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Case No. 2020-0245-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BED BATH & BEYOND INC., Plaintiff, v. 1-800-FLOWERS.COM, INC. and 800-FLOWERS, INC., Defendants.	C.A. No. 2020-_____-___

VERIFIED COMPLAINT

Plaintiff Bed Bath & Beyond Inc. ("Bed Bath"), by its attorneys Richards, Layton & Finger, P.A. and Proskauer Rose LLP, alleges as follows for its complaint against defendants 1-800-Flowers.com, Inc. ("Parent") and 800-Flowers, Inc. ("Buyer") (also collectively "1-800-Flowers"):

NATURE OF THE ACTION

1. Bed Bath brings this action against both 1-800-Flowers defendants for specific performance of their joint obligation to close on the purchase of Personalizationmall.com, LLC ("PMall" or the "Company") from Bed Bath (the "Transaction"), which they were obligated to do on March 30, 2020 (the "Closing"), but failed to do in breach of the Equity Purchase Agreement dated February 14, 2020, among the parties (the "Agreement"). *See* Exhibit 1.

2. In February 2020, Bed Bath agreed to move forward with 1-800-Flowers on the sale of PMall for approximately $252 million, eschewing multiple other offers in the process. Bed Bath's decision to accept 1-800-Flowers' offer, as opposed to other offers, was in large part based on the anticipated ease of Closing the Transaction. Unlike other offers Bed Bath received, 1-800-Flowers indicated that it would fund the purchase price with cash already on hand and available credit, and would not require third party financing, removing uncertainty. Moreover, Bed Bath believed that 1-800-Flowers' presence as an online retailer with shipping and manufacturing infrastructures already in place would facilitate a smoother transition upon Closing.

3. After Bed Bath selected 1-800-Flowers' offer, the parties moved forward with negotiations on an exclusive basis and executed the final Agreement only seven days later, on February 14, 2020. The Agreement provides for a straightforward sale of PMall by Bed Bath to defendant 800-Flowers Inc., with a guarantee by its parent, defendant 1-800-Flowers.com, Inc., which "unconditionally guarantees to the Seller the due and punctual payment, performance and discharge of the Buyer's obligations." *See id.* § 9.14. The parties set the Closing Date for "the third (3rd) business day after the satisfaction or waiver" of each of the Closing conditions, including expiration or termination of the applicable HSR waiting period required by law. *See id.* § 1.3. All conditions to the Buyer's obligation to

consummate the Transaction (other than those conditions that by their nature are to be satisfied at the Closing, which were properly satisfied on March 30, 2020), were properly satisfied on Wednesday, March 25, 2020, resulting in a required Closing Date of Monday, March 30, 2020 under the Agreement. This March 30, 2020 date was specifically requested by 1-800-Flowers to correspond with the end of its fiscal quarter. As a matter of fact, 1-800-Flowers indicated that this March 30, 2020 Closing Date was so critical that it would walk away from the Transaction if Bed Bath did not accommodate its request. Given its stated importance to 1-800-Flowers, Bed Bath accommodated the request for a March 30, 2020 Closing Date in an effort to come to terms on the Transaction.

4. The parties' Agreement specified how risk was allocated on a variety of issues, including the potential occurrence of a Company Material Adverse Effect (a "MAE"), the absence of which between signing and Closing was a condition to Buyer's obligation to consummate the Transaction. The parties agreed that a change, effect, event, occurrence or development would only constitute a MAE if it was an individualized event negatively affecting PMall or a broader event which had "a disproportionate effect on the Company compared to other participants in the industries or markets in which the Company operates." *See* Ex. § 1.1. The parties specifically *excluded* potential adverse events "resulting from conditions affecting any of the industries or markets in which the Company operates" or "any change

resulting from changes in general business, financial, political, capital market or economic conditions (including any change resulting from any calamity, natural or man-made disaster or acts of God, hostilities, war or military or terrorist attack)." *Id.*

5. At the time the parties entered into the Agreement in mid-February, the outbreak of COVID-19 in other countries was universally public knowledge, as was its potential to impact the economy. In executing the Agreement, both Bed Bath and 1-800-Flowers agreed that nonetheless, absent circumstances specific to PMall, the risks and benefits of operating PMall as a business would transfer to 1-800-Flowers as of March 30, 2020.

6. Following the Agreement's execution on February 14, 2020, Bed Bath began working diligently towards Closing. For more than a month thereafter, including the period when businesses generally began to be heavily impacted by COVID-19 (including some being ordered to close), 1-800-Flowers pressed forward, was responsive and took steps needed to Close in a timely manner as required by the Agreement.

7. On March 20, 2020, the Governor of the State of Illinois issued a "stay at home order" ordering all non-essential businesses to close in an effort to help stop

the spread of COVID-19.[1] Shortly following the issuance of that stay at home order, Bed Bath's counsel contacted counsel to 1-800-Flowers to inform them of the order. In response, counsel for 1-800-Flowers requested information regarding the Company's operational plans in response to the stay at home order, which Bed Bath's counsel provided to 1-800-Flowers' counsel shortly thereafter. Bed Bath's counsel specifically invited a conference call with 1-800-Flowers if it wanted to discuss those operational plans in further detail. 1-800-Flowers never took Bed Bath up on that offer.

8. Then, abruptly on Monday, March 23, 2020, just two days prior to the scheduled expiration of the HSR waiting period, 1-800-Flowers' counsel contacted Bed Bath's counsel and indicated for the first time that 1-800-Flowers did not intend to Close the Transaction on March 30, 2020. While acknowledging that 1-800-Flowers was contractually obligated to Close the Transaction on March 30, 2020 and would require an accommodation from Bed Bath to delay the Closing, 1-800-Flowers requested that the Closing be delayed until April 30, 2020, without offering any assurances that the Closing would happen on that date or on any date in the future. In an effort to be cooperative during a time of disruption, Bed Bath offered to be flexible as it relates to transition services to ease the burden on 1-800-Flowers.

[1] *See* Executive Order in Response to COVID-19 (March 20, 2020), available at www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf.

Without responding to Bed Bath's offer of flexibility with respect to transition services, the following day, one day prior to the expiration of the HSR waiting period, and less than a week before the parties were obligated to complete the Closing, 1-800-Flowers suddenly and unilaterally declared that it was purporting to delay the Closing Date to at least April 30, 2020 due to uncertainty surrounding COVID-19. *See* Exhibit 4 (Letter from 1-800-Flowers dated March 24, 2020). Bed Bath responded the next morning, reminding 1-800-Flowers of its obligations, reiterating its intention to be flexible as it relates to transition services to ease the burden on Buyer and declining to move the Closing Date. *See* Exhibit 5 (Letter from Bed Bath dated March 25, 2020). In a series of letters over the following days, 1-800-Flowers repeatedly stated that it was unilaterally postponing the Closing Date due to generalized uncertainty surrounding COVID-19, but at least did confirm that it desired to continue with the Transaction. *See* Exhibits 4, 6, 8 and 9 (Letters from 1-800-Flowers dated March 24, 26, 27, and 29).

9. 1-800-Flowers transparently seeks to rewrite the Agreement and avoid its obligations, forcing Bed Bath to bear any associated losses and refusing to commit to a Closing Date. 1-800-Flowers' stated reasons to delay Closing were the "limited resources available to dedicate to completing the documentation and other actions necessary to close" and the difficulties in preparing to "integrate the PersonalizationMall.com business into our existing business." *See* Ex. 4. But

neither of those asserted reasons legitimately explains 1-800-Flowers' motivations. As a matter of fact, the Company is a relatively stand-alone business, capable of operating with very little integration into 1-800-Flowers' existing businesses. In a straightforward sale such as the one here, Closing is a simple procedure. In this case, the only items that remained and that were required to Close the Transaction were the delivery of signature pages to certain ancillary documentation and the wiring of the purchase price to Bed Bath, all of which could be done via remote communications, as Bed Bath reminded 1-800-Flowers. *See* Ex. 5 ("[T]he only remaining actions required to consummate the transaction are the exchange of signature pages and the wiring of the purchase price."). While there were two other documents that the parties contemplated finalizing prior to the Closing, a transition services agreement and a commercial selling agreement, the Closing was not conditioned on finalization of either of those documents, which was one of the reasons that Bed Bath selected 1-800-Flowers as the winning bidder.

10. With regard to integration, the Agreement already provides that Bed Bath will provide "transition services" to ease the integration process. *See* Ex. 1 § 5.11(f). In fact, only a week before its sudden change of heart, 1-800-Flowers delivered its list of requested transition services to Bed Bath on March 13, 2020. Bed Bath's counsel then delivered a comprehensive draft Transition Services Agreement to 1-800-Flowers' counsel the following week on March 19, 2020, to

which 1-800-Flowers never even provided a response. Even at that time, 1-800-Flowers clearly had no intent to Close the Transaction on March 30, 2020, as required by the Agreement.

11. On March 30, 2020, Bed Bath was ready, willing, and able to Close the Transaction, but 1-800-Flowers failed to do so. On the scheduled Closing date, Bed Bath's counsel emailed 1-800-Flowers' counsel all remaining documents required for Closing, and Bed Bath sent a letter confirming its compliance with all requirements under the Agreement, but 1-800-Flowers did not pay Bed Bath the required purchase price. *See* Exhibit 10 (Letter from Bed Bath dated March 30, 2020).

12. Moreover, notwithstanding the repeated efforts of Bed Bath and its counsel to set up principal-level meetings between the parties before the scheduled Closing to discuss 1-800-Flowers' desire to postpone the Closing, 1-800-Flowers failed to respond with a proposed date and time until the date of the Closing and, even then, offered only to speak the following day, when it would by then be fully in breach of the Agreement and its obligation to Close the Transaction.

13. Further, although 1-800-Flowers refused to comply with its obligations under the Agreement to Close the Transaction on March 30, 2020 based on the present situation caused by COVID-19, it never invoked any provision of the Agreement to justify its actions, instead stating at most that it needed additional time

to "assess" whether an MAE had taken place. In fact, 1-800-Flowers' counsel acknowledged that 1-800-Flowers was required to Close the Transaction on March 30, 2020. 1-800-Flowers is well aware that no MAE has taken place as specifically defined in the Agreement, because PMall is in the same situation as millions of businesses worldwide facing the impact of COVID-19, and 1-800-Flowers cannot refuse to Close the Transaction on that basis. *See* Ex. 1 § 1.1. In any event, 1-800-Flowers cannot continue to consider whether or not an MAE had taken place following the contractually agreed Closing Date.

14. This is certainly a challenging time for all businesses (including Bed Bath), but 1-800-Flowers was a willing party to the Agreement, which expressly allocated the risk of negative events, and it agreed to a customary MAE clause that has no application here. 1-800-Flowers, a sophisticated counterparty, should not be permitted to unilaterally delay its obligations, let alone for its now-stated purpose of determining later, whenever it choses, whether it will seek to avoid them entirely.

15. In the event of a breach, such as the one 1-800-Flowers committed by refusing to Close when required to do so, the parties agreed to specific performance, and expected it to be available as a remedy, because they agreed that the Transaction represented a "unique business opportunity at a unique time for each of the parties" and that "irreparable damage would occur if any provision of this Agreement were not performed in accordance with its terms." *See* Ex. 1 § 9.4.

16. Because 1-800-Flowers is not permitted to renegotiate the terms of the Agreement more than a month after its execution on a basis specifically excluded by the Agreement, Bed Bath is entitled to the specific performance remedy agreed upon by the parties, and 1-800-Flowers should be required to abide by its obligations and complete its purchase of PMall by paying Bed Bath $252 million (subject to adjustment as set forth in the Agreement).

JURISDICTION

17. This Court has subject matter jurisdiction over this action pursuant to 10 *Del. C.* 341, which gives the Court of Chancery jurisdiction "to hear and determine all matters and causes in equity" where, as here, plaintiff lacks an adequate remedy at law.

18. This Court has personal jurisdiction over defendants because the Agreement specifically provides:

> **9. Choice of Law; Forum; Waiver of Jury Trial**
>
> (a) This Agreement, and all claims or causes of action that may be based upon, arise out of or relate to this Agreement or the negotiation, execution, or performance of this agreement or the Transactions shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to conflicts of laws principles that would cause the application of the laws of another Jurisdiction.
>
> (b) Any proceeding arising out of or relating to this Agreement or the Transactions shall be brought only in the federal or state courts located in the State of Delaware. This provision may be filed with any court as written evidence of the knowing and voluntary

> irrevocable agreement between the parties to waive any objections to jurisdiction, to venue or to convenience of forum.

Ex. 1 § 9.3.

PARTIES

19. Plaintiff Bed Bath & Beyond Inc. is a corporation formed under the laws of the State of New York and headquartered in Union, New Jersey.

20. Defendant 1-800-Flowers.com, Inc. is, upon information and belief, a corporation formed under the laws of the State of Delaware and headquartered in Carle Place, New York.

21. Defendant 800-Flowers, Inc. is, upon information and belief, a corporation formed under the laws of the State of New York. Upon information and belief, 800-Flowers, Inc. is a wholly-owned subsidiary of 1-800-Flowers.com, Inc.

22. Non-party PersonalizationMall.com, LLC is a Delaware limited liability company.

FACTUAL ALLEGATIONS

Transaction Background

23. Having received unsolicited interest from multiple companies about a potential purchase of PMall, Bed Bath in August 2019 decided to explore the potential sale of PMall by way of a competitive auction process. Through its financial advisor, Goldman, Sachs & Co., Bed Bath began soliciting potential purchasers for the Company.

24. The first company to express interest in purchasing PMall was 1-800-Flowers, who delivered an unsolicited indication of interest in June of 2019 for between $250 million and $300 million. *See* Exhibit 2 (June 25, 2019 offer letter). Importantly, the letter stated that 1-800-Flowers was prepared to "fund the Proposed Transaction through a combination of cash on hand as well as through an amended credit facility with their current and long-term lenders." *Id.* 1-800-Flowers was also the first suitor to sign an NDA to gain access to diligence materials.

25. Months later, 1-800-Flowers submitted a second offer to purchase PMall for between $250 million and $270 million. *See* Exhibit 3 (Nov. 22, 2019 offer letter). This time, the offer letter, similar to the prior offer letter, stated that 1-800-Flowers was prepared to "fund the proposed transaction through a combination of cash on hand as well as through [their] existing credit facility" and that "[t]he Transaction would not be subject to any financing contingency." *Id.*

26. At the time it was negotiating with 1-800-Flowers, Bed Bath was entertaining multiple offers from other potential purchasers. Ultimately, Bed Bath decided to move forward towards an agreement with 1-800-Flowers on February 7, 2020 when it agreed to negotiate with 1-800-Flowers on an exclusive basis. This decision was in large part based on 1-800-Flowers' statement that it would fund the purchase price with cash already on hand and available credit and would not require third party financing, removing uncertainty, as well as 1-800-Flowers' presence as

an online retailer with shipping and manufacturing infrastructures already in place that would facilitate a smoother transition upon Closing.

27. After reaching preliminary agreement on the purchase terms, the parties continued to negotiate the details of the Transaction and terms of the Agreement. While other potential purchasers repeatedly expressed interest, Bed Bath continued to operate in good faith in compliance with its contractual obligations to continue to exclusively negotiate with 1-800-Flowers.

28. After signing the Exclusivity Agreement on February 7, 2020, the parties finalized the terms of the Agreement and executed it on February 14, 2020.

The Agreement

29. Pursuant to the Agreement, 1-800-Flowers agreed to purchase all of the membership interests of PMall for a purchase price of $252 million, subject to certain purchase price adjustments. Ex. 1 § 1.4(a).

30. The Agreement provides that the Closing will take place "on the third (3rd) Business Day after the satisfaction or waiver of each of the [closing conditions]," but if that third business day is prior to March 30, 2020, "the closing shall take place on March 30, 2020." *See* Ex. 1 § 1.3. It further provides that "the Buyer has, and will have at the Closing, the financial capability and sufficient cash on hand or other sources of immediately available funds necessary to pay in full the Purchase Price and any other amounts required to be paid" and that "its obligations

under this Agreement . . . are not contingent upon or conditioned in any manner on obtaining any financing or the receipt or availability of any funds." *Id.* § 4.6.

31. To assist in 1-800-Flowers' integration of PMall into its business, the Agreement provides that the parties shall cooperate, negotiate in good faith and use commercially reasonable efforts to enter into a mutually agreed upon transition services agreement pursuant to which Bed Bath will agree to provide certain services to the Company for a period of up to 60 days following the Closing in the even that Buyer delivers written notice to Bed Bath prior to the date that is thirty (30) days following the date of the agreement identifying certain specific services that were provided by Bed Bath to the Company immediately prior to the date of the Agreement that the Company requires to continue to operate the business substantially as conducted by Bed Bath prior to the date of the Agreement. *See id.*§ 5.11(f). Although such transition services are contemplated under the Agreement, they are not a condition to Closing, and, in its offer, 1-800-Flowers did not demand transition services as a condition to Closing and over the course of discussions placed relatively little importance on it as compared to other bidders. That served to reinforce Bed Bath's belief that 1-800-Flowers would be able to more easily transition the Company into its existing business and allow an easier Closing, which was an important factor in Bed Beth selecting 1-800-Flowers as the winning bidder.

32. Article VI of the Agreement lists the conditions to Closing. Among the conditions that must be satisfied in order for Buyer to be required to Close is that no Company Material Adverse Event has taken place. *Id.* §§ 1.1, § 6.1. A MAE is defined, in relevant part, as "any change, effect, event, occurrence or development that has or would reasonably be expected to have, individually or in the aggregate, a material adverse effect on" either "the assets, business, properties, results of operations or condition (financial or otherwise) of the Company," or "the ability of the Seller to consummate the Transactions contemplated hereby on or prior to the Outside Date."[2] *Id.* § 1.1. However, the MAE definition *explicitly excludes*, among other things, "any change resulting from conditions affecting any of the industries or markets in which the Company operates," as well as "any change resulting from changes in general business, financial, political, capital market or economic conditions (including any change resulting from any calamity, natural or man-made disaster of acts of God, hostilities, war or military or terrorist attack (including cyber-terrorist attack))." *Id.* It similarly excludes "the failure of the Company to achieve any projections, forecast, sales level or budget." *Id.* Although they cannot form the basis of a MAE or be taken into account in determining whether an MAE has

[2] Section 8.1(e) of the Agreement sets an "Outside Date" of June 15, 2020, after which either party may terminate the Agreement. However, the right to terminate is *not* provided to a party "whose failure to fulfill any obligation under [the] Agreement has been the principle cause of or resulted in the failure of the [Closing] to occur on or before such date."

occurred, the Agreement does allow such events to be considered, but *only* "to the extent that such Effect has a disproportionate effect on the Company compared to other participants in the industries or markets in which the Company operates." *Id.* Under the plain terms of the definition, even a calamitous event such as COVID-19 does not permit a party to avoid its obligations unless it causes a disproportionate impact on the Company, which is simply not the case. On March 30, 2020, Bed Bath delivered a certificate to 1-800-Flowers confirming that no MAE had occurred between signing and Closing.

33. The Agreement also lists the additional conditions to Closing. Specifically, the Agreement requires that:

- All representations and warranties in the Agreement must be true for both Buyer and Seller (subject to certain materiality thresholds in the Agreement) (Bed Bath delivered a certificate to 1-800-Flowers confirming this to be the case as it relates to Bed Bath and the Company on March 30, 2020);
- All covenants set forth in the Agreement must have been performed in all material respects (Bed Bath delivered a certificate to 1-800-Flowers confirming this to be the case as it relates to Bed Bath and the Company on March 30, 2020);

- The HSR waiting period has expired or terminated (which took place on March 25, 2020);
- The applicable Closing deliverables have been delivered by each party (all Closing deliverables required to be delivered by Bed Bath were timely delivered to 1-800-Flowers on or prior to March 30, 2020);
- Bed Bath has provided an IRS Form W-9 (which Bed Bath provided to 1-800-Flowers on March 16, 2020);
- Payoff letters, if any, provided by the Company (no payoff letters were applicable); and
- Closing payments made by Buyer (which were never made, notwithstanding the satisfaction of all of the conditions to Buyer's obligation to Close the Transaction).

See Ex. 1 §§ 6.1, 6.2.

34. Section 8.1 of the Agreement permits termination in limited instances, including, among others, "mutual written consent of the Seller and the Buyer," an uncured violation of any of the representations and warranties made by the parties to the extent such violation would result in the failure of a Closing condition, or upon court order. 1-800-Flowers has not asserted in any of its letters or otherwise that any

basis of termination contained in the Agreement is applicable, and no such basis exists.

35. In the event a party breaches the Agreement, including by refusing to Close, the Agreement contains a detailed negotiated Specific Performance provision which expressly permits enforcement of the Agreement as a remedy for breach. The Specific Performance provision states that:

> The provisions of this Agreement are **uniquely related to the desire of the parties and their respective Affiliates to consummate the Transactions, and such Transactions represent a unique business opportunity at a unique time for each of the parties and their respective Affiliates. As a result, the parties acknowledge and agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with its terms. The parties further acknowledge and agree that, although monetary damages may be available for the breach of such covenants and undertakings, monetary damages would be difficult to ascertain and an inadequate remedy therefor**. Accordingly, each party agrees, on behalf of itself and its Affiliates, that if the Seller, **on the one hand, or the Buyer or the Parent, on the other hand, breaches or threatens to breach any provision of this Agreement, the Seller, on the one hand, or the Buyer, on the other hand, shall be entitled to an injunction or injunctions, specific performance and any and all other equitable relief to prevent or restrain breaches or threatened breaches of this Agreement.** Any party seeking an injunction or injunctions to prevent breaches of this Agreement or seeking to enforce specifically the terms and provisions of this Agreement shall not be required to provide, furnish or post any bond or other security in connection with or as a condition to obtaining any such Order or injunction. Each party

> irrevocably waives any right it may have to require the provision, furnishing or posting of any such bond or other security. **If any action or proceeding should be brought in equity to enforce the provisions of this Agreement: (a) no party shall allege, and each party waives the defense, that there is an adequate remedy at Law; and (b) each party waives all other defenses to enforcement of the terms and provisions of this Agreement other than defenses to the existence of any breach hereof.** The rights in this Section 9.4 are in addition to any other remedy to which a party may be entitled at Law or in equity, and the exercise by a party of one remedy shall not preclude the exercise of any other remedy. Notwithstanding the foregoing, it is explicitly agreed that the right of a party to seek specific performance or other equitable remedies, in each case, in order to cause the Closing to occur, shall be subject to the requirements that all of the conditions to Closing set forth in Article VI were satisfied (other than those conditions that have been waived or that by their terms are to be satisfied by actions taken at Closing) at the time when the Closing would have been required to occur but for the breach alleged by the non-breaching party. To the extent any party brings any Proceeding to enforce specifically the performance of the terms and provisions of this Agreement (other than a Proceeding to enforce specifically any provision that expressly survives termination of this Agreement) when available to such party pursuant to the terms of this Agreement, the Outside Date shall automatically be extended to (i) the 20th Business Day following the resolution of such Proceeding, if later than the date the Outside Date would otherwise occur pursuant to the terms hereof, or (ii) such other time period established by the court presiding over such Proceeding.

Id. § 9.4 (emphasis added).

36. In the event the Buyer (defendant 800-Flowers Inc.) is unable to fulfill its obligations, Section 9.14 of the Agreement contains a "Parent Guarantee," which

states that the "Parent," defendant 1-800-Flowers.com, Inc., "absolutely, irrevocably, and unconditionally guarantees to the Seller the due and punctual payment, performance and discharge of the Buyer's obligations." The Parent Guarantee provides that Bed Bath is permitted to "take any and all actions available hereunder or under Law to enforce the Parent's obligations," including "a separate Proceeding against the Parent for the full amount of the Guaranteed Obligations, regardless of whether a Proceeding is brought against the Buyer or whether the Buyer is joined in any such proceeding." *Id.*

1-800-Flowers Unilaterally Attempts to Delay the Closing

37. After executing the Agreement on February 14, 2020, the parties began working towards the Closing. Bed Bath began assembling the documents necessary for the Closing, including the prompt preparation of a "Closing Checklist." The Parties also communicated regularly by email and had frequent calls between counsel regarding completion of the tasks outlined on the Closing Checklist. These regular discussions continued through March 16, 2020, weeks after the outbreak of COVID-19 and well into the time period where businesses around the United States were ordered to temporarily cease operations. Among the matters referenced were the transition services Bed Bath would be responsible for providing post-Closing.

38. On March 13, 2020, Bed Bath's counsel received a detailed request from 1-800-Flowers' counsel about requested transition services. As of this date,

there was no indication that 1-800-Flowers was not prepared to complete the Closing on March 30, 2020.

39. On March 19, 2020, Bed Bath's counsel provided a draft Transition Services Agreement to 1-800-Flowers' counsel in response to its March 13 request for services, as well as a draft Closing Letter Agreement regarding certain matters that had been agreed to between the parties following execution of the Agreement. At no point did 1-800-Flowers or its counsel indicate that it wished to delay Closing or would not abide by its obligations.

40. Four days later, and without any prior notice or warning, 1-800-Flowers' counsel contacted Bed Bath's counsel on March 23, 2020, stating for the first time that 1-800-Flowers did not intend to Close the Transaction on March 30, 2020. 1-800-Flowers' counsel admitted that its client was obligated to Close the Transaction on March 30, 2020 and would require an accommodation to delay the Closing, but requested that the Closing be delayed by a month, until April 30, 2020. Working to be cooperative during a difficult period, Bed Bath offered to be flexible as it relates to transition services to ease the burden on 1-800-Flowers. Without responding to Bed Bath's offer of flexibility with respect to transition services, the following day, one day prior to the expiration of the HSR waiting period, and less than a week before the parties were obligated to complete the Closing, 1-800-Flowers sent a three-paragraph letter stating that the COVID-19 outbreak had left

"limited resources available to dedicate to completing the documentation and other actions necessary to Close" the Transaction "and to prepare to, and successfully, integrate the PersonalizationMall.com business into our existing business." *See* Ex. 4. As a result, 1-800-Flowers declared in its letter that it was unilaterally, and without a contractual basis for doing so, "postponing the closing of the transaction until April 30, 2020." *Id.* It did not invoke any provision in the Agreement or state that it was unable to Close, but merely that it had decided not to abide with its obligation to Close. In addition to being impermissible under the Agreement, 1-800-Flowers' statement was disingenuous, as the Company is a standalone business which would in fact require very little integration to continue operating after Closing.

41. Bed Bath responded the following day, on March 25, 2020. *See* Ex. 5. Bed Bath wrote in its letter that, although it "appreciate[d] the challenges that all businesses are facing in light of COVID-19," it wished to move forward. It noted in its letter that, upon expiration of the HSR waiting period, Bed Bath intended to move forward with the Transaction and was ready, willing, and able to Close on March 30, 2020, and was happy to be flexible with the transition services being provided to ease the burden of integration. Further, Bed Bath stated that 1-800-Flowers' failure to Close "will constitute a breach of the Purchase Agreement." *Id.*

42. The following day, March 26, 2020, 1-800-Flowers responded by letter. *See* Ex. 6. Once again, 1-800-Flowers did not assert a contractual basis for its refusal to Close and attempt to delay the Transaction, but stated that it was unilaterally "postponing the closing of the transaction until April 30, 2020." *Id.* While 1-800-Flowers stated that it believed it would be "extremely and unreasonably difficult for both businesses" to Close the Transaction, it again did not invoke any provision of the Agreement or state that 1-800-Flowers was unable to Close, and had no basis to make the factually incorrect statement that it would be unreasonably difficult for Bed Bath to Close the Transaction. As with its prior letter, 1-800-Flowers merely stated that it was choosing not to comply with its obligation to Close based on its own singular desires due to general market conditions.

43. Bed Bath responded the same day, informing 1-800-Flowers that it had "no basis not to consummate the transaction" and that Bed Bath "disagree[d] that closing on [the Closing Date] is impractical." *See* Exhibit 7 (Letter from Bed Bath dated March 26, 2020). Rather, Bed Bath stated that 1-800-Flowers was "attempting to use the unfortunate challenges presented by COVID-19 as a tactic to avoid its contractual obligations and unilaterally impose a 30-day extension to suit its interests, with no assurance whatsoever of a firm closing date." *Id.* Bed Bath further stated that the anticipatory repudiation of 1-800-Flowers' Closing obligations constituted a "willful and material breach of the Purchase Agreement," but reiterated

Bed Bath's flexibility regarding transition services to ease any burden imposed by the COVID-19 outbreak. *Id.* Bed Bath's letter went further, and also stated that it was "open to other suggestions [1-800-Flowers] may have in an effort to find a constructive path forward." *Id.*

44. On March 27, 2020, 1-800-Flowers yet again restated its position that it would not Close prior to April 30, 2020, but explicitly stated it was not terminating the Agreement or invoking the MAE provision. *See* Exhibit 8 (Letter from 1-800-Flowers dated March 27, 2020).

45. In the final days before the scheduled Closing, Bed Bath continually reached out to 1-800-Flowers and its counsel, but received no response other than vague statements about a potential future call. When Bed Bath attempted to schedule a call over the weekend prior to Closing or on the morning of the Closing date, 1-800-Flowers either ignored the requests or failed to meaningfully engage. As a result, despite Bed Bath's best efforts, the parties did not have a direct conversation in the days prior to the scheduled Closing. *See* Ex. 10 (Letter from Bed Bath dated March 30, 2020) ("After reaching out to you through your bankers and lawyers numerous times and making ourselves available over the weekend and today for a discussion, you finally offered this afternoon to have a call with us tomorrow, the day after the closing is required to take place."). Had 1-800-Flowers been truly

interested in moving forward, it could easily have arranged a meaningful conversation *prior* to its intentional breach of the Agreement.

46. Bed Bath attempted to proceed with the Closing as scheduled on March 30, 2020. Bed Bath's counsel sent copies of relevant resignation letters, the Seller's Closing Certificate, and the Closing Letter Agreement in the morning on March 30, 2020, which, combined with previously sent documents, constituted satisfaction of all of the conditions to Buyer's obligation to consummate the Transaction. Bed Bath also sent a letter confirming its compliance with the Agreement's Closing requirements. *See id.* Bed Bath continued its attempts to discuss the situation with 1-800-Flowers, but 1-800-Flowers responded to those requests only mid-afternoon on the closing day and, even then, would not have the requested discussion until the following day, when it would already be in breach of its obligation to Close on March 30, 2020.

47. To meet its Closing obligations, 1-800-Flowers was merely required to countersign previously agreed-upon documents and wire the purchase price to Bed Bath. 1-800-Flowers failed to do so on or prior to March 30, 2020, the contractually agreed Closing Date, has not done so to date, and has offered no certainty whatsoever as to when it might do so. 1-800-Flowers' failure to meet its Closing obligations constitutes an intentional and material breach of the Agreement.

1-800 Flowers' Delays Cause Substantial Harm

48. While Bed Bath recognizes the difficulties presented by the COVID-19 outbreak for many retail businesses, 1-800-Flowers' unilateral decision to ignore its contractual obligations is an unexcused and impermissible attempt to rewrite the Agreement's terms and subvert the specific bargain reached by the parties. In signing the Agreement in mid-February 2020 and setting the Closing Date for March 30, 2020, the parties allocated the risks, such that absent a contractually-defined MAE on PMall, 1-800-Flowers would assume all risk and benefits regarding PMall beginning on March 30, 2020, notwithstanding the continued development of the situation caused by COVID-19.

49. 1-800-Flower's maneuvering, though couched as a mere delay by a month, is designed to allow it to "wait and see" what impact the COVID-19 outbreak has on the Company's business and to assess whether it should attempt to assert in the future a retroactive invocation of a MAE so as to argue it can terminate the Agreement. In essence, 1-800-Flowers is attempting to unilaterally convert the parties' binding purchase agreement into merely an option agreement. That is not the parties' Agreement and is utterly unreasonable.

50. While it has not been subjected to a MAE because its position in the marketplace is similar to virtually all other retail businesses, PMall's business has—like almost every business in the United States and many around the world—been

significantly impacted by COVID-19. Nonetheless, PMall, an online retailer, is well-positioned to succeed in the current environment, and 1-800-Flowers should be required to abide by the Agreement it made with the assistance of sophisticated counsel.

51. Unless and until the Closing takes place, Bed Bath suffers daily harm from business performance, carrying costs, forgone interest and the opportunity to shore up its balance sheet with the cash it bargained to receive on March 30, 2020 and ongoing delay and uncertainty for its management team, associates and shareholders alike. This harm far outweighs any hardship to 1-800-Flowers that might be brought on by requiring it to abide by the Agreement it entered into to purchase a stand-alone business that requires very little integration and explicitly claims to want to finalize, using cash it already has on hand and which has been earmarked for this purpose since last year. Indeed, the parties expressly agreed that a failure to abide by the Agreement's obligations would cause Bed Bath "irreparable damage," entitling it to the equitable remedy of specific performance as specifically permitted by the Agreement. *See* Ex. 1 § 9.4.

COUNT I
(Breach of Contract and Specific Performance)

52. Plaintiff repeats, re-alleges, and incorporates by reference the allegations in paragraphs 1 through 51 above as if fully set forth herein.

53. The Agreement is a valid and enforceable contract, and Plaintiff has substantially performed its obligations, has not breached the Agreement, and was on March 30, 2020, and remains, ready, willing, and able to undertake the Closing and provide certain transitional services as contemplated by the Agreement.

54. Plaintiff has satisfied all conditions precedent in the contractual agreements before initiating the instant action.

55. Defendants have breached the Agreement by unilaterally refusing to Close on the Closing Date without any basis for taking such action under the Agreement or applicable law.

56. As a result of Defendants' breaches, Plaintiff has been damaged and has no adequate remedy at law. Indeed, the parties recognized that Defendants' breaches would cause Plaintiff irreparable harm. Pursuant to Section 9.4 of the Agreement, the sale of PMall represents "a unique business opportunity at a unique time for each of the parties," and 1-800-Flowers therefore agreed that "irreparable damage would occur if any provision of this Agreement were not performed in accordance with its terms," as well as the fact that monetary damages are an "inadequate remedy" for either a breach or a threatened breach.

57. As the parties expressly agreed, Plaintiff will be irreparably damaged if Defendants are allowed to delay the Closing and are not required to specifically

perform their obligations under the Agreement, including consummating the Closing and bearing responsibility for any loss from and after March 30, 2020.

58. As a result of the injury caused by Defendants' actions, Bed Bath is entitled to specific performance of Defendants' obligation to Close the Transaction under the Agreement, as well as to all other relief this Court deems just and equitable.

COUNT II
(Declaratory Judgment)

59. Plaintiff repeats, re-alleges, and incorporates by reference the above allegations in paragraphs 1 through 58 above as if fully set forth herein.

60. The Agreement is a valid and enforceable contract, and Bed Bath has substantially performed its obligations, has not breached the Agreement, and remains ready, willing, and able to undertake the Closing and provide certain transitional services as contemplated by the Agreement.

61. Plaintiff has satisfied all conditions precedent in the contractual agreements before initiating the instant action.

62. Defendants have refused to abide by their obligations and have unilaterally breached the Agreement by failing to Close on the contractually agreed Closing Date and attempting to delay the Closing.

63. A real and adverse controversy exists between the parties which is ripe for adjudication, including whether Defendants are in breach of the Agreement by having failed to Close on March 30, 2020.

64. Plaintiff is entitled to a declaration that Defendants' refusal to Close is a violation of the Agreement and that Defendants have knowingly and willfully breached the Agreement.

REQUEST FOR RELIEF

WHEREFORE, plaintiff Bed Bath & Beyond Inc. respectfully prays for Judgment as follows:

A. Order Defendants to specifically perform their obligations under the Agreement, including consummating the Closing and transferring the purchase price to Plaintiff, including interest calculated since March 30, 2020;

B. Award Bed Bath & Beyond Inc. its attorneys' fees and costs in connection with bringing this action to the extent permitted by contract or applicable law;

C. Render the declaratory judgment referred to above; and

D. Award Plaintiff such other relief as this Court deems just and equitable under the circumstances.

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