

Hearing Date: September 8, 2010 at 10:00 a.m.
Objection Deadline: September 1, 2010 at 4:00 p.m.

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

In re:

JENNIFER CONVERTIBLES, INC., *et al.*,

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**MOTION OF THE WINFIELD GROUP TO CONFIRM
THAT NO STAY IS IN EFFECT OR, ALTERNATIVELY,
FOR NUNC PRO TUNC RELIEF FROM AUTOMATIC STAY**

Movant Winfield Group ("**Movant**"), by its attorneys Binder & Malter LLP and Sheppard Mullin Richter & Hampton, LLP, respectfully submits this motion (the "**Motion**") for entry of an order (i) confirming that the automatic stay under section 362 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**") is not applicable to the relief sought by Movant or, in the alternative, (ii) for *nunc pro tunc* relief

from the automatic stay under section 362 of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") to permit the Movant to terminate the month-to-month lease described below and repossess the subject property thereunder. In support of this Motion, the Movant states as follows:

Jurisdiction and Venue

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. The statutory predicates for the relief requested in this Motion are sections 362(b)(10) and, alternatively, 362(d)(1) and (d)(2) of the Bankruptcy Code and Rule 4001 of the Bankruptcy Rules.

Background

3. On July 18, 2010 (the "**Petition Date**"), Jennifer Convertibles, Inc. (the "**Debtor**") filed a petition for relief under chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and is operating and managing its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. On July 23, 2010, the Office of the United States Trustee for the Southern District of New York appointed an Official Committee of Unsecured Creditors. No request has been made for the appointment of a trustee or examiner in this case to date.

5. The Debtor, a Delaware corporation d/b/a Jennifer Convertibles, is currently a holdover, month-to-month tenant of Movant herein at the Blossom Hill Shopping Center and specifically occupying the premises known as 944-B Blossom Hill Road, San Jose, California (the "**Subject Premises**").

6. On or about March 1, 2004, Movant leased to the Debtor the Subject Premises pursuant to a written Shopping Center Lease for a term of five (5) years (the “**Lease**”). The Lease term commenced on July 1, 2004 and expired by its own terms on June 30, 2009, over a year prior to the Petition Date. There is no security deposit under the Lease. A true and correct copy of the Lease is attached to the *Declaration of Susan Benton* filed in support of this Motion on even date herewith (the “**Benton Declaration**”) as Exhibit A thereto and is incorporated herein by reference.

7. Pursuant to the terms of the Lease, the Debtor was initially required to pay to Movant the sum of \$8,750.00 per month as and for the minimum monthly rental of the Subject Premises, said sum being due and payable on the first day of each calendar month. A schedule for increases in the minimum monthly rental for the life of the Lease (in each case, the “**Minimum Monthly Rental**”) is contained in the Lease as follows:

Year	Dates	Minimum Monthly Rent
1	7-1-2004 to 6-30-2005	\$8,750.00
2	7-1-2005 to 6-30-2006	\$8,946.88
3	7-1-2006 to 6-30-2007	\$9,148.18
4	7-1-2007 to 6-30-2008	\$9,354.01
5	7-1-2008 to 6-30-2009	\$9,564.48

8. In addition to the Minimum Monthly Rent, the Debtor was obligated to pay its proportionate share of real estate taxes and common area charges, both of which are considered additional rent under the Lease. *See* Lease ¶¶8.1 and 11.4.

9. There have been no extensions or renewals of the Lease since its expiration on June 30, 2009. However, since the expiration of the Lease, the Movant and Debtor have been operating on a month-to-month basis pursuant to applicable California law.

10. During the month-to-month tenancy, the Debtor has failed to pay to Movant the sum of \$33,046.60 representing the following payments when would have been due (i.e., on the first of each calendar month or within the first 10 days of the month - or "grace period" under the Lease) in order to continue the month-to-month tenancy in which the parties engaged prior the Debtor's bankruptcy:

Date	Description	Amount Due
Pre-Petition Arrears:		
6-1-10 to 6-30-10	Minimum rent	\$9,564.48
6-1-10 to 6-30-10	CAM	\$1,330.00
7-1-10 to 7-17-10	Minimum rent (pro rated) 17 days @ \$318.82 per day	\$5,419.87
7-1-10 to 7-17-10	CAM (pro rated) 17 days @ \$44.33 per day	\$753.67
	Subtotal	\$17,068.02
Post-Petition Arrears:		
7-18-10 to 7-31-10	Minimum rent (pro rated) 14 days @ \$318.82 per day	\$4,463.48
7-18-10 to 7-31-10	CAM (pro rated) 14 days @ \$44.33 per day	\$620.62

Date	Description	Amount Due
8-1-10 to 8-31-10	Minimum rent	\$9,564.48
8-1-10 to 8-31-10	CAM	\$1,330.00
	Subtotal	\$15,978.58
	Total Arrears	\$33,046.60

11. On the date of the filing of this Motion, funds were received from the Debtor by direct deposit in the sum of \$10,894.48 and designated by the Debtor for August 2010 rents. However, such funds were not received on the first of the month (or within the 10-day grace period) as required under the terms of the Lease (which terms apply to any month-to-month tenancy created in accordance with applicable California law).

12. On July 26, 2010, without prior notice or knowledge of the filing of this bankruptcy case,¹ Movant caused to be served upon the Debtor a notice of default informing the Debtor that it had five days to quit the Subject Premises or pay the delinquent rent of \$21,788.96 which included rent and CAM charges through July 31, 2010 (the “**Five Day Notice**”). See Benton Declaration at ¶ 12. A true and correct copy of the Five Day Notice is attached as Exhibit B to the Benton Declaration and is incorporate herein by reference.

13. Also on July 26, 2010, without prior notice or knowledge of the filing of this bankruptcy case, Movant caused to be served upon the Debtor a notice of termination

¹ Indeed, the Debtor's "Creditor Mailing Matrix" available on the electronic docket for this case indicates that Debtor has not served Movant with any notices of this proceeding.

of tenancy therein informing the Debtor that its tenancy would be terminated thirty days after service or August 31, 2010, whichever is later (the "**Thirty Day Notice**"). See Benton Declaration at ¶ 13. A true and correct copy of the Thirty Day Notice is attached as Exhibit C to the Benton Declaration and is incorporate herein by reference.

Relief Requested and Basis Therefor

14. Movant respectfully requests entry of an order, substantially in the form of Exhibit 1 hereto, confirming that the automatic stay is not applicable to the actions of Movant in providing the Thirty Day Notice and to complete re-possession of the Subject Premises pursuant to applicable California law and section 362(b)(10) of the Bankruptcy Code or,² in the alternative, providing *nunc pro tunc* relief to the Movant from the automatic stay to provide such Thirty Day Notice and complete re-possession of the Subject Premises.

Argument

15. California state law applies in determining the nature and extent of the debtor's interest in the Subject Premises. See, e.g., *In re Sauk Steel Co., Inc.*, 133 B.R. 431, 437 (Bankr. E.D.Ill. 1991). Under California state law, all that the Debtor acquired after the expiration of the Lease by its own terms was a month-to-month tenancy. See Cal. Civ. Code sec. 1945. Specifically, Section 1945 of the California Civil Code provides “[i]f a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him the parties are presumed to have renewed the hiring on the

² Movant requests such an order because it has been advised that the Sheriff of Santa Clara County will not enforce a writ of possession of real property to complete a return of possession to a landlord when informed that the tenant therein has filed a voluntary petition. Therefore, Movant requires an order from this Court confirming that the automatic stay of 11 U.S.C. §362(a) does not apply to Movant and any action by Movant to recover possession of the Subject Premises.

same terms and for the same time, *not exceeding one month* when the rent is payable monthly nor in any case one year.” Cal. Civ. Code §1945 (emphasis added).

16. In addition, Movant is entitled to terminate the month-to-month tenancy at any time upon 30 days notice to the Debtor for no cause or any cause. *See* Cal. Civ. Code sec. 1946. Specifically, Section 1946 of the California Civil Code further provides that:

A hiring of real property . . . is deemed to be renewed as stated in Section 1945, at the end of [each] term specified by law [in Section 1945 of the California Civil Code] unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination.

Cal. Civ. Code §1946. The Thirty Day Notice simply provides the Debtor with notification that it must quit the Subject Premises upon the expiry of the next full term of the month-to-month tenancy (i.e., by September 30, 2010) in accordance with California law. Although Movant need not cite cause for the termination of the month-to-month tenancy, the Debtor nevertheless failed to pay rent for the month term of June of 2010 (prior to the Petition Date) as well as for the month terms of July and August of 2010 (after the Petition Date). As stated above, under California law, in order to effectuate a month-to-month tenancy, the holdover tenant must pay, and the landlord must accept, rental amounts under the terms of the expired lease. If the holdover tenant fails to so pay, such failure entitles the landlord to immediately terminate the month-to-month tenancy. *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 670 (1944). Moreover,

failure to pay in accordance with the Lease would also mean that no month-to-month tenancy had been created for those months under applicable California law.

17. In addition, section 362(b)(10) of the Bankruptcy Code provides for an exception from the automatic stay applicable under section 362(a) of the Bankruptcy Code “of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.” 11 U.S.C. .

§362(b)(10). The Lease, which is for commercial space in a shopping center, expired by its own terms on June 30, 2009, more than one year before the Petition Date. Moreover, due to the Debtor's failure to pay rent for the month-to-month terms commencing on June 1, 2010, no month-to-month "lease" came into effect for the month of June (or any month thereafter) and the Debtor ceased to hold any leasehold interest that could be assumed or assigned as of the Petition Date. *See* 11 U.S.C. §365(c)(3).³ Rather, as of the Petition Date, the Debtor only held a naked possessory interest in the Subject Premises and held over unlawfully.

18. Allowing the automatic stay to protect such a fleeting interest would nullify section 362(b)(10) of the Bankruptcy Code which, according to the legislative history, was purposely placed into the Bankruptcy Code to permit landlords to proceed promptly in state court to reclaim possession of non-residential lease premises where the lease expired by its own term and to finalize landlord/tenant disputes deal with these situations. *See*

³ Section 365(c)(3) of the Bankruptcy Code provides that a trustee or debtor-in-possession may not assume or assign a lease, if – “such lease is of non-residential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.” 11 U.S.C. §365(c)(3).

e.g., In re Neville, 118 B.R. 14, 18 (Bankr. E.D.N.Y. 1990); S.Rep. No. 98-65, 98th Congr. 1st Sess. 68 (1983).

19. Accordingly, Movant was and is entitled to take all steps provided for under California law to obtain possession of the Subject Premises pursuant to section 362(b)(10) of the Bankruptcy Code and without regard to the application of section 362(a) of the Bankruptcy Code.

20. Alternatively, in the event that this Court finds that section 362(b)(10) of the Bankruptcy Code is not applicable to the instant matter, Movant is entitled to relief from the automatic stay.

21. Section 362(d)(1) of the Bankruptcy Code provides that a bankruptcy court, after notice and a hearing, may terminate, annul, modify or condition the automatic stay "for cause, including the lack of adequate protection of an interest in property" of the party seeking relief. 11 U.S.C. § 362(d)(1). Section 362(d)(2) of the Bankruptcy Code further provides that a bankruptcy court, after notice and a hearing, may terminate, annul, modify or condition the automatic stay with respect to property if "the debtor does not have any equity in such property" and "such property is not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2). Movant would be entitled to relief under either and both of these sections of the Bankruptcy Code.

22. The term "cause" is not defined in the Bankruptcy Code, but "it is viewed as a broad and flexible concept." *In re M.J. & K. Co., Inc.*, 161 B.R. 586, 590 (Bankr. S.D.N.Y. 1993) (internal citations omitted). Once the movant shows that cause exists, the burden is on the debtor to prove that it is entitled to the protection of the automatic stay. *Id.* (citing *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1285 (2d Cir. 1990)). Whether cause

exists for relief from the automatic stay under section 362(d)(1) of the Bankruptcy Code must be determined on a case-by-case basis. *Id.* at 591.

23. Generally speaking, "[w]hen deciding whether to modify the automatic stay, 'the court must consider the particular circumstances of the case and ascertain what is just to the claimants, the debtor, and the estate.'" *Id.* at 590 (quoting *In re Mego Int'l Inc.*, 28 B.R. 324, 326 (Bankr. S.D.N.Y. 1983)); see also *Sonnax*, 907 F.2d at 1286 (listing 12 factors to consider when determining whether to modify stay to allow litigation to continue in another forum, including the "impact of the stay on the parties and the balance of harms."). Affirmative harm to the movant from the continuance of the automatic stay constitutes cause. See *In re Boodrow*, 192 B.R. 57, 60 (Bankr. N.D.N.Y. 1995)("The bankruptcy court is, and should be, prepared to act to prevent harm occasioned by the continuance of the automatic stay."); see also *In re The Bennett Funding Group, Inc.*, 255 B.R. 616, 638-39 (N.D.N.Y. 2000) (finding cause to lift stay where "further delay in requiring the Trustee to turn over the lease payments could operate to the detriment of the entire investor creditor body."). Bankruptcy courts have consistently held that a failure to perform under a contract postpetition is cause to lift the automatic stay. See *In re Uvaydov*, 354 B.R. 620, 623 (Bankr. E.D.N.Y. 2006) (debtor's failure to make post-petition mortgage payments is grounds for modifying the stay).

24. Cause exists to terminate the automatic stay *nunc pro tunc* to the Petition Date in order to validate the service of the Five Day Notice and the Thirty Day Notice given that the Debtor did not provide notice to Movant of the commencement of this bankruptcy case prior to the service of said notices. In addition, the Debtor failed in its obligation to make payments of post-petition rent as it became due and owing in

accordance with the terms of the Lease, and as mandated by section 365(d)(3) of the Bankruptcy Code which provides that a debtor-in-possession "shall timely perform all the obligations of the debtor . . . arising from and after the [commencement of a bankruptcy case] under any [lease] . . . until [such lease] is assumed or rejected." 11 U.S.C.

§365(d)(3) The Court should therefore terminate the automatic stay for cause under section 362(d)(1) of the Bankruptcy Code effective July 17, 2010.

25. In addition, the Debtor has no equity in the Subject Premises. As explained above, as of the Petition Date, the Debtor had nothing more than a fleeting possessory interest in the Subject Premises that could not be assumed or assigned and could not last for any considerable length of time in that, at that point, the Debtor was an unlawful and non-consensual hold-over having not paid any rental amounts as is necessary to effect a month-to-month tenancy under applicable California law. Property which is no longer considered property of the estate as of the Petition Date, and in which the Debtor has no real interest capable of assuming or assigning, cannot have value to the estate or be used in a reorganization. Accordingly, Movant should be granted relief from the automatic stay under section 362(d)(2) of the Bankruptcy Code effective July 17, 2010.

26. Moreover, so long as the Debtor continues to hold over in possession of the Subject Premises and the automatic stay is not lifted (if applicable at all), Movant is being harmed. The application of the automatic stay inhibits the Movant's right to terminate at any time, without cause, in accordance with applicable California law, and the Movant ability to re-let the Subject Premises to a paying tenant under an actual lease, as opposed to on a highly unpredictable month to month basis. The Debtor has not paid any rent since prior to the Petition Date and continues to not pay rent on a post-petition basis. Movant is

therefore at risk of losing a potential replacement tenant and suffering further economic setbacks the longer the Debtor remains in possession, which is a clear harm to the Movant.

Waiver of Rule 4001 Stay

27. Rule 4001(a)(3) of the Bankruptcy Rules provides that "[a]n order granting a motion for relief from an automatic stay . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 4001. Movant respectfully seeks a waiver of the 14-day stay period in order to complete repossession of the Subject Premises pursuant to the Thirty Day Notice and in accordance with California law immediately upon entry of the order.

No Prior Request

28. No prior motion for the relief requested herein has been made to this Court or any other court.

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WHEREFORE, Movant respectfully requests that the Court enter an order, substantially in the form attached as Exhibit 1: (i) confirming that the automatic stay does not apply to Movant, and the automatic stay does not prohibit any action by Movant to recover possession of the Subject Premises pursuant to 11 U.S.C. §362(b)(10); alternatively (ii) granting Movant relief from the automatic stay pursuant to 11 U.S.C. §362(d) for cause effective July 17, 2010 in order to proceed as provided by the laws of the State of California to recover possession of the Subject Premises; (iii) in any case, for an order waiving the fourteen (14) day stay of Fed. R. Bank. Proc. 4001(a)(3) as Movant would suffer irreparable harm if not permitted to proceed as soon as possible to recover possession of the Subject Premises; and (iv) for such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 23, 2010

SHEPPARD MULLIN RICHTER & HAMPTON LLP

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Exhibit 1

Proposed Order

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

In re:

JENNIFER CONVERTIBLES, INC., *et al.*,

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**ORDER GRANTING MOTION OF THE WINFIELD GROUP
TO CONFIRM THAT NO STAY IS IN EFFECT OR, ALTERNATIVELY,
FOR *NUNC PRO TUNC* RELIEF FROM AUTOMATIC STAY**

Upon the *Motion of the Winfield Group to Confirm that No Stay is in Effect or, Alternatively, for Nunc Pro Tunc Relief from Automatic Stay* (the “**Motion**”);¹ and the Court having read and considered the Motion, objections to the Motion, if any, and arguments of any counsel appearing regarding the relief requested in the Motion at the hearing on the Motion, the Court finds and determines the following:

¹ Terms capitalized but not otherwise defined herein shall have the meaning ascribed to them in the Motion.

A. Consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b).

B. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

C. The Court has jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334.

D. Due and proper notice of the Motion has been provided and no further notice is necessary.

E. The legal and factual bases set forth in the Motion establish just and sufficient cause to grant the relief requested therein.

F. The relief granted herein is in the best interests of the Debtor, its estate, creditors, and all parties in interest.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED in all respects and as set forth below.

Objections to the Motion, if any, that have not been withdrawn are hereby overruled.

2. The automatic stay of 11 U.S.C. § 362(a) is not applicable to Movant's actions in providing the Thirty Day Notice and to complete re-possession of the Subject Premises pursuant to applicable California law and 11 U.S.C. § 362(b)(10).

[or]

Movant is granted *nunc pro tunc* relief from the automatic stay to provide the Thirty Day Notice and complete re-possession of the Subject Premises.

3. This Order shall be effective immediately upon entry and the modification of the automatic stay shall not be stayed by operation of Rule 4001 of the Bankruptcy Rules.

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

Dated: September __, 2010

United States Bankruptcy Judge