the remaining 10%, even though representatives of the Debtors reached out more than five times on average to each such creditor. *See* Dkt. 1957, ecf pages 10 and 20 of 61. In their solicitation procedures, the Debtors asked for Court approval to send to the 10% who did not sign such agreement, as well as to all of their priority tax and other priority creditors, a second form, which would require such creditors to complete and return the form in order to opt-***out*** of the proposed treatment under the plan. *See* Dkt. 1959. The Plan provided that anyone who did not return such opt-***out*** form would be deemed to have agreed to such treatment. *See* Dkt. 1956, Art. II.A.1 and Art. III.B.2.

20. On July 13, 2021, the U.S. Trustee filed an objection to, *inter alia*, the Debtors' request to use opt-***out*** forms with administrative and priority creditors, and to approval of the Disclosure Statement, because it included certain inaccurate and inadequate information, and because the Plan was not confirmable. Included with the objection was the declaration of one of Delaware's chapter 7 panel trustees, Fred Giuliano, addressing inaccurate information in the debtors' liquidation analysis regarding the amount a trustee's professional fees likely would be if the cases converted to chapter 7. *See* Dkt. No. 1995.

21. Prior to the hearing, the Debtors filed a Fourth Amended Plan and Disclosure Statement. *See* Dkt. Nos. 2008, 2009. In that Disclosure Statement, the Debtors asserted that if even one administrative or priority creditor retuned an opt-***out*** form, or objected to the Plan, the Debtors would not be able to confirm the Plan. *See* Dkt. No. 2009, Section III.A, ecf page 9 of 78, and IX.A.11, ecf page 47 of 78.

22. A hearing on the Debtors' request for approval of their Disclosure Statement and proposed solicitation procedures was held on July 22, 2021. At the hearing, the Court indicated it was "not prepared to conclude that an opt-out process for administrative claimants is sufficient to comply with 1129(a)(9)," and found that the "debtors' statements and filings make it clear that, if even one administrative claimant does not opt in, that the plan cannot be confirmed." *See* Transcript of July 22, 2021, copy annexed hereto as **Exhibit A**, Tr. 65:13-15, Tr. 66:21-23. The Court ruled that "the plan, as written, is patently non-confirmable, based on the debtors' admission of what their assets are that are available." *Id.*, Tr. 66:24 – 67:2.

23. After ruling, the Court asked whether the U.S. Trustee's Original Motion to Convert was still pending,[3] or "whether the debtor wants to make the decision as to what to do." *See id.*, Tr. 67:4-7. Debtors' counsel indicated they would like to confer on their side, and then coordinate with the U.S. Trustee regarding next steps. *Id.*, Tr. 67:13-19.

24. On July 29, 2021, this Court entered an Order Denying Debtors Motion for Entry of an Order (A) Approving the Disclosure Statement, (B) Establishing the Voting Record Date,

[3] The U.S. Trustee's Original Motion to Convert was no longer pending. As noted above, the Court had denied that motion without prejudice in connection with the Debtors' Motion for Reconsideration. *See* Dkt. No. 1632.

Voting Deadline, and Other Dates, (C) Approving Procedures for Soliciting, Receiving, and Tabulating Votes on the Plan, and (D) Approving the Manner and Forms of Notice and Other Related Documents. *See* Dkt. No. 2048. By the Order, the Court held that, "[t]he Plan fails to satisfy section 1129(a)(9) of the Bankruptcy Code and is therefore patently unconfirmable." *Id.*

25. After the Court's ruling, the U.S. Trustee's counsel and the Debtors' counsel had a number of communications, but could not reach an agreement as to the appropriate next step for the cases. The U.S. Trustee believes that conversion of the cases to chapter 7 is unquestionably the appropriate next step, and therefore filed this Motion.

BASIS FOR RELIEF

26. These cases should be converted to cases under chapter 7 of the Bankruptcy Code pursuant to 11 U.S.C. § 1112(b)(1), which provides:

> Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

27. Subsection (4) of Section 1112(b) of the Code sets forth a number of examples of "cause." However, that list of examples is preceded by the word "includes," and so is non-exhaustive. The Court has discretion in determining if cause exists under Section 1112(b)(1). *See In re See In re Am. Cap. Equip., LLC*, 688 F.3d 145, 161, n. 10 (3d Cir. 2012)(the "listed examples of cause" under section 1112(a)(4) "are not exhaustive"); *accord In re Brown*, 951 F.2d 564, 572 (3d Cir. 1991). As a result, other things that are not enumerated in the statutory list

may constitute cause. *See, e.g.*, *YBA Nineteen, LLC v. IndyMac Venture, LLC (In re YBA Nineteen, LLC)*, 505 B.R. 289, 302 (S.D. Ca. 2014) ("Cause is a flexible standard, subject to the Court's discretion, and does not necessarily involve one or all of the factors set forth in Section 1112(b)(4).") (internal quotation marks omitted).

28. This Court is afforded "wide latitude in determining whether cause exists" under § 1112(b) and "is not limited to the statutory examples," so "cause may be determined from the facts and circumstances of the case." *Matter of NuGelt, Inc.*, 142 B.R. 661, 665 (Bankr. D. Del. 1992); *see also Am. Cap. Equip*., 688 F.3d at 161 (reviewing bankruptcy court's finding of cause under § 1112(b) for abuse of discretion).

29. Indeed, the legislative history of § 1112(b) emphasizes that that the statute was intended to give "wide discretion to the court to make an appropriate disposition of the case," and because "the list is not exhaustive," courts "will be able to consider other factors as they arise[.]" *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 405-06 (1977).

30. As recognized by this Court at the hearing on the Debtors' Motion to Reconsider in these cases, "an inability to confirm any plan of reorganization may be a basis to convert a case." *See* Transcript of October 21, 2020 Hearing, Dkt. No. 1631, Tr. 26:6-8.

31. "Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case." 7 Collier on Bankruptcy ¶ 1129.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2020). The Supreme Court has long acknowledged that a debtor's inability to propose a confirmable plan is cause to dismiss or convert a chapter 11 case. *See Toibb v. Radloff*, 501 U.S. 157, 165 (1991) ("[T]he Code gives bankruptcy courts substantial discretion to dismiss a Chapter 11 case in which the debtor files an untenable plan of reorganization."); *Tenn. Publ'g Co. v. Am.*

Nat'l Bank, 299 U.S. 18, 22 (1930) (authorizing dismissal under Bankruptcy Act of 1898 because, "[h]owever honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog up its docket with visionary or impractical schemes for resuscitation").

32. Prior to the 2005 BAPCPA amendments to the Code, the statutory list of examples of cause under § 1112(b) included the "inability to effectuate a plan." *See Am. Cap. Equip.,* 688 F.3d at 161. But, even though the BAPCPA removed it as a listed example of cause, the Third Circuit Court of Appeals has recognized that "the inability to effectuate a plan remains a viable basis for dismissal because the listed examples of cause are not exhaustive." *Am. Cap. Equip*., 688 F.3d at 162 n.10 (internal brackets and quotation marks omitted).

33. Other courts, including several in this Circuit, have recognized that, even after BAPCPA amended § 1112(b), the inability to effectuate a plan constitutes cause in and of itself—completely separate from the subsection (b)(4)(A) reference to "rehabilitation."[4] *See, e.g*., *In re Aurora Memory Care, LLC*, 589 B.R. 631, 642 (Bankr. N.D. Ill. 2018) (finding cause due to "[t]he lack of a reasonable likelihood that a plan will be confirmed," without analyzing § 1112(b)(4)(A)); *In re Commonwealth Renewable Energy, Inc.*, 550 B.R. 279, 283 (Bankr. W.D. Pa. 2016) (finding cause where debtor "ha[d] no reasonable possibility of a successful reorganization or liquidation within a reasonable time," without analyzing § 1112(b)(4)(A)); *In re Brooks,* 488 B.R. 483, 492 (Bankr. N.D. Ga. 2013) (finding cause "[b]ecause of the Debtor's

[4] Grounds also exist to convert these cases due to a "continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). These Debtors have not been operating since February of 2020 when they sold principally all of their assets and their business. Thus, no "rehabilitation" of their business is possible. There is a continuing loss to or diminution of the estate because there is no revenue coming in, but professional fees, and potentially other administrative costs, continue to accrue.

failure to file a plan within a reasonable time . . . and an inability to effectuate a confirmable plan of reorganization," without analyzing § 1112(b)(4)(A)); *In re SHAP, LLC,* 457 B.R. 625, 628 (Bankr. E.D. Mich. 2011) (finding cause where debtor was unable to propose a plan that would "meet all of the requirements of § 1129(a)," without analyzing § 1112(b)(4)(A)); *In re Babayoff*, 445 B.R. 64, 76-78 (Bankr. E.D.N.Y. 2011) (finding cause where "the Debtor [was] unable to effectuate a plan," without analyzing § 1112(b)(4)(A)).

34. There are more than ample grounds for these cases to be converted due to the Debtors' inability to propose a confirmable plan, because, as this Court has found, the Debtors do not have the ability to pay administrative claimants in full as required under section 1129(a)(9)(A) of the Code. *See Am. Cap. Equip*., 688 F.3d at 152, 161-62. In that case, the Court of Appeals for the Third Circuit affirmed the bankruptcy court's *sua sponte* conversion of the chapter 11 cases to chapter 7 cases at the disclosure statement stage because the debtors "have been unable to propose a confirmable plan, and will be unable to do so in the future."

35. "Cause" to convert these cases therefore has been established under 11 U.S.C. § 1112(b)(1). If a movant establishes "cause," the Court "*shall* convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, unless the court determines that the appointment under § 1104(a) of a trustee or examiner is in the best interest of creditors and the estate." 11 U.S.C. § 1112(b)(1)(emphasis added). The only exception to this rule is what is set forth in sections 1112(b)(2) and 1112(c) of the Code.[5]

5 Section 1112(c) of the Code is inapplicable to the Debtors, because it addresses only debtors who are farmers or corporations that are not moneyed, business or commercial corporations.

36. Section 1112(b)(2) of the Code provides:

> The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies ***unusual circumstances*** establishing that converting or dismissing the case is not in the best interests of creditors and the estate, ***and*** the debtor or any other party in interest establishes that—
>
> (A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; ***and***
>
> (B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—
>
> i. for which there exists a reasonable justification for the act or omission; and
>
> ii. that will be cured within a reasonable period of time fixed by the court.

11 U.S.C. § 1112(b)(2)(emphasis added).

37. The exception set forth in § 1112(b)(2) of the Code cannot apply here because there are no unusual circumstances that establish that conversion is not in the best interests of the creditors of the Debtors' estates, and there is no reasonable likelihood that a plan will be confirmed within a reasonable period of time.[6]

38. The party seeking conversion or dismissal has the initial burden of showing that cause exists. *See In re Products Int'l Co.*, 395 B.R. 101, 109 (Bankr. D. Ariz. 2008); *In re Schriock Constr., Inc.*, 167 B.R. 569, 575 (Bankr. D.N.D. 1994). The movant must satisfy its

[6] Sections 1121(e) and 1129(e) of the Code do not apply, as they relate to small business cases.

burden of proof by a preponderance of the evidence. *See In re Creekside Senior Apartments, L.P.*, 489 B.R. 51, 60 (6th Cir. BAP 2013).

39. If the movant establishes cause under § 1112(b)(1), then the burden shifts to the debtor to show the existence of unusual circumstances, and that the other requirements of § 1112(b)(2) have been met. *See In re Ramreddy, Inc.*, 440 B.R. 103, 112-13 (Bankr. E.D. Pa. 2009) (citing *DCNC North Carolina I, L.L.C. v. Wachovia Bank, N.A.*, Nos. 09-3775, 09-3776, 2009 WL 3209728, at *4 (E.D. Pa. 2009).

40. If the Court determines that cause exists under § 1112(b)(1), as the U.S. Trustee believes it does, in light of the inapplicability of the exception set forth in § 1112(b)(2), the Debtors' cases must be converted or dismissed. *See* 7 COLLIER ON BANKRUPTCY ¶ 1112.04; *In re Gateway Access Solutions, Inc.*, 374 B.R. 556, 559-60 (Bankr. M.D. Pa. 2007) (noting that the 2005 amendments to § 1112 changed the statute's language "from permissive to mandatory" and limited the Court's discretion not to dismiss or convert a case if cause exists).

41. Upon the determination that cause exists under § 1112(b), the Court must decide between dismissal and conversion based on the best interest of creditors and the estate. *See In re Am. Capital Equip., LLC*, 688 F.3d 145, 161 (3d Cir. 2012). The Court has "wide discretion to use its equitable powers to make an appropriate disposition of the case." *Id.* at 163 (quotation marks and citation omitted). In determining what is in the best interests of creditors, the Court may compare creditors' rights in bankruptcy with their rights under state law. *See NuGelt,* 142 B.R. at 669.

42. Because there appears to be assets of the Debtors' estates available for distribution to administrative creditors, the U.S. Trustee believes that conversion of the cases to

cases under chapter 7, rather than dismissal, is in the best interests of the creditors and the estates. Conversion will allow the Court to retain jurisdiction to ensure that similarly situated creditors are treated fairly under the Bankruptcy Code's priority scheme. Conversion would also allow a chapter 7 trustee to investigate whether there may be causes of action that could be pursued to increase distribution to the Debtors' administrative creditors, such as breach of contract or other "rights under" the contracts and leases that were not transferred as part of the sale of the Debtors' assets. *See* Notice of Filing of Final Asset Purchase Agreement, Dkt. No. 922-1, subsections (g), (h) and (i) of the definition of "Excluded Assets," ecf pages 18-19 of 83.

43. It is notable that in the eleven months that have passed since the Debtors moved for reconsideration of the Court's ruling granting the U.S. Trustee's Original Motion to Convert, the Debtors have not achieved any benefit for their creditors that could not have been achieved by a chapter 7 trustee. Instead, the Debtors have increased chapter 11 professional fees, further reducing potential recoveries to administrative creditors. These cases should therefore be converted as soon as possible.

RESERVATION OF RIGHTS

44. The U.S. Trustee reserves all rights, remedies and obligations to, amongst other things, complement, supplement, augment, alter, substitute and/or modify this Motion and to conduct any and all discovery as may be required or deemed necessary, and to assert such other grounds as may become apparent.

WHEREFORE, the U.S. Trustee respectfully requests that this Court enter an order converting these cases to cases under chapter 7 of the Bankruptcy Code, in the form

annexed hereto as **Exhibit B**, and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

Dated: September 9, 2021

By: */s/ Juliet Sarkessian*

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re FOREVER 21, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 19-12122 (MJW) (Jointly Administered) **Hearing Date: October 4, 2021 at 10:30 a.m.** **Objections Due: September 23, 2021 at 4 p.m.**

NOTICE OF UNITED STATES TRUSTEE'S RENEWED MOTION FOR AN ORDER, PURSUANT TO 11 U.S.C. § 1112(b), CONVERTING THE DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

PLEASE TAKE NOTICE that on September 9, 2021, Andrew R. Vara, United States Trustee for Regions 3 and 9, filed the United States Trustee's Renewed Motion for an Order, Pursuant to 11 U.S.C. § 1112(b), Converting the Debtors' Chapter 11 Cases to Cases under Chapter 7 of the Bankruptcy Code (the "Motion") with the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held on **October 4, 2021 at 10:30 a.m. Eastern Time,** before the Honorable Mary F. Walrath, Judge for the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Courtroom 4, Wilmington, Delaware 19801. The agenda for the hearing will be filed on the Court docket two business days prior to the hearing and will provide information on how to

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). The location of the Debtors' service address is: 3880 N. Mission Road, Los Angeles, California 90031.

attend the hearing, which may be conducted through Zoom. You may also contact Juliet Sarkessian by email at Juliet.M.Sarkessian@usdoj.gov to obtain information on how to attend the hearing.

PLEASE TAKE FURTHER NOTICE that any responses to the Motion must be in writing, filed with the Clerk of the Bankruptcy Court, 824 Market Street, Third Floor, Wilmington, Delaware 19801, and served on the parties set forth below, on or before **September 23, 2020, at 4 p.m. Eastern Time,** which service may be made through the CM/ECF filing system, with courtesy copies emailed to: (a) the United States Trustee, J. Caleb Boggs Federal Building, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Juliet Sarkessian (Juliet.M.Sarkessian@usdoj.gov); (b) counsel to the Debtors, Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Joshua A. Sussberg, P.C. (jsussberg@kirkland.com) and Aparna Yenamandra (aparna.yenamandra@kirkland.com) and Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn: Anup Sathy, P.C. (asathy@kirkland.com); (c) co-counsel to the Debtors, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box 8705, Wilmington, Delaware 19899-8705 (Courier 19801), Attn: Laura Davis Jones (ljones@pszjlaw.com), James E. O'Neill (joneill@pszjlaw.com), and Timothy P. Cairns (tcairns@pszjlaw.com); and (d) counsel to the Committee, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Adam Rogoff (arogoff@kramerlevin.com) and Saul Ewing Arnstein & Lehr LLP, 1201 N. Market Street, Suite 2300, Wilmington, Delaware 19801, Attn: Lucian B. Murley (luke.murley@saul.com).

Dated: September 9, 2021

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 and 9

By: */s/ Juliet Sarkessian*
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Exhibit A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Chapter 11
	.
	. Case No. 19-12122(MFW)
FOREVER 21, INC., et al,	.
	.
	. 824 Market Street
	. Wilmington, Delaware 19801
Debtors.	.
. . . . .	. Thursday, July 22, 2021

TRANSCRIPT OF VIDEO HEARING
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES VIA ZOOM:

For the Debtors:	Laura Davis Jones, Esq. James O'Neill, Esq. PACHULSKI, STANG, ZIEHL & JONES, LLP
	Joshua A. Sussberg, Esq. Aparna Yenamandra, Esq. Austin Klar, Esq. Lydia Yale, Esq. Ann Wallice, Esq. Jacob Ruby, Esq. Simon Briefel, Esq. KIRKLAND & ELLIS, LLP
For the U.S. Trustee:	Joseph Cudia, Esq. Juliet Sarkessian, Esq. Robert Boden, Esq. OFFICE OF THE U.S. TRUSTEE

(Appearances Continued)

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(Appearances Continued)

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(Proceedings commence at 3:00 p.m.)

THE COURT: All right. Good afternoon. This is Judge Walrath and we're here in the Forever 21 case. I'll turn it over to counsel for the debtor.

MS YENAMANDRA: Thank you, Your Honor. Good afternoon, Your Honor. Aparma Yenamandra from Kirkland & Ellis on behalf of the debtors.

Your Honor, we have two items up for today: The remaining pending claims objection, the fifth omnibus claims objection, and then the debtors' disclosure statement and related order and exhibits.

Your Honor, I'm joined today by my partners Mr. Josh Sussberg and Mr. Austin Klar, as well as my colleagues Mr. Simon Briefel and Mr. Jacob Ruby. We also have, from Alvarez & Marsal, Mr. Richard Niemerg and Jonathan Goulding, the debtors' Chief Restructuring Officer.

If it works for Your Honor, in terms of order of operations, we thought it made sense to start with the questions I understand Your Honor has on the pending claims objection. If we can answer those right now, great; if not, we can move to the disclosure statement while we work through getting you answers on the claims objection.

THE COURT: All right. That makes sense. I only had three:

First, on Schedule 3 -- they're all on Schedule 3

to the fifth omnibus. The first one is Tab 26. The objection says the debtor doesn't own the property on which the creditor asserts a security interest, but the documents attached to the proof of claim, the equipment finance agreement and the UCC-1, lists the debtor as the owner. So it's not clear from the declaration or the exhibit, the assertion made that the debtor doesn't own the property.

Similarly -- these are all similar -- Tab 64, again, asserts the debtor doesn't own the property. But in that instance, it's the shipper who asserts a lien in goods being shipped to the debtor, at least I assume that the debtor ordered those goods and, therefore, would be the owner of them.

And the third question deals with both Tabs 94 and 95, that deal with security deposits. And the objection says the security deposit is property of F21 OpCo, LLC, but it's the debtor that's the tenant under the lease, so -- and again, there's no other evidence or -- presented to explain why the security deposit is not the debtors' security deposit.

So I don't know if your witness can answer those questions on the fly or if you want to proceed with the disclosure statement.

MR. RUBY: Your Honor, this is --

UNIDENTIFIED: (Indiscernible)

MR. RUBY: -- Jacob Ruby from Kirkland & Ellis on behalf of the debtors, for the record. We're --

THE COURT: Yes.

MR. RUBY: As my colleague has -- Ms. Yenamandra noted, we're here with Richard Niemerg, who is the declarant on this objection. He is available to answer those questions if he knows them offhand; if not, I'd ask for an adjournment while we handle the disclosure statement, and we can get you those specific details on those claims. We'll have to look at our notes on the analysis that we did not on those.

THE COURT: Does he want to give you a thumbs-up or thumbs-down if he knows the answers?

MS YENAMANDRA: Your Honor, I thought I saw Mr. Niemerg on when we first started. I see now that he -- there he is.

THE COURT: There he is.

MS YENAMANDRA: You're muted, Richard.

MR. NIEMERG: Hello, Your Honor. I thought I was dialed into the phone. I don't know if you can hear me here. I apologize for having some technical difficulties.

I will need a couple of minutes just to go back and look at my notes on those particular claims, if that's okay. I don't know if I know the answers right off the top of my head for each particular one.

THE COURT: And we'll put you at the end of the

list and let you do that research.

MR. RUBY: Thank you, Your Honor.

THE COURT: All right. We'll go to the disclosure statement.

MS YENAMANDRA: Okay. Great, Your Honor. Mr. Sussberg is going to kick us off today.

MR. SUSSBERG: Hello, Your Honor.

THE COURT: Good afternoon.

MR. SUSSBERG: Can you hear me okay?

THE COURT: I can.

MR. SUSSBERG: Joshua Sussberg from Kirkland & Ellis on behalf of Forever 21 and its related debtors.

Thank you for the time today, Your Honor. You know, we've been talking about this day for many months, from the hearing on the United States Trustee's motion to convert these cases to the hearing on the motion to reconsider the conversion to the hearing on our administrative procedures that the Court approved.

And along with Your Honor's references to miracles and surprises, I think the common theme throughout the course of the last several months has been putting the creditors in charge of their own destiny. And what we wanted to do was allow the creditors to make a decision as to whether or not Chapter 11 made sense. And Your Honor, in accordance with our settlement procedures our creditors have spoken.

Pursuant to those administrative procedures that Your Honor approved a couple of months ago, 91 and a half percent of administrative creditors have affirmatively agreed to this process. And now, just to contextualize, this represents 118 million of the estimated 130 million of allowed administrative claims that we expect for these estates. So 91.5 percent of our administrative creditors determined that they want to control their own destiny and maximize their recovery through the Chapter 11 process.

And we, frankly, were not surprised. We had conviction that people were going to agree with this process and we are happy with the results. But of course, it's not a 100 percent. So today's hearing, obviously, is about the remaining 8 and a half percent and the equivalent of approximately $12 million in outstanding estimated administrative claims.

And at the hearing on the administrative settlement procedures, there was a theoretical question of what would happen if creditors did not opt in to the settlement. And Your Honor correctly noted that the Court did not need to answer that question at the time. But obviously, today we do. And we submit, Your Honor, that the facts here matter and are very important.

Not one of the eight and a half percent of the creditors that did not opt in objected to the disclosure

statement. Not one of the eight and a half percent of creditors that did not opt in objected to the administrative claims settlement. Instead, as reflected in the declaration we submitted yesterday or earlier today, these creditors simply have not responded.

But this was not a situation where, as typical in Chapter 11, a notice was served and that was the end of the correspondence. Quite the contrary, Your Honor, the 8 and a half percent of creditors have been contacted repeatedly. And as set forth in my declaration, it's, on average, 8.4 times. Each one of the outstanding administrative creditors was contacted both by phone and email, on average, 8.4 times. And as the declaration attests, this includes through our foreign offices, where people, in the appropriate dialect, were able to communicate and reach out to these creditors, so that nothing got lost in translation if we were able to get somebody on the other end.

Again, this is not an instance where a few large creditors have simply ignored this. These are small creditors, many creditors belonging to the 8 and a half percent, many of whom have *de minimis* claims. And ultimately, what that means is 11 percent on a *de minimis* claim is very, very small.

And we think, because of our completed outreach, the complete lack of objection, and yet another opportunity

in our disclosure statement and solicitation procedures for these same creditors to say they object to the plan, they object to the settlement, they object to the disclosure statement, we think the facts and circumstances justify and we submit necessitate approval of our process.

There is no bait-and-switch here, Your Honor. I personally take issue with that every time it's cited by the United States Trustee. To suggest we are doing anything other than honoring our duty to maximize value is simply frustrating. We are well aware of Your Honor's ruling -- we've talked about it many times -- in Washington Mutual and your original skepticism for this process. But this is different, Your Honor, and it's wholly distinguishable on the facts.

Words matter, and Ms. Yenamandra will talk about 1129(a) and the difference between "agree" and "accept" and the litany of cases that have cited that and the many courts that say this does not necessitate affirmative consent. But even so, we knew of that precedent before this process, and as part of this process we went above and beyond in the face of Your Honor's admitted skepticism. We gave people many, many bites at the apple. Again, each of the creditors that has not yet opted in was contacted at least eight times.

And in the end, Your Honor, I think the argument that prevails is silence by few should not defeat the will of

many. Our job is to maximize value for our creditors. That is exactly what this process is designed and will do. And 118 million and close to 92 percent of our stakeholders have affirmatively agreed to this process.

I'm going to turn it over to Ms. Yenamandra, who will walk through the specifics our or legal argument. And then, of course, I'm happy to answer any questions Your Honor may have.

THE COURT: Thank you.

MS YENAMANDRA: Thank you, Your Honor. Again, for the record -- I just wanted to make sure I unmuted myself. Again, for the record, Aparna Yenamandra from Kirkland & Ellis on behalf of the debtors.

Your Honor, we -- as you may have seen, we filed a declaration this morning from Mr. Sussberg, which he referenced. We have the declaration. And we also have a statement on the record that we worked through with Ms. Sarkessian, with our thanks to her for working through with us on many drafts. If it works for Your Honor, we would propose to start with the declaration and the statement, and then we can really move into the heart of today's hearing.

THE COURT: Go ahead.

MS YENAMANDRA: Okay. Great.

So, Your Honor, I'll turn it over to my partner Mr. Klar to cover the declaration.

MR. KLAR: Good afternoon, Your Honor. Can you hear me?

THE COURT: I can.

MR. KLAR: Austin Klar of Kirkland & Ellis for the record, on behalf of the debtors.

So, before turning things back to Ms. Yenamandra, I'll address the declaration that was filed this afternoon from Mr. Sussberg at Docket Number 2034. Attached to that declaration, at Docket 2034-1, is a chart summarizing the outreach that was performed by Kirkland and Prime Clerk to holders of administrative claims regarding the administrative claims settlement and proposed plan treatment.

We're not providing the declaration or the attached outreach log as proof that these creditors have definitively agreed to their proposed plan treatment or opted into the settlement. As discussed with the U.S. Trustee, we're offering it simply for the limited purpose of providing context to the Court on the extensive outreach process and to simply show that the communication has occurred. You know, we don't believe the level of acceptance or extent of opt-in is reasonably in dispute, but you know, we'll provide any evidence required to prove those facts when the time comes in connection with confirmation, to the extent that the parties are not able to reach agreement on those issues.

As I mentioned, we previewed the declaration with

the United States Trustee, and I believe, with the caveats that I've just laid out, the United States Trustee does not have an objection to the declaration's admission for those limited purposes that I just described. And obviously, Mr. Sussberg is available if the Court has any clarifying questions.

So, with that, Your Honor, I'll move Mr. Sussberg's declaration, filed at Docket Number 2034, into evidence.

THE COURT: All right. Any objection?

MS. SARKESSIAN: Your Honor, I will confirm that, based on -- sorry. For the record, Juliet Sarkessian on behalf of the U.S. Trustee. Good afternoon, Your Honor.

(Indiscernible) confirm that the U.S. Trustee does not object to the declaration and its attachments coming in for this limited purpose, basically as a representation by counsel as to the status of the opt-in procedures and reserve all rights to object to the contents, to the degree they reflect any communications with particular creditors to object on hearsay and any other grounds.

But again, I understand that's not the purpose that it's being offered for today; so we, therefore, do not object to that limited purpose. Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. Klar.

MR. KLAR: To clarify, so --

THE COURT: It's --

MR. KLAR: To clarify --

THE COURT: It's admitted.

MR. KLAR: Thank you, Your Honor.

(Sussberg Declaration received in evidence)

MR. KLAR: With that, I'll turn it back to Ms. Yenamandra.

MS YENAMANDRA: Thank you, Your Honor. Again, for the record, Aparna Yenamandra from K&E on behalf of the debtors.

Your Honor, with that, I'll move to the statement on the record I referenced that we worked through with Ms. Sarkessian, again, with our thanks to her. And I'll just -- if Your Honor will bear with me, I will just literally read it.

Your Honor, from late January through late May of 2021, in connection with the solicitation of acceptances to the settlement approved by the Court on December 22nd, 2020, certain Kirkland attorneys called and/or emailed known holders of general administrative claims to discuss the settlement, advising such holders that Kirkland was counsel to the debtors, and answer any related questions.

Such outreach was directed to known holders of general administrative claims for whom the debtors' professionals had been reasonably able to obtain contact

information based on filed proofs of claim or the debtors' books and records or to such holders' counsel, where the debtors' professionals were reasonably able to identify one based on filed proofs of claim or pleadings filed on the docket of these cases.

In addition to checking the proofs of claim and court filings, we instructed attorneys tasked with reaching out to ask as the first question whether the claimant was represented and, if so, stop the conversation.

Each attorney was assigned a particular list of claimants to reach out to and was responsible for logging his or her personal outreach efforts in a communal outreach log. That outreach log is attached as Exhibit A to Mr. Sussberg's declaration.

Where a claimant was identified as a Cantonese or Mandarin native speaker, Kirkland attorneys in Asia who speak Cantonese or Mandarin reached out to such claimants to ensure that they understood the terms of the settlement and had an opportunity to ask questions without the need for a translation.

During that same time, in conjunction with Kirkland's outreach efforts, Prime Clerk also sent bimonthly emails to holders of general administrative claims who had not yet accepted the settlement to remind them of the deadline to accept the settlement.

In addition, Prime Clerk maintained a dedicated email address and phone number so claimants could proactively reach out with questions regarding the settlement and the process to accept the settlement. This contact information was listed both on Forever 21's Prime Clerk restructuring webpage and on the settlement form itself. Kirkland and Prime Clerk promptly replied to each inquiry.

As of today, the total number of individual outreaches to holders of general administrative claims completed by Kirkland and Prime Clerk is estimated to be approximately 5,600. This includes approximately 4,000 outreach efforts to claimants that have not yet accepted the settlement, which represents, on average, approximately 8.4 outreach attempts per such claimant that have not accepted the settlements.

As a result of these efforts, the debtors --

THE COURT: Go ahead. Somebody is not muted, but we can hear you.

MS YENAMANDRA: Thank you, Your Honor.

As a result of these efforts, the debtors estimate that holders whose claims represent approximately 90 percent of the aggregate dollar value of outstanding general administrative claims accepted the settlement. The debtors also estimate that holders of 509 general administrative claims, constituting approximately 65 percent of the total

number of general administrative claims, have accepted the settlement, and that holders of 276 general administrative claims, constituting approximately 35 percent of the total number of general administrative claims, have not yet accepted the settlements.

Additionally, excluding claims that the debtors believe, according to their books and records, are zero-dollar claims, but for which they have not yet filed a claims objection, the debtors estimate that holders of 444 general administrative claims, constituting approximately 71 percent of the total number of general administrative claims, have accepted the settlement, and that holders of 185 general administrative claims, constituting approximately 29 percent of the total number of general administrative claims, have not accepted the settlement.

Prime Clerk initially populated the outreach log using filed proofs of claim and the debtors' books and records, and Kirkland and Prime Clerk each subsequently made revisions thereto to record each of their outreaches. At the beginning of each week, Prime Clerk sent Kirkland a report detailing each acceptance form that Prime Clerk had received in the preceding seven days, as well as any outreach (indiscernible) that Prime Clerk had delivered since the prior report. Kirkland layered these updates into the outreach log.

Finally, the U.S. Trustee has also asked that we make the following representation on the record:

Assuming the Court expunges the priority claims listed in the pending claims objection, there are approximately -- I'm sorry -- there are currently 209 other priority claims on the claims register estimated at approximately $393,700 in the aggregate, and 42 priority tax claims estimated at approximately 6.7 million. Claims reconciliation work is still ongoing and these numbers will continue to change.

Thank you, Your Honor. That completes the statement that we worked out with Ms. Sarkessian. I'm happy to answer any questions Your Honor may have on that. Otherwise, we can move into the argument section.

THE COURT: You can move into argument, I have no questions.

MS. SARKESSIAN: Your Honor, if I could just clarify. Again, Juliet Sarkessian on behalf of the U.S. Trustee.

THE COURT: Okay.

MS. SARKESSIAN: Clarify that -- and I certainly appreciate debtors' counsel in sending me the statement in advance. And I did ask them if they could provide some additional information like the number of priority claims, and they did put that.

I, obviously, have no knowledge of whether any of this information is, you know, correct or not. I did not tell them to, you know -- it wasn't a -- you know, I wasn't a drafter of this document, I just want to make that clear. And I do not object to it coming in, again, as a -- essentially, a report from counsel to the Court as to the status of the proceedings. Thank you, Your Honor.

THE COURT: Thank you. And it will be admitted.

MS YENAMANDRA: Thank you, Your Honor.

(Status Statement received in evidence)

MS YENAMANDRA: Your Honor, as Mr. Sussberg said at the start of today's hearing, today's hearing is really about two issues: Whether the Court can and should approve a disclosure statement and plan process that includes an opt-out construct for administrative and priority creditors, and the second issue is the treatment of general unsecured creditors under the plan.

And so, Your Honor, when you cut through the papers that have been filed and the arguments that have been made, all we're trying to do here is actually very simple. We're trying to give creditors yet another opportunity to voice their objections, to voice their concerns, and to voice their views on what they believe is the proper trajectory for the remainder of these cases. We're doing it in a way, as I'll go through in a minute, that we think is expressly permitted

by the Bankruptcy Code and consistent with evolving jurisprudence on this question. And we're doing it with the goal to make sure that, ultimately, a silent and apathetic fractional minority does not inadvertently and accidentally speak for a vocal majority.

Mr. Sussberg went through the numbers on -- the number of creditors that have opted in and what that means and claims amounts, so I won't belabor that. But I do want to highlight that, of the eight and a half percent that have not opted in, there are creditors in that group that have filed objection to other matters in these cases at different points in time, whether that's been, by way of illustrative example, the GOB sales procedures approve at the start of the case in the first phase of the case, the bidding procedures and sale order that Judge Gross entered in the second half of the case. So I say that to say that there are certainly creditors within that group that know how to file objections and know where to find Your Honor if they have an opinion that they want to voice, and they simply haven't.

And so a lot of today's hearing focuses on one question, which is: How do we interpret the silence? How do we interpret the eight and a half percent that have not opted in? And what are they trying to convey to us by virtue of not opting in? And the reality is, is that we just don't know.

A significant number of claimants who haven't opted in have claims, as Mr. Sussberg alluded to, in an asserted amount of less than $10,000, and they may have just thought it wasn't worth it to opt in, given the low percentage of recovery.

Others who did assert an amount on their proof of claim form, but who the debtors believe have actually a zero-dollar claim, according to our books and records, may have not opted in because they suspected a claims objection was coming down the pipeline and they didn't want to waste their time for a claim that may ultimately be reduced to zero or something close to zero.

Others may have simply ignored the mailing. We are 22 months into the case and people have certainly received a lot of Forever 21 correspondence in the last 22 months. And as Judge Walsh said in Trans World, referring to solicitation materials, with thousands of administrative and priority claims, it's almost a certainty that one or more claimants would simply not respond to the solicitation. He went on to say, indeed, as I suspect that, as is the case in any large Chapter 11 cases, any number of such claimants treated the solicitation package as junk mail and toss it into the circular file.

Or Ms. Sarkessian may be right. They may, by not opting in, be communicating to us that they don't support the

9019, they don't support the plan process and the debtors' plan forward, and they would prefer to see these cases convert.

But the reality is we simply don't know and reasonable minds can differ as to what that silence means. And there's no better evidence of that than what's sitting in front of us today. On the one hand, we have the U.S. Trustee aligning with a handful of judges in non-binding jurisdictions with opinions issued in the 1980s and 1990s finding that, for 1129(a)(9) purposes, silence is objection.

Conversely, we have, starting with Judge Walsh in Trans World, in 2001, Judge Bernstein echoing the same sentiments in Teligent 2002 and, since then, six other judges arriving to the same conclusion, which is that, for 1129(a)(9) purposes, acceptance may be implied from conduct or silence.

Judge Bernstein, in Teligent, faced with nearly identical facts, went so far as to say, and I quote, that:

> "A creditor who may hold the future of the case in his hands should be under an obligation to speak up. This does not mean that he must accept the debtor's offer to take less, but only that he must respond to it; otherwise, his silence could defeat the plan, even though that was not his intention."

In other words -- in other words, Judge Bernstein

interpreted the silence to be apathy at best and a failure on a duty to speak at worst. And since Judge Walsh and Judge Bernstein issued these rulings, six other judges, including as recently as March of this year, have ruled the same way.

And I say all this to say, again, silence can mean many things. But when the stakes are as high as they are here, we believe we owe it to the creditors who have spoken up, the creditors who have voiced their opinion, the creditors who have said what their views are on the proper trajectory of these cases. We owe it to them to take every opportunity to eliminate the silence -- to eliminate the ambiguity on what the silence of the fractional minority could mean.

And when I say "the stakes are high," I want to be absolutely clear about what I mean. If an admin or a priority creditor submits the opt-out form or they object to the plan -- and we'll treat that objection as the equivalent of submitting an opt-out form -- the plan process will fail. The 9019 process, on its face and under the terms of the 9019 order, will automatically fail, and in all likelihood, these cases will convert to a Chapter 7.

The U.S. Trustee argues in her objection that a Chapter 7 Trustee will simply pick up where the debtors left off and singularly focus on reconciling the admin claims that are still unreconciled and making distributions. But again,

the reality is nobody on this call knows what a Chapter 7 Trustee can do. We've all seen, certainly, the scope of what Chapter 7 Trustees try to do. And at minimum, we can expect that the trustee will retain its own professionals, do its version of an investigation, all of which, at minimum, inserts uncertainty and delay in the process.

Now, for purposes of today, we've agreed with the U.S. Trustee to mutually reserve on all issues related to the liquidation analysis and best interests for confirmation, if we get there. And at confirmation, certainly our burden will be to show that we believe creditors are doing at least as well under our plan as they would in a Chapter 7, and we'll satisfy that burden at that time. But suffice it to say for now that the Chapter 7 process would, at minimum, again, insert uncertainty and delay, possibly significant costs. And the creditors who will bear the brunt of those consequences have been vocal that they do not support a conversion.

And so, in short, Your Honor, I'd say I bring this back to where Mr. Sussberg started. This is not a bait-and-switch. We've been clear from the start of the 9019 process that this is a two-stage process. The first stage was immensely successful, 91 and a half percent of the admin claims, hundreds of millions of dollars in claims, have opted into a process, notwithstanding their frustration and

unhappiness with the circumstances that led us here.

We're now in stage two, which is just providing the remaining eight and a half percent with an opportunity to tell us that they, in fact, don't want the money we're offering in the settlement process and that they would prefer to see these cases convert or go some other path beyond what we've outlined in our papers. And perhaps most importantly, we are explaining to them fully and in plain English, as well as in translated forms, the consequences of their decision to opt out and the consequences of their decision to not opt out.

And so, Your Honor, we believe all of that is not only appropriate, but it's expressly within the permutations of the Code and, as I said, evolving case law on the subject.

1129(a)(9) says that administrative creditors may agree to alternative treatment. It does not say "consent," it does not say "accept," it does not say "express consent," it does not say "written consent," all of which are terms of art that are used elsewhere in the Code, including illustratively in 1129(a)(8), 365(d)(4), 1112, just to name a few.

And as Mr. Sussberg said -- and I know this is an oft-cited phrase in bankruptcy, and it's never been more relevant than it is today -- words have meaning. And as the Supreme Court said in Sosa v. Alvarez in 2004, when Congress

uses one term of art in one part of a statute and a different term of art in a different part of the statute, the Court assumes that different intention -- different meanings were intended.

Here, Congress didn't use "consent" or "express consent" or "written consent," all of which create a more exacting standard than use of the word simply "agree," leaving open the possibility that "agree" can be satisfied in other ways, including by silence or inaction and based on the individual tracks of each case.

Judge Sontchi recognizes it in Molycorp, stating that the Bankruptcy Code does not state a form for which consent to a different treatment must be given.

Judge Walsh went one step further, specifically rejecting Digital Impact, a case cited by the U.S. Trustee, in that case, as well as the U.S. Trustee here, stating that the wording of 1129(a)(9) does not require affirmative agreement. He said, and I quote:

> "This section does not require a claimant to enter into an agreement, whether written or oral. It merely requires that the claimant agree to the alternative treatment."

The dictionary definition of "agree" is to accept or concede something. In this case, the claimants agreed by the simple act of not saying no.

And as I noted, in the years following Judge Walsh's ruling, Judge Bernstein and, following Judge Bernstein, six other judges have ruled the same way.

And so, with that, I'd like to take a minute to just talk about the cases the U.S. Trustee cited on this particular deemed consent opt-out point. The cases the U.S. Trustee cited generally fall into three categories:

The first is cases that, if not singularly, almost singularly focus on the propriety of an opt-out for third-party releases. In this vein, she cites WaMu, Zenith, and Emerge Energy. Of course, the question of releases and the question of plan treatment are entirely separate analyses. Our plan is fully consistent with this line of cases and Third Circuit precedent on releases.

In fact, what our plan does for admin and priority creditors is we make it an opt-in. So they'll receive a separate form that says, if you check this box, you're deemed to opt into the releases; if you don't check this box, you're deemed to have opted out. So we're certainly taking the far end of creditor protection seriously when it comes to the releases.

The second category are cases that just involve incredibly different facts. First, Jenkins, which was from the Eastern District of Virginia in 1995, and Windsor, which is from the Eighth Circuit in 1993. In Jenkins, the debtor

was asking for the deemed consent of a party that was objecting to the plan. Again, we're taking the view that, if a party objects, we're treating that as an opt-out. And we're certainly not trying to argue that a party who has objected is, in fact, deemed to consent. And in Windsor, the creditor that was objecting owned 99 percent of the claims being asserted against the debtor. Here, again, the only reason we're even able to be here today is because hundreds of millions of dollars in claims, representing 91.5 percent of the admin claims, have already voiced their support for this process.

And finally, Your Honor, the third set of cases are cases that are quite a bit older, from the 1980s and 1990s, where a critical part of the Court's ruling was the fact that the Court, at that time, was comporting with the majority view. In particular, Digital Impact, which I already referenced; St. Louis Freight Lines, which is from the Eastern District of Michigan in 1984. In those cases, the Court says that silence means objection in accordance with what the majority view was at the time.

But as we detailed in our reply, the majority view is changing. And in the last 20 years -- you know, in the last 20 years, 8 judges have said that they don't agree with that line of cases and that "accept" can be -- we can get to -- we can get to "agree," rather, through inaction or through

silence.

And so, Your Honor, when you put all that together, what we think this boils down to is we're giving creditors an opportunity to tell us what their actual views are. And giving them an opportunity to tell us their views and keeping that line of communication open goes to the heart of what bankruptcy is about and what the transparency of the bankruptcy process is intended to achieve,.

And given the extreme stakes at issue, we're making sure that we're not guessing as to what their intent are. We're simply saying, if you don't want the money we're offering and you don't support the process we've outlined, just tell us and then we'll know, and we can reconvene, and you should do it in a way that makes it clear that you understand the consequences of what you're doing.

With that, Your Honor, let me turn quickly to the second objection, the treatment of general unsecured claims. Under the plan, general unsecured claims are getting two things: They're getting, first, cash that's left after admin and priority claims have been paid in full, if any. And they're also receiving a waiver of avoidance actions that the debtors own.

The U.S. Trustee's argument is that, with respect to the former, there is no universe in which the admin and priority creditors get paid in full, so that's, effectively,

zero dollars. My argument with respect to the latter is that the debtors sold all avoidance actions under the APA; and so, as a result, the GUC classes should be deemed to reject and we won't have an impaired accepting class.

Your Honor, taking each of those in turn, first of all, we've said many times and agree that it would be extraordinarily unlikely to find ourselves in a situation where we happen to stumble upon enough cash to clear the admin and priority claims. Now, of course, that's the risk in any waterfall plan, that, ultimately, there is not enough water to fall to the bottom of the capital structure. So is it a -- is it a likely outcome? By all means, no. But in the spirit of never say never for waterfall plans, we can't say that it's absolutely impossible.

With respect to the second, the avoidance action waivers, we just simply disagree with the U.S. Trustee that all avoidance actions were sold. As we detailed in our reply, under the APA, there were acquired assets, which the buyer took, and excluded assets, which the debtors retained.

The acquired assets -- the section on acquired assets, I should say, had two relevant sentences here: One sentence saying that acquired assets included avoidance actions, and one sentence saying that acquired assets excluded excluded assets. So, in turn, excluded assets had three relevant provisions: One provision said that excluded

assets included all rejected contracts, excluded assets also included all rejected leases, and excluded assets included the debtors' rights under the excluded assets.

And so, putting those together, it's unambiguous that the excluded assets included pre-petition contracts and leases that were ultimately rejected. Presumably, under those pre-petition contracts, the debtors would have made payments on a pre-petition basis, some of which may qualify as avoidance actions, some of which may not. We don't know as we're sitting here.

The U.S. Trustee's argument is that avoidance action rights arise under the Code and not under the underlying contractual arrangement. We don't disagree that, clearly, avoidance action claims and the ability to pursue those claims are claims and rights that are created under the Code and nothing more. But we have a few responses to that argument:

First, to divorce the ability to pursue such claims and the receipt of the proceeds of those claims from the contractual arrangements pursuant to which those payments were made, just as a logical matter, doesn't seem to make sense to us.

And second, the APA doesn't speak to whether or not there are any avoidance actions and whether or not they exist. As the U.S. Trustee says, and which we agree, that's

a question under statutory law.

What the APA does do is lay out which party the buyer or the debtor retains various assets and liabilities. Any avoidance action proceeds would clearly be an asset of the party retaining such proceeds. And we believe the intent here was all assets, benefits, and rights arising from any excluded asset are ours and any assets, benefits, and rights excluded from an acquired asset are the buyers.

And third, and perhaps most importantly, we have talked to buyer's counsel about this point, and I have confirmed with them that I can represent that they do not plan on objecting to this characterization by the debtors, and they do not plan to take a contrary position to the debtors' position on this matter. And frankly, it should, in some way, speak volumes that the actual parties to the APA are not taking different positions as to who owns this particular asset.

Your Honor, with that, that addresses the U.S. Trustee's two most significant remaining objections. There's two smaller ones, which I'll just spend a minute on.

The first is, Your Honor, we're asking for very limited authority to pay Prime Clerk's reasonable out-of-pocket costs, solely to the extent incurred in connection with the solicitation, which we estimate -- or I'm sorry -- which they estimate to be approximately 220,000. We believe

that's narrowly tailored and reasonable under the circumstances.

Finally, the U.S. Trustee has a procedural objection that, when the plan flipped from a plan of reorganization to a plan of liquidation, we didn't file a revised DS motion reflecting that flip.

To this, the liquidating plan and the liquidating disclosure statement were filed in early November of last years, so parties have been notice -- on notice for eight or nine months that this is now a liquidating plan. We also filed the revised DS order and exhibits and served them on June 11th, so parties have had over a month with those materials. And so, frankly, everything they need to know, they know, and they've known since November of last year, and they've known what the DS order is going to ask of them since the middle of June. And a -- as a technical matter, having a motion that sort of bridges all that we don't believe is a fatal flaw to the process.

And so, Your Honor, with that, I think what I would just say in closing is, again, in the spirit of bankruptcy being all about hearing your creditors and taking direction from them on what they believe is the right outcome in these cases, we've done an incredible amount of reach-out to solicit exactly that information. And the second step of the process is to ensure that we are not putting ourselves in the

shoes of creditors and guessing as to what the silence means, which is especially important here, when the consequences of guessing wrong could be catastrophic to the creditors, who have already very clearly told us which way they want us to go.

With that, Your Honor, I'm happy to take any questions. Otherwise, I would just ask to reserve a bit of time as necessary to respond to anything the U.S. Trustee or any other party may want to say.

THE COURT: I have no questions.

Let me hear from -- before Ms. Sarkessian speaks, does anybody else want to be heard?

MR. SCHMIDT: Good afternoon, Your Honor. Can you hear me?

THE COURT: I can.

MR. SCHMIDT: Robert Schmidt from Kramer Levin on behalf of the creditors' committee.

And just briefly, the committee's silence on this, so far, shouldn't be construed as apathy or any objection to the process. The committee has been consistent that we believe the debtor should have the opportunity to go down the plan path, as opposed to a Chapter 7 conversion, which we don't think is in the best interests of the estate and all creditors. We think we're on the -- you know, maybe the five yard line, to use the football phrase, give or take. And at

this point, we think the debtors should be -- the disclosure statement should be approved and the debtors should be permitted to move (indiscernible) confirmation.

I would note, Your Honor, that, as the committee, we do, from time to time, hear from a number of creditors just checking in on the status of the case and what's going on. We have not heard a single complaint from any creditor with respect to the solicitation process that the debtor has utilized in connection with the admin claims settlement. So we think that speaks volumes and a good indicator that it was a full and fair process.

THE COURT: All right.

MR. SCHMIDT: Thank you, Your Honor.

THE COURT: Thank you.

THE COURT: All right. Then I'll hear from Ms. Sarkessian.

MS. SARKESSIAN: Thank you, Your Honor. Again, for the record, Juliet Sarkessian on behalf of the U.S. Trustee.

Your Honor, I just want to start with talking about what has been resolved. And I do want to thank debtors' counsel for their efforts in resolving a -- the number of issues, disclosure-related issues, and those have all been resolved with the exception of the disclosure regarding avoidance actions, and that's relevant for two reasons: One, it's relevant just in terms of what is being disclosed in the

disclosure statement about avoidance actions and the release thereof. But of course it's also relevant as to whether the general unsecured creditors can be a voting class. So I will address that issue when I get to the issue about them being a voting class.

And I want to start by actually addressing the technical issue. And I don't, you know, really want to make a big deal about this because I think that the substance of these issues is more important. But there is no motion before the Court seeking approval of the solicitation procedures that the debtor is now seeking or the disclosure statement that the debtor is now seeking to have approved.

The motion that the debtors are relying on -- in fact, when I got all of this, I said, okay, where's the motion. And then I saw the notice of hearing referenced this motion filed in December of 2019. And at that time, the debtors were, in fact -- there was a plan of reorganization, it was before the debtors sold their assets. They never actually even noticed that motion. The motion was filed, it was never noticed because, in about a month, they did an emergency sale. And so -- and they sold all of their assets and they no longer have any employees.

And that plan that was filed, the motion relates to a plan that treated -- that had the standard treatment of general administrative creditors and priority creditors.

They're paid in full as set forth under the Code, unless they agree to a different treatment. There was nothing about opt-outs or opt-ins, none of that. It wasn't in the disclosure statement, it wasn't in the mo -- it wasn't discussed in the motion, it wasn't in the solicitation procedures.

So, you know, we're not just talking about -- yes, of course, we understand disclosure statements get amended and -- but you know, you're talking about going from a reorganization plan to a complete liquidation, where you're paying administrative creditors 11 cents on the dollar and you want to do an opt-out process, none of which was addressed in the motion. So, you know, it is what it is and I'll move on.

I want to discuss the point that the debtors make about, well, there's no objections by creditors to the disclosure statement. There were two reservation of rights. I understand one was resolved, I don't know if the other one is still outstanding. The creditor said that they had just received the notice and they had -- you know, didn't have enough time to respond.

But apart from that, I pulled the affidavits of service. I looked at the affidavits of service that were for everything relating to this disclosure statement. So, in June, the debtors filed this disclosure statement, the plan, a -- blacklines of the same, and then a revised form of

order, ballots, notices, et cetera, in blackline.

That went to the 2002. So, if you were an administrative creditor on the 2002 list, yes, you would have gotten those. If you weren't on the 2002 list, the -- as far as I can tell -- and the debtors can correct me if I'm wrong -- but based on the affidavit of service from Prime Clerk, the only thing creditors got if they were not on the 2002 list was a two- or three-page notice of the hearing and the objection deadline and that's it.

And then I looked back at the motion, again, that was filed in December of 2019, and that was also only served on the 2002 list. And at that time, there wasn't even a notice of hearing, so, actually, nothing went out to -- if you weren't on the 2002 list, you didn't know about it at all.

So it's all fine and good to say that nobody has objected, but they haven't actually seen -- again, unless they're on the 2002 list, they may every well -- and unless they went on the claims agent site and knew how to do that and pulled the documents, they haven't actually seen these documents.

Now I want to discuss the issue of the opt-out form following the opt-in form. So, as noted, the debtor sold its business pursuant to a 363 sale in February 2020. At that time, at the sale hearing, the debtors admitted they were

administratively insolvent by $100 million, and I think that's pretty much been the case. It might have gone up or down a little bit over time, but it's been a very, very large number since that time.

In the fall of last year, the debtors commenced a process with this Court's approval, whereby the sent to all their administrative creditors an opt-in form, where they asked the creditor, if you wish to accept the treatment, your treatment under the plan of at least 11 percent, mark this box, you're opting in, and send it back. And Your Honor's order specifically said that anyone who does not send back that form -- there was no obligation to take action. If you did not agree, you did not have to send back the form.

Now the debtors are now requesting approval to serve opt-out forms on the administrative creditors that have not returned the opt-in forms. This request is in furtherance of debtors' plan that provides, if an administrative creditor or priority tax creditor or other priority creditor does not return an opt-out form or file an objection to confirmation, they shall be deemed to agree to their treatment under the plan, which gives them a small fraction of what they are mandated to be paid under 1129(a)(9) of the Code.

Now, just to clarify, the debtors did not previously seek to serve the opt-in form on priority tax or

other priority creditors. They are now asking for authority to serve the opt-in form on those priority creditors and then, ten days -- if I understand this correctly, ten days after the deadline to return the opt-in form, the debtors are going to turn around and send these priority creditors -- any priority creditor who did not return an opt-in form is now going to get an opt-out form ten days later. I would imagine there would be some confusion there. And the U.S. Trustee doesn't have a problem with sending an opt-in form to the priority tax and other priority creditors; it's the opt-out form that's the problem.

And I think, before we get to the law, it's helpful to go through the numbers that the debtors' counsel has presented today to the Court. So the debtors counsel says 91 percent -- the dollar amount of administrative claims -- of administrative claimants -- I'm sorry. Let me restate that.

THE COURT: Start over. Start over.

MS. SARKESSIAN: The debtors' counsel reported that administrative claimants holding 91 percent in dollar amount of total administrative claims returned an opt-in form, and approximately 8 and a half percent -- administrative creditors holding approximately 8 and a half percent in dollar amount of administrative claims have not returned the opt-out form -- opt-in -- excuse me -- opt-in form.

And they also indicated that they've made, on

average, 8.4 attempts to contact all of the creditors that did not return that opt-in form. And some of that was done by Kirkland attorneys and some of that was done by Prime Clerk.

Now let's look at the actual -- instead of looking at the actual percentage of dollar amount, let's look at the number of administrative creditors who have not opted in. And that number, as reported by the debtor, is 276 creditors, and that is 35 percent of the number of current administrative creditors. And the debtor says, well, we think that number is really lower because, you know, there's some claims that we haven't yet filed, you know, and if we file them, that number comes down to 276 to 185 administrative creditors that have not opted in, and that's 29 percent of the total.

Even at 29 percent of the total, that is actually a significant number of administrative creditors that have not agreed to their treatment under the plan. And even if the percentage was less, it wouldn't matter because a majority of administrative creditors cannot bind a minority of administrative creditors to accept less under the Code. The Code does not allow administrative creditors to be classified and to be solicited. For general unsecured creditors, for example, yes, it -- if you read the percentages under the code, a majority of the general administrative [sic]

creditors can bind a minority, but you cannot do that with administrative creditors. Each creditor -- and I don't think the debtor is saying otherwise. But each creditor has the right to agree or not to agree to their treatment, so -- under the plan, if it is less than what's provided by the Code. So, even if there's only, you know, one or two, it doesn't matter.

But here, I think these numbers are significant. And they're especially significant because the debtor has now -- the U.S. Trustee -- one of the objections was the plan does not -- the disclosure statement does not disclose, if you have a situation in which there is an opt-out that -- you know, the Court approves it, they do the opt-out procedure, and a creditor sends back an opt-out form. What does that creditor get? The disclosure statement doesn't say. And their response was to put in language in a number of places in the disclosure statement saying that, if even one administrative or priority creditor opts out, the debtor will not be able to confirm the plan, not may not be able, but will not be able. One, only one. So you have either -- whether it's 185 or 276 administrative creditors, whatever the number is, that have not returned an opt-in form. Any of them return an opt-out form, the plan is tanked.

Similarly, the reason I asked for information from the debtor on how many priority creditors there, so there are

42 priority tax creditors holding claims of 6.7 million and 209 other priority claims asserting claims in the aggregate of 393,000. None of those have yet been served with opt-in forms, and we don't know yet how many will do that. But right now, if any of those whatever -- 209 plus 42 is 251. If any of those priority creditors sends in an opt-out form, the plan cannot be confirmed, according to the debtor. So those numbers are significant.

I want to talk a little bit about the case law. There's not a lot of reported case law on this issue, which is not -- under the 1129(a)(9) issue, what constitutes "agree" for purposes of that section of the Code. And that's not surprising because the Code is pretty clear about the treatment of administrative and priority claims. And everybody knows what it is and you have to be able to pay them in full. So it's not surprising there's not a lot of reported opinions.

The United States Trustee has cited to a number of cases that have held that "agreement" for purposes of 1129(a)(9), agreement to accept treatment other than that provided requires affirmative agreement, silence is not sufficient.

Now the debtors just argued, well, that was the old majority view, and the new majority view is different. There is one reported case, Teligent from 2002, one reported case

that supports the debtors' position. And I agree that case supports the debtors' position. Everything else that the debtors are citing to, six judges did this, whatever they said, that's the majority, now the majority view is different. Not only -- these are not reported decision. They're not even written opinions that are in, say, LEXIS or Westlaw and say not for publication. They're referencing confirmation orders, the language of plans, and in some instances, like in the TWA, they're reading for a transcript.

So, Your Honor, we did not -- I can try, but we did not, in our briefing, try to distinguish these cases for two reasons:

Number one, I've heard Your Honor say many times please do not --

THE COURT: Yes.

MS. SARKESSIAN: And number two, it's actually quite difficult. You know, some of these cases are so old you can't even -- TWA, I couldn't even get material from the web -- you know, from ECF because it wasn't available. So it's extremely difficult to do that and to know what you should be looking at in that context. So, again, unless Your Honor wants me to take a stab at talking about those cases --

THE COURT: No, you don't have to.

MS. SARKESSIAN: Thank you, Your Honor.

And of course, you know, the views of the cases

that we've cited are consistent with Your Honor's ruling in Washington Mutual, Judge Owens' ruling in Emerge Energy, yes, those were in the context of third-party releases.

Frankly, I think that this issue is -- it's even more important to know that there's actual agreement because the Code provides something. It guarantees administrative, priority tax, and other priority creditors a certain payout under the Code. And if there is going to be an agreement to a different treatment, a lesser treatment, it's even -- to me, it's maybe even more important to make sure that that's an actual agreement, an affirmative agreement, than with third-party releases. They're both important, but I -- you know, and Your Honor, obviously, is very, you know, well aware of your own decisions and your view.

And so let me see. Oh, and the debtors also say, oh, well, the cases the U.S. Trustee cite are 20 years old. Yeah, Teligent, again, the only reported opinion that supports the debtors, it's 19 years old. So, you know, they're all about the same period of time.

Now I think, interestingly, Teligent is an interesting case and Judge Sontchi's opinion in Molycorp described the holding in Teligent to be, quote, "novel" and based on a, quote, "questionable fiction." The U.S. Trustee does not believe that a questionable fiction is sufficient to override the clear mandate of Section 1129(a)(9) of the Code.

In addition, there are aspects of the Teligent ruling that make it very inapplicable to the present case. Teligent was a reorganization. And the Court stressed that, quote:

"One's general right to remain silent in the face of an offer should be subject to question and reconsideration, for passivity" --

THE COURT: Passivity.

MS. SARKESSIAN: Excuse me, Your Honor.

"-- will threaten the fundamental goals of bankruptcy - rehabilitation, saving jobs, and equality of distribution."

And that's from Page 772 of the Teligent decision.

There's no jobs to save in Forever 21, there's no employees. There's no possibility of rehabilitation. It's a plan of liquidation, all the assets are going to be gone, there's no possibility of rehabilitation.

Also in Teligent, approximately 75 percent of the administrative creditors fell into a convenience class of $3,000 or less, and they were to be paid in full. Of the remainder, half opted into the convenience class. There's no convenience class in Forever 21. And from the claims register, there are a good number of administrative claims that are in the hundreds of thousands and I see some in the millions. So these are not three-thousand-dollar claims.

And finally, Teligent did not involve a situation, as we have here, where the debtor first sent opt-in forms, and then flipped the script and sent opt-out forms. So, you know, it's just -- it's different in very many ways.

The debtors try to argue that the words "agree" and "consent" are different in the Code. I -- to me, the "agree" and "consent" means the same thing. I recognize that 1129(a)(9) does -- when it uses the word "agree," doesn't say whether it's affirmative or -- but frankly, I think -- you know, if a creditor is going to give up the right to get paid in full, I think it's implicit that any agreement to take less, there must be solid evidence of an agreement to accept less if you're guaranteed to get paid in full under the Code. Mere silence does not qualify, as has -- as was held by the cases that the U.S. Trustee cited in our objection.

I want to talk about fairness. The debtors' request to use opt-out forms to administrative creditors that did not return opt-in forms, after being contacted, according to Kirkland & Ellis, eight times on average by K&E attorneys or by Prime Clerk -- okay. So it's not like they didn't know about it. The form was sent and they got all these contacts, you know, please, please sign the opt-in form. These creditors have made it clear they do not agree to accept less than what's provided under 1129(a)(9). The debtors shouldn't now -- they've already said it. The debtors shouldn't be

able to -- you know, if you want to call it "bait-and-switch," "flip the script," whatever, and reverse the process. It's obviously going to be confusing. We have a lot of foreign creditors here.

The debtors are asking to be able to deem agreement from administrative creditors to accept or reduce distribution if they don't return a opt-out form. But these creditors have already communicated they do not agree to such treatment. You -- and the same would be true with a priority or tax -- priority tax or other priority creditor that does not return the opt-in form. To deem a creditor who has to implicitly agree to a proposal that they have expressly rejected defies logic, it defies fairness, and it does not comply with 1129(a)(9) of the Code.

Now the debtors argue in their reply that just -- oh, and they've argued in oral argument, well, just because an administrative creditor has not returned an opt-in form does not mean that they do not agree to the proposed treatment under the plan. Well, there might be other reasons. And I make this argument all the time when I argue in favor of an opt-in with third-party releases and not an opt-out. I say, if somebody doesn't return an opt-out, it could mean they never even received it, it could mean a lot of things, sure.

So, here, in this context, when the creditor does

not return the opt-in form, the debtors say that silence should not be seen as evidence that they do not consent to their treatment. But at the same time, the debtors take the position, if they are allowed to send out the opt-out forms, and those same creditors do not return those opt-out forms, well, in that context, then silence equals agreement. You can't have it both ways, it's one way or the other.

The debtors also argue that the plan does not contemplate stripping rights from parties who inadvertently fail to act. That's exactly what it does. If you fail to return -- you know, for whatever reason, you didn't get the opt-out form, you thought it was the same as the opt-in form and you -- for whatever reason, you don't return it, your rights are being stripped.

The debtors (indiscernible) argue that deemed consent should be permitted because, really, it's going to be so much better for these administrative creditors under the plan versus what might happen under Chapter 7. But as debtors' counsel indicated, you know, they have not put on any proof as to their liquidation analysis, that's all being reserved, so they haven't offered any evidence. And the United States Trustee does not agree with the accuracy of the analysis we've submitted, filed the declaration of Mr. Giuliano in support thereof.

And I think, even more important, Your Honor

previously ruled that the administrative and priority creditors should be able to decide for themselves whether to accept the plan's treatment of their claim, and that should be true, regardless of whether the debtors think the outcome will be better for them under a plan, versus Chapter 7.

Now I'd like to move on to soliciting the general unsecured creditors, unless Your Honor has any questions at this point in time.

THE COURT: No, you may proceed.

MS. SARKESSIAN: So, by their solicitation procedures, the debtors ask the Court to approve them soliciting two classes of general unsecured creditors, Class 3A and 3B, they're the only voting classes. 3A is general unsecured creditors who also hold administrative claims, and 3B are administrative creditors -- I'm sorry -- are general unsecured creditors who do not also hold administrative claims.

For the purposes, at this point in time, we're not making argument about separating them into two classes. We'll reserve that, if the time comes. The United States Trustee's view is whether they're in one class, two classes, it does not matter. General unsecured creditors are not receiving anything under the plan; and, therefore, under 1126(g), they're deemed to reject and cannot be solicited.

So there's two pieces of this. And I actually -- I

think that the debtors' explanation of their view was helpful with respect to the avoidance actions. But let me start with the distribution under the plan.

So the -- there is a distribution chart in the distribution -- in the disclosure statement that indicates the possibility of general unsecured creditors receiving less than one percent if all administrative and priority claims are paid in full. However -- and it -- you know, I think debtors' counsel recognize how remote that is.

But I think, more importantly, in the actual documents they're planning to send to the voting creditors -- so there was a -- there's a letter that's going to voting -- the voting classes that they're asking the Court to approve and there's also the confirmation hearing notice. And in both of them, the debtors state, quote:

> "The debtors anticipate that holders of unsecured claims will not receive any cash recovery under the plan on account of such claims."

If the debtors are telling the unsecured creditors you're not going to get anything, that's an admission. That's an -- they're not going to get anything. If there was any chance that they could get something, the debtors would not be telling them you're not going to get something, especially when they're asking please vote on our plan, you're not going to get anything under it.

So, clearly, a cash recovery is so remote as to be -- as to be at zero. And to use that as a basis to say they're getting something under this plan, they should be able to vote, that is creating an artificial class for voting purposes.

Now, moving on to avoidance actions. And so let's start out with -- okay. So the debtors argue that, apart from this theoretical possibility, there might be some cash distribution to the general unsecured creditors, which the debtors admit will not happen. The general unsecured creditors are also receiving a waiver of avoidance actions under the plan, which they argue qualifies as -- and this is now I'm reading language from 1126(g):

> "-- the receipt or retention of property under the plan on account of such claims or interests."

That would what be -- what the avoidance actions would have to qualify as.

Okay. So the debtors' argument is wrong for a number of reasons:

First, because the debtors sold all its avoidance actions to the buyer, they have nothing left to waive, and I'll get into detail on that.

Second, even if they had some avoidance actions that were retained, as they now argue, the waiver of an avoidance action does not qualify as property under the plan

on account of a general unsecured creditor's claim. I'm going to go into detail on both of those points, and I'm going to start out with the debtor having sold all of their avoidance actions.

So, if one looks at the version of the disclosure statement that the debtors filed on June 11th -- so that's the disclosure statement to the third amended plan -- in Article 3(e), the debtors asserted that they had sold, quote, "substantially all" avoidance actions. Yet, at the same time, they were saying the debtors were going to release avoidance actions against the general unsecured creditors. It was very contradictory.

Now the debtors have now taken that out. It was in there, they've now deleted it. You can see that in the redline. But that prior assertion was not correct under the facts, but it actually was supported if you looked at the debtors' liquidation analysis. If you look at the liquidation analysis, there is zero value given to any avoidance actions.

And in fact, I looked at the statement of financial affairs of Forever 21 Retail. They listed $244 million in ninety-day transfers. So, if the debtor retained any of those avoidance actions, presumably they would have some value. They're giving them zero value because they sold them all.

Now the debtors -- first of all, the debtors admit, as they must, that the definition of "acquired assets" includes -- and this is in Subsection (5) of the definition:

"All avoidance claims or causes of action arising under Section 544, 547, 548, 549, and 550 of the Bankruptcy Code, and any similar state law."

No exceptions are listed.

Now I agree with debtors' counsel that the definition of "acquired assets" does exclude any assets that fall under the definition of "excluded assets." The debtors argue that -- they point to Subsections (h) and (i) of the definition of "excluded assets," which cover all contracts other than transferred contracts and all leases other than assumed leases.

And then they point to Subsection (g) of the definition of "excluded assets," which cover "all of seller's rights under any excluded asset," that's a quote. And those words are very important, quote, "all of seller's rights under any excluded asset."

Based on these provisions, the debtors now assert that the avoidance actions that are associated with non-transferred contracts and non-assumed leases were not sold, but were retained by the debtors. But that's not what the wording of the APA says. Subsection (g) does not say -- doesn't use associated with, doesn't say any actions --

anything associated with non-transferred contracts or assumed [sic] leases. It says it is limited to a seller's, quote, "rights under any excluded asset," "rights under any excluded asset," that's a quote. The debtors' right to bring avoidance actions is not a right under any contract or lease, whether it was transferred to the buyer or not. Those rights do not arise under the contractor lease. They arise under certain sections of the Bankruptcy Code and state law.

And that's recognized by the asset purchase agreement because, when it talks in the section on acquired assets, the language is all avoidance claims or causes of action arising under Section 544, 547, et cetera. That's where they arise. They do not arise under the contracts or leases. So the debtors' interpretation is just simply wrong.

Now they say, oh, well, you know, the purchaser agrees with us. Well, first of all, that's hearsay. Second of all, under the APA, all of the avoidance actions that were purchased by the buyer, the buyer agreed they would not pursue them. So it has no financial benefit, those avoidance actions, they have not financial effect on the debtor, one way or the other. It doesn't matter if it -- you know, why should they take a position contrary to the debtors? (Indiscernible) whether they get them or not doesn't make any difference, they have agreed not to pursue them.

But even if the Court agreed with the debtors' view

that they have retained some avoidance actions, limited to just those contracts and leases that were not transferred to the buyer, the general unsecured creditors still must be viewed as a rejecting class under 1126(g). Now this is for a number of reasons.

First of all, the debtors do not cite any authority for the proposition that the waiver of an action against a creditor constitutes property under a plan for 1126(g) purposes, or even that a waiver of an action qualifies as property for any purposes, waiver of an action. Of course a cause of action constitutes property -- you know, a debtor's cause of action would constitute property of the estate. The waiver of a cause of action is not property. And certainly, again, debtors do not cite anything that would support such a view.

But even if the waiver of an avoidance action could be considered property, it's still not sufficient under 1126(g) because, under 1126(g), a class is deemed not to have accepted a plan if a plan provides that the claims are -- the claims -- this is a quote:

> "Claims or interests of such class do not entitle the holder of such claims or interests to receive or retain property under the plan on account of such claims or interests."

So the claims of the two classes of general

unsecured creditors are the are the unsecured sums that they are owed by the debtors as of the petition date. A waiver of avoidance actions would not concern those claims, but rather payments that were actually received by the general unsecured creditors prior to the petition date as to which such creditors would not have any claim because they were paid. So, therefore, even if the debtors had retained some avoidance actions, and even if a waiver of avoidance actions could be considered property of the estate for 1126(g) purposes, it's still not property on account of the claims of the general unsecured creditors.

Even if Your Honor was to conclude that the debtors did retain some avoidance actions and waiver of avoidance actions could be viewed under 1126(g) as constituting the receipt or retention of property under the plan on account of such claims and interests, that would not be the end of the analysis because, even under the debtors' view of the APA, the only avoidance actions the debtors have retained, and therefore may release, are those related to non-transferred contracts and leases.

The debtors agree that they have sold all avoidance actions relating to transferred contracts and leases and also avoidance actions against creditors with whom the debtors do not have any contract release. I asked debtors' counsel could they estimate by number, percentage, anything, how many

general unsecured creditors would fall into that category, that they have a contract or lease with the debtor, but it was not assigned to the buyer. They said they were not able to make that determination between yesterday and today.

To the extent that there are any general unsecured creditors that fall into this category, then, first of all, the disclosure statement and the other materials sent to the general unsecured creditors must clearly disclose that those are the only categories of general unsecured creditors that will actually receive an avoidance waiver.

But more importantly, those -- if there are -- again, you know, if Your Honor agrees with the debtors' view of this, the only general unsecured creditors then that would have any -- be receiving the avoidance waiver would be a subcategory of general unsecured creditors, so they would have to be separately classified and solicited. The debtors cannot solicit all general unsecured creditors merely because there is some subset that will be getting this benefit, again, if Your Honor believes that the benefit qualifies as -- exists and qualifies as property for purposes of 1126(g).

I'm going to move on to the argument that the plan is not confirmable. And of course, a lot of this relates to the issues we've already discussed. It's not confirmable because the plan does not comply with 1129(a)(9). The only way that the plan could comply with 1129(a)(9) is if it

provided that any creditor -- any administrative creditor or priority tax creditor that does not return an opt-in form, they have to be paid in full. And that would require 11 million for the -- or twelve -- I think maybe the number was 12 million -- well, 11 or 12 million for the administrative creditors, maybe as much as an additional 7 million for the priority creditors. There's just no money in the estate for this. Even the 8 million in a carveout account that's being used to pay professional fees, even if that was made available, that would not be enough.

And I think an additional reason that was not addressed in the objection that the plan is not confirmable -- and that is based on the changes that the debtors made to the disclosure statement, where they're now saying, even if one administrative or priority creditor returns an opt-out form, one of the hundreds of these creditors returns an opt-out form, that alone will sink the plan, it will not be confirmable.

I was not aware of it at the time we filed the objection, not aware of it. I assumed there were some amounts, you know, perhaps, that could be paid in full if they got an opt-out form. But the debtors are now saying, no, not even one. So, you know, honestly, with all these hundreds of creditors that have not opted in, you know, 185 administrative creditors, 42 priority tax, 200 non-other

priorities, you know, 436 individual creditors, any one of whom, if they send in an opt-out form, is going to tank the plan. I think that, in and of itself, is a reason that this plan is not confirmable because the odds of that, not even one returning an opt-out form, seems let's just say extremely slim,.

The plan is also not confirmable because there is no way the debtors can comply with 1129(a)(10). As we discussed, the general unsecured creditors are not receiving any property, receiving or retaining any property under the plan, they are deemed to reject. They cannot be solicited. And there's no other class of creditors that can be solicited. They're either unimpaired or they're fully impaired and deemed to reject. So it's just not possible for the debtors to comply with 1129(a)(10).

Just, as I mentioned, the discharge provision. The debtors have a discharge provision in the plan, and that is one issue that I think -- unlike the other issues, unlike the other issues we've been discussing, the discharge issue could be addressed at confirmation. The only reason I raise it now is that, if the debtors are moving ahead with this plan because they want to get a discharge, then this is -- a lot of expense and time can be saved by addressing this issue now, if that's the real purpose. It's pretty straightforward.

The debtors sold all their assets, they have no business, they have nothing. There's nothing to -- that could possibly be reorganized. And in fact, the plan -- it says it's liquidating all the debtors' remaining assets. And then there's a provision that says the plan administrator will have the power and authority to take any actions to wind down and dissolve the debtors' estates; and that, from the effective date, the debtors, for all purposes shall be deemed to have withdrawn their business operations from any state in which they were previously conducting it. So I'm not really sure how the debtors think they can get a discharge. But again, if that's the reason they're pursuing this plan, then maybe that issue should be addressed now.

The other issues, though, Your Honor, I think really do need to be addressed now. And maybe in a different case where the debtors weren't so severely administratively insolvent, perhaps there would be more leeway. But you know, to say, well, we can push some of these questions off to confirmation, first of all, here, the debtors are asking Your Honor now to approve these procedures, to send out an opt-out form, to solicit the general unsecured creditors. But they're also asking to prepay Prime Clerk $200,000 to run the solicitation. And also, obviously, additional counsel fees are amassing, other professional fees through this process.

So to permit the debtors to pursue a plan that is

not confirmable on its face for numerous reasons, and elements that simply cannot be fixed at confirmation is something, I think, is really best denied, again, given how administratively insolvent the debtors are.

I think the last thing I want to mention is, you know, committee counsel made a statement regarding the committee's position. The general unsecured creditors are completely out of the money. I mean, this plan has to do with whether administrative creditors and priority creditors -- you know, whether they're going to be using opt-outs or whatever process, it really has next to no effect from general unsecured creditors. So, you know, I certainly appreciate the statement of counsel, but I don't -- they just don't have a dog in the show at this point.

And Your Honor, unless you have any questions, my argument is concluded.

THE COURT: No, thank you.

MS YENAMANDRA: Your Honor, I will just very briefly respond. Again, Aparna Yenamandra from Kirkland & Ellis on behalf of the debtors.

Your Honor, perhaps I was mistaken. I thought we were adjourning the question on the discharge altogether to confirmation, so I didn't address it. Certainly, we are not doing this for purposes of getting the discharge, so we're happy to delete the discharge as we sit here right now and

move on from that point.

Beyond that, we're happy to answer any other questions Your Honor may have in connection with any of the U.S. Trustee's issues. But otherwise, we think we've addressed them in our opening remarks.

THE COURT: Okay. Well, here we are again. I guess I have to make a ruling now. Mr. Sussberg is right, I ducked it the last time, but I do have to decide it today.

Let's start with the comments from both counsel for the debtor, talking about, you know, the silence of a few should not defeat the many, and that a silent and apathetic minority cannot speak for a vocal majority. I mean, those are good sentiments. However, Congress did not put them in the Bankruptcy Code. Administrative claimants are treated differently from other creditors or claimants in bankruptcy. A majority, even a super-majority, cannot bind all administrative claimants.

So I'm being asked to decide whether or not the language in 1129(a)(9), which requires the agreement of administrative claims to take less than they would otherwise be entitled to can be inferred by silence, and I'm just not prepared to do that.

When I allowed the debtor to proceed with the administrative claims settlement process, I did say that the debtors' creditors, those who stand to gain or lose from the

success or downfall of the debtors' proposed plan, should be the ones to decide the fate of these proceedings. But I did not intend to change the requirement of the Code that all administrative get paid in full, unless they specific -- each specifically agrees to less.

And while the debtor was hopeful and the Court was, quite frankly, hopeful, too, that the debtors would be able to get 100 percent of the administrative claimants to accept it or to otherwise provide that they will be treated as the Code provides; i.e., if there are a few stragglers, they would be able to be paid in full, while the remainder could still get their 11 percent, that was not to be.

I am not prepared to conclude that an opt-out process for administrative claimants is sufficient to comply with 1129(a)(9). I don't agree with the ruling in Teligent, although I acknowledge that it is distinguishable, in that it was a reorganization, and the thought of the Judge approving it was to assure that the business and jobs were saved. But I simply do not think that is permitted by the Bankruptcy Code.

And the U.S. Trustee is correct. I do not rely on oral rulings, such as TWA, or bare orders, such as the others cited by counsel for the debtor. And I certainly don't think that those represent a wave of going to a new understanding of what 1129(a)(9) requires.

And I don't think that this case is really different from WaMu. Counsel for the debtor suggested that, in WaMu, the plan of reorganization was depriving creditors of rights by the grant of third-party releases. But I think that the proposed plan here is, in fact, depriving administrative claimants of rights; namely, their right under 1129(a)(9) to be paid in full.

And I don't agree with the other, I would characterize semantic argument about whether "accept" is different from "consent" or different from "agreement." I think we all know what "agreement" means. And again, I am not prepared to say that silence, in response to a notice that said you have the right to opt into a settlement should be seen as consent to or an opt-in to that settlement.

And I am concerned about the pivot now to an opt-out, when for, what, six months, seven months, administrative claimants have been told that they must opt in. I am somewhat concerned about the fairness of, all of a sudden, pivoting to an opt-out.

So I don't think that the plan and I think the debtors' statements and filings make it clear that, if even one administrative claimant does not opt in, that the plan cannot be confirmed. So I think that we ought to just stop this process at this time. And I'm prepared to hold that the plan, as written, is patently non-confirmable, based on the

debtors' admission of what their assets are that are available.

I think we should, as I say, stem the tide of losses and just -- I don't know if the U.S. Trustee's motion to dismiss is still pending -- excuse me -- motion to convert is still pending, or whether the debtor wants to make the decision as to what to do.

MR. SUSSBERG: Your Honor --

THE COURT: (Indiscernible)

MR. SUSSBERG: -- thank you, obviously, thank you for the time today, as always, Your Honor. I'm very disappointed, of course.

I think what we should do is let us take a moment on our side with some of the folks involved, including some of the administrative claimant representatives, just to caucus. And we'll, of course, coordinate with the United States Trustee, and we can all decide what makes sense, as far as next steps are concerned, if that's okay with the Court.

THE COURT: That's fine.

MR. SUSSBERG: Okay. Well, thank you, Your Honor.

THE COURT: Okay. I think we can adjourn for the day. Is that correct?

MS YENAMANDRA: Your Honor, I think we actually just had to circle --

THE COURT: Oh --

MS YENAMANDRA: Yes.

THE COURT: Circle back.

MS YENAMANDRA: I see mister -- I actually don't know if we've resolved the answers to your questions, so I'll just turn it over to Mr. Ruby and Mr. Niemerg to give Your Honor the update.

MR. RUBY: Hello, Your Honor. Jacob Ruby from Kirkland & Ellis for the record.

We have looked into these issues and we believe we have answers that resolve your questions.

THE COURT: Okay.

MR. RUBY: As to the first claim, Claim Number 1909, this claim was purportedly secured by a mechanic's lien on stores that Forever 21 formerly leased.

THE COURT: What -- wait a minute. What tab is that?

MR. RUBY: That's Number 25 on Schedule 3.

THE COURT: Yeah, I didn't have a problem with 25, but I -- it was 26 that I had an issue with, the equipment finance agreement.

MR. RUBY: Apologies. I must have misheard.

As to Bryn Mawr, their counsel did reach out to us directly and confirmed that they agree with the objection.

THE COURT: Okay.

MR. RUBY: The second one, 2743 --

THE COURT: That's tab?

MR. RUBY: 64.

THE COURT: 64, yes.

MR. RUBY: That obligation was for the transportation of goods. Those goods that the lien was purportedly secured by were sold to the purchaser in connection with the sale, so the estate no longer has an interest in the property that secures those liens.

THE COURT: Okay.

(Pause in proceedings)

MR. RUBY: Those are Numbers 94 and 95, at -- those liens were on security interests associated with a lease. That lease was assumed at Docket Number 1237. Security deposits were sold -- were also sold to the buyer in connection with the asset purchase agreement, so the debtors do not own those security deposits.

THE COURT: That satisfies my questions then. And I noted that you had filed a certification of counsel, so I can sign the order that you submitted.

MR. RUBY: Thank you, Your Honor.

THE COURT: All right. Then we are done?

MS YENAMANDRA: We are. Thank you, Your Honor.

MS. SARKESSIAN: Thank you, Your Honor.

THE COURT: Thank you. We'll stand adjourned.

(Proceedings concluded at 4:33 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

July 23, 2021

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

For Reliable

Exhibit B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re FOREVER 21, INC., *et al.*, [1] Debtors.	Chapter 11 Case No. 19-12122 (MJW) (Jointly Administered) **Re: Docket No. ____**

ORDER CONVERTING CASES

Upon consideration of the United States Trustee's Renewed Motion for an Order Pursuant to 11 U.S.C. § 1112(b), Converting the Debtors' Chapter 11 Cases to Cases under Chapter 7 of the Bankruptcy Code ("Motion"), and finding that due and sufficient notice of the Motion having been given under the circumstances; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and this is a core proceeding under 28 U.S.C. §157(b)(2); and after due deliberation and sufficient cause appearing therefore, based upon the record, the Court finds that grounds exist to convert the above-captioned Chapter 11 cases to cases under Chapter 7 of the Bankruptcy Code, and that such conversion is in the best interests of the Debtors' creditors and the Debtors' estates. Based on the foregoing and on the record in these cases, and it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. The Motion to convert these cases to cases under Chapter 7 is GRANTED and the case of each and every one of the Debtors is hereby converted to a case under Chapter 7; and

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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). The location of the Debtors' service address is: 3880 N. Mission Road, Los Angeles, California 90031.

IT IS FURTHER ORDERED that:

2. The Debtors shall:

   a. forthwith turn over to the chapter 7 trustee all records and property of the estates under their custody and control as required by Federal Rule of Bankruptcy Procedure ("FRBP") 1019(4);

   b. within 15 days of the date of this order file schedules of unpaid debts incurred after commencement of the superseded cases including the name and address of each creditor, as required by FRBP 1019(5);

   c. within 15 days of the date of this order file the statements and schedules required by FRBP 1019(1)(A) and 1007(b), if such documents have not already been filed; and

   d. within 30 days from the date of this order, file and transmit to the United States Trustee final reports and accounts as required by FRBP 1019(5)(A).

3. The services of Prime Clerk LLC (the "Claims Agent") authorized pursuant to the Order Authorizing Retention and Appointment of Prime Clerk LLC as Claims and Noticing Agent List order appointing Claims Agent under 28 U.S.C. §156(c) (the "Claims Agent Order") [Docket No. 101] are terminated effective fourteen (14) days after entry of this Order. Nothing herein alters the terms of the Claims Agent Order regarding compensation of the Claims Agent.

4. The Claims Agent shall comply with Local Rule 2002-1(f)(x) and this Court's Protocol for the Employment of Claims and Noticing Agents under 28 U.S.C. § 156(c)(the "Protocol"), with respect to delivery of proofs of claims, and the other

matters addressed in Local Rule 2002-1(f)(x) and the Protocol.

5. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.