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**Hearing Date: August 31, 2010 at 11:00 am  
Objection Deadline: August 24, 2010 at 4:00 pm**

*Proposed Counsel to the Debtors and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT  
THE SOUTHERN DISTRICT OF NEW YORK**

In re:	Chapter 11
JENNIFER CONVERTIBLES, INC., <i>et al.</i> , <sup>1</sup>	Case No. 10-13779 (ALG)
Debtors.	(Jointly Administered)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS  
TO REJECT FIVE UNEXPIRED, NON-RESIDENTIAL REAL PROPERTY LEASES  
NUNC PRO TUNC TO DATE OF SURRENDER**

Jennifer Convertibles, Inc. ("Jennifer Convertibles") and its affiliated debtors, as debtors in possession (together, the "Debtors"), hereby move this Court (the "Motion") for entry of an order authorizing the debtors to reject five unexpired, non-residential real property leases *nunc pro tunc* to the date of surrender, but in no case later than August 31, 2010. In support of this Motion, the Debtors respectfully state as follows:

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

## **Background**

1. On July 18, 2010 (the “Petition Date”), each of the Debtors commenced with the Bankruptcy Court a voluntary case pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. An Official Committee of Unsecured Creditors was appointed in these chapter 11 cases on July 23, 2010.

2. Jennifer Convertibles, Inc. was organized as a Delaware corporation in 1986, and is currently the owner of (i) the largest group of sofaed specialty retail stores and leather specialty retail stores in the United States, with stores located throughout the Eastern seaboard, Midwest, West Coast and Southwest, and (ii) seven big box, full-line furniture stores operated under the Ashley Furniture HomeStore brand (the “Ashley Stores”) under a license from Ashley Furniture Industries, Inc.

3. As of the Petition Date, the Debtors’ stores included 130 stores operated by the Jennifer segment. During fiscal 2007, the Debtors opened their first Ashley Store. As of the Petition Date, the Debtors operate seven Ashley Stores.

4. As of the Petition Date, the Debtors employed 497 people. There are 336 employees in the Jennifer segment, 114 employees in the Ashley segment and 47 corporate employees. None of the employees are represented by a collective bargaining unit.

5. On July 20, 2010, the Debtors filed a motion to approve a sale process (the “Sale Motion”). Through this Motion, the Debtors sought the Court’s permission to sell inventory in 32 of its stores to a liquidating agent. Attached as Exhibit A to the Motion was a proposed

agency agreement (the “Agency Agreement”) entered into by the Debtors and Great American Financial Services LLC (“GAFS”). An amended Agency Agreement was filed on July 22, 2010. On July 26, 2010, the Court approved the Debtors’ bid procedures. The Debtor received no bids other than that of GAFS.

6. Accordingly, on July 29, 2010 the court granted the relief requested in the Sale Motion, and approved the sale to GAFS (the “Sale Order”).

7. Pursuant to section 6.2 of the Agency Agreement, GAFS is to provide the Debtors with not less than seven (7) days’ advance written notice of its intention to vacate any of the store locations.

8. On August 3, 2010, the Debtors received notice from GAFS that they intend to vacate the following store locations on or before August 11, 2010: (i) 20665 Lyons Road, Boca Raton, FL, and (ii) 161 West Dekalb Pike, King of Prussia, PA, (collectively, referred to as “Store Closing Locations”) On August 5, 2010, a letter was sent to each of the respective landlords advising them that these premises were going to be vacated on August 11, 2010.

9. The Debtors have further determined that three (3) locations they currently operate pose too much of a drain on their limited resources. The Debtors have determined to close these locations on August 31, 2010. The locations for the 3 additional stores to be closed are as follows: (i) a Jennifer store located at 1274 Second Avenue a/k/a 301 East 66<sup>th</sup> Street, New York, New York, (ii) an Ashley Furniture Homestore located at 225 West 83<sup>rd</sup> Street, a/k/a 2300 Broadway, New York, New York 10024 and a (iii) Jennifer Leather store located at 229 Independence Plaza, Seldon, NY 11784 (collectively referred to as “Additional Locations”).

10. The disposition of the inventory at the Additional Locations will either be sold “as is” and “where is” by the Debtors or relocated to one of their remaining locations or the Debtors’

New Jersey warehouse. This inventory will not be part of the sales made by GAFS pursuant to the Sale Order.

11. The factual background relating to the Debtors' commencement of these chapter 11 cases is set forth in additional detail in the Declaration of Rami Abada in Support of First Day Motions (the "Abada Declaration") filed on July 19, 2010 and incorporated herein by reference.

### **Jurisdiction**

12. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

13. The statutory predicates for the relief requested herein are sections 105(a), 365(a) and 554(a) of title 11 of the United States Code (the "Bankruptcy Code"), Rule 6000 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules") and Rule 6006-1 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules").

### **Relief Requested**

14. Specifically, the Debtors seek to reject the non-residential real property leases for Store Closing Locations and for the Additional Locations, (now and hereinafter collectively referred to as the "Vacating Leases"), and to abandon certain property that is related to the Vacating Leases (the "Related Property").

15. All of the Vacating Leases are no longer necessary to the Debtors' ongoing business operations and present a burdensome liability. The Debtors cannot operate profitably while making rental payments for leases that provide no benefit to the Debtors' estates.

16. The Debtors are in the process of vacating these locations and will be in a position to return the properties vacant to the respective landlords by no later than August 31, 2010. The

Debtors therefore hope to minimize unnecessary postpetition obligations by rejecting these burdensome leases under section 365, and seek that such rejection be effective *nunc pro tunc* to the surrender date,<sup>2</sup> or as to the Additional Stores whose premises were not part of the Sale Order, to August 31, 2010.

17. In addition, the Debtors seek authorization to remove from the premises that are the subject property of the Vacating Leases (i) personal property, consistent with the Debtors' ownership rights or other interests therein, and (ii) personal property that the Debtors have installed in or about the leased premises (i.e., fixtures, furniture, equipment, and other property) that is either owned by the Debtors, leased by the Debtors from third parties, or subject to any equipment financing agreements with third parties. If the Debtors determine that any property located at such location has little or no value or that the preservation thereof will be burdensome to their estates compared with the expense of removing and storing such property, the Debtors seek authorization, in their sole discretion, to abandon such property pursuant to section 554 of the Bankruptcy Code.

#### **Basis For Relief**

18. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). The United States Court of Appeals for the Second Circuit has stated that "[t]he purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property.'" Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir. 1993).

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<sup>2</sup> In accordance with the Sale Order, GAFS provided the Debtors with notice seven days prior to the date by which GAFS would be vacating the Closing Store Locations, and thus the Debtors provided corresponding notice to the landlords.

19. The business judgment standard is employed by courts in determining whether to permit a debtor to assume or reject a contract. In re Old Carco LLC, 406 B.R. 180, 188 (Bankr. S.D.N.Y. 2009), citing In re Penn Traffic Co., 524 F.3d 373, 383 (2d Cir. 2008); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984). In applying the “business judgment” standard, debtors are usually given significant discretion when requesting to assume or reject an executory contract or unexpired lease. See In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) (“[A] court will ordinarily defer to the business judgment of the debtor’s management”). The business judgment standard mandates that a court shall approve a debtor’s business decisions unless the decision is the product of bad faith or gross abuse of discretion. Id., see also In re G Survivor Corp., 171 B.R. 755, 757 -8 (Bankr. S.D.N.Y. 1994), citing Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1047 (4<sup>th</sup> Cir. 1985), cert. denied, 475 U.S. 1057 (1986); In re Chipwich, Inc., 54 B.R. 427, 430-31 (Bankr. S.D.N.Y. 1985) (finding that a court should not interfere with a debtor’s decision to assume or reject “absent a showing of bad faith or abuse of business discretion”).

20. Where a debtor determines that the estate will obtain a net benefit from the rejection of an executory contract or unexpired lease, as the Debtors herein have so determined, the rejection should be authorized. Penn Traffic, 524 F.3d at 383, quoting Sundial Asphalt Co. v. V.P.C. Investors, Corp. (In re Sundial Asphalt Co.), 147 B.R. 72, 81 (E.D.N.Y. 1992). Courts in this circuit have also found that proper business reasons for rejecting a contract or lease include: (i) the contract is uneconomical to complete according to its terms; (ii) the contract is financially burdensome to estate; or (iii) rejection will make the debtor more attractive to a prospective purchaser or investor. See Riodizio, 204 B.R. at 425.

21. Bankruptcy Code section 554(a) provides that a debtor in possession may abandon, subject to Court approval, “property of the estate that ... is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a). Before authorizing abandonment of the property, the bankruptcy court must find either that: (a) the property is burdensome to the estate or (b) the property is both of inconsequential value and inconsequential benefit to the estate. See, e.g., Midatlantic Nat’l Bank v. N.J. Dep’t of Ent’l. Prot., 474 U.S. 494, 497 (1986), reh’g denied, 475 U.S. 1090 (1986); In re Texaco, Inc., 92 B.R. 38, 44 (S.D.N.Y. 1988); In re Crowthers McCall Pattern, Inc., 114 B.R. 877, n.7 (Bankr. S.D.N.Y. 1990).

22. In addition, Bankruptcy Code section 105(a) provides in relevant part that “[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

23. Finally, courts both within and outside of the Second Circuit routinely hold that a debtor is not prohibited from selecting a retroactive date for the effective date of rejection of the lease. As stated by the court in In re Jamesway Corp., 179 B.R. 33, 37 (S.D.N.Y. 1995), “Section 365 merely states that rejection of an unexpired lease is subject to court approval. It does not state that rejection cannot be applied retroactively, or that there are restrictions as to the manner in which the court can approve rejection.” See Adelpia Business Solutions, Inc. v. Abnos, 482 F.3d 602, 607 (2d Cir. 2007) (Second Circuit “assume[d], without deciding, that the bankruptcy court had equitable authority to make its order retroactive,” and affirmed the bankruptcy court holding that allowed rejection of an unexpired commercial lease *nunc pro tunc*); see also BP Energy Co. v. Bethlehem Steel Corp., 2002 WL 31548723 (S.D.N.Y. 2002) (finding no evidence that a “bankruptcy court’s assignment of a retroactive rejection date falls outside of its authority when the balance of the equities favors this solution.”); In re Garfinckels,

Inc., 118 B.R. 154, 154 (Bankr. D. D.C. 1990) (suggesting that, in the absence of unfair prejudice, a bankruptcy court may enter an order *nunc pro tunc* setting the motion filing date as the effective date of approval); In re At Home Corp., 392 F.3d 1064, 1065 (9<sup>th</sup> Cir. 2004) (“[A]lthough rejection of an unexpired nonresidential lease does not take effect until court approval, the approving court has the equitable power, in suitable cases, to order a rejection to operate retroactively”); In re TW, Inc., No. 03-10785 (MFW), 2004 WL 115521, at \*2 (D. Del. Jan. 14, 2004) (“An order granting relief *nunc pro tunc* is not a remedy that should be given as a matter of course, but only after a balancing of the equities in a particular case. It is the burden of the moving party to show that relief, of this character, is appropriate”). Typically, a retroactive order will be allowed as long as it promotes the purposes of section 365(a). In re Thinking Machines Corp., 67 F.3d 1021 (1<sup>st</sup> Cir. 1995).

24. The Debtors submit that the relief requested herein is appropriate in these chapter 11 cases and is well within this Court’s equitable powers under this section. In an effort to maximize the value of their estates and reduce their administrative costs in these chapter 11 cases, the Debtors have reviewed their overall operations and have determined, in their business judgment, that the Vacating Leases are burdensome and provide no economic value to their estates. The Debtors, in the exercise of their business judgment, have determined that the Vacating Leases are unprofitable and are not necessary for the Debtors’ restructuring efforts. Rejection of the Vacating Leases at this time will therefore eliminate under-performing assets and allow management to focus its limited resources on maximizing the value of the Debtors’ remaining assets.

25. In order to avoid paying unnecessary expenses, the Debtors seek to reject the Vacating Leases. The landlords of these store locations will not be prejudiced by the Debtors’



request to reject the Vacating Leases as of the surrender date, as rent has already been paid in full to each of the affected landlords for the entire month of August.

26. In light of the foregoing, the Debtors respectfully request that the Court approve rejection of the Vacating Leases under section 365(a) of the Bankruptcy Code as a sound exercise of their business judgment, with such rejections to be effective to the date of surrender.

#### **Notice**

27. Notice of this Motion has been provided to: (i) Office of the United States Trustee for the Southern District of New York; (ii) counsel to the Official Committee of Unsecured Creditors; (iii) counsel to Haining Mengnu Group Co. Ltd.; (iv) to the affected landlords for the Store Closing Locations and Additional Locations, and (v) any other party who has filed a notice of appearance in these cases. The Debtors submit that such notice is sufficient under the circumstances.

#### **No Previous Request**

28. No previous request for the relief sought herein has been made to this or any other Court.

WHEREFORE the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York  
August 5, 2010

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By: /s/ Michael S. Fox  
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*Proposed Attorneys for the Debtors and  
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**EXHIBIT A**

**Proposed Order**

**UNITED STATES BANKRUPTCY COURT  
THE SOUTHERN DISTRICT OF NEW YORK**

In re:

JENNIFER CONVERTIBLES, INC.,<sup>1</sup>  
  
Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**ORDER AUTHORIZING THE DEBTORS TO REJECT FIVE  
UNEXPIRED, NON-RESIDENTIAL REAL PROPERTY LEASES**

Upon the motion, dated August 5, 2010 (the “Motion”)<sup>2</sup> of Jennifer Convertibles, Inc. and its affiliated debtors, as debtors in possession (collectively, the “Debtors”), for entry of an order authorizing the debtors to reject five unexpired, non-residential real property leases *nunc pro tunc* to the date of surrender and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion (the “Hearing”); and the appearances of all interested parties having been noted in the record of the Hearing; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

<sup>2</sup> All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

relief requested in the Motion is in the best interests of the Debtors, their estates, and creditors and parties in interest; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED.
2. Pursuant to section 365(a) of the Bankruptcy Code, the rejection of each of the Vacating Leases is hereby approved, with each such rejection being effective *nunc pro tunc* to the surrender date, or as to the Additional Stores whose premises were not part of the Sale Order, to August 31, 2010.
3. The Debtors are authorized to execute and deliver all instruments and documents, and take such other action as may be necessary or appropriate, to implement and effectuate the transactions contemplated by this Order.
4. The Debtors are authorized to remove from the premises that are the subject property of the Vacating Leases (i) personal property, consistent with the Debtors' ownership rights or other interests therein, and (ii) personal property that the Debtors have installed in or about the leased premises as set forth in the Motion.
5. Any personal property and fixtures, furniture and equipment remaining in or on the premises of the Vacating Leases after the surrender date or August 31, 2010, as applicable, is deemed abandoned to the landlords pursuant to 11 U.S.C. § 554, and the landlords shall have the right to dispose of such personal property and fixtures, furniture and equipment in its discretion and without any liability to the Debtors.
6. The rejection of the Vacating Leases in this Order is notice to and may be relied on by filing agents, filing officers, title agents, title companies, recorders and mortgages, recorders of deeds, or registrars of deeds, that may be required by operation of law, the duties of

their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or that may be required to report or insure title or state of title in or to the Leases or the underlying real properties.

7. The Debtors' rights to assert any Vacating Lease rejected hereby expired by its own terms or was terminated prior to the date hereof are fully preserved.

8. The requirements of Bankruptcy Rule 6006 and Local Rule 6006-1 are deemed satisfied or waived, and notwithstanding the possible applicability of Bankruptcy Rule 6006 and Local Rule 6006-1, the terms and conditions of this Order shall be immediately effective and enforceable upon entry of this Order.

9. This Court shall retain jurisdiction to resolve all matters relating to implementation of this Order.

Dated: August \_\_, 2010  
New York, New York

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UNITED STATES BANKRUPTCY JUDGE