

HEARING: Tues., Aug. 31, 2010 (11:00 a.m.)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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 In re: : Chapter 11
 :
 JENNIFER CONVERTIBLES, INC., : Case No. 10-13779 (ALG)
 :
 Debtors. : (Jointly Administered)
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UNITED STATES TRUSTEE’S OBJECTION TO THE DEBTORS’ MOTION FOR ENTRY OF AN ORDER AUTHORIZING DEBTORS TO ENTER INTO A STIPULATION WITH HAINING MENGNU GROUP CO. LTD.

TO: THE HONORABLE ALLAN L. GROPPER,
UNITED STATES BANKRUPTCY JUDGE:

Tracy Hope Davis, the United States Trustee for Region 2 (the “United States Trustee”), hereby respectfully files her objection to the motion (the “Motion”) of Jennifer Convertibles, Inc. and related Chapter 11 debtors (collectively, the “Debtors”) for entry of an order authorizing the Debtors to enter into a stipulation with Haining Mengnu Group Co., Ltd. (“Mengnu”). In support of her objection (the “Objection”), the United States Trustee respectfully represents as follows:

INTRODUCTION

The United States Trustee has a number of concerns about the pending Motion. In effect, Mengnu is getting a more favorable treatment than the Debtors’ other vendors. With this Motion, the Debtors seek the ability to pay a creditor for goods shipped from overseas without the Debtors having seen the goods. It is also of concern that payment will be made to a vendor located in China where familiarity with the UCC may not be common. Hence, at the very least,

to the extent the Court grants the Motion, it should be modified as discussed below.¹

BACKGROUND

On July 18, 2010 (the “Filing Date”), the Debtors commenced these cases by filing voluntary petitions under chapter 11 of the Bankruptcy Code. On July 23, 2010, the United States Trustee appointed an Official Committee of Unsecured Creditors in these cases (the “Committee”).

OBJECTION

The United States Trustee objects to the approval of the Motion unless and until certain changes are made to the proposed order granting the Motion.

First, the proposed order granting the Motion should provide that the 75% Prepayment remains property of the Debtors’ estates until the relevant funds are remitted to Mengnu. Such a requirement would ensure that any funds turned over to the Escrow Agent would be held in compliance with all the requirements of Section 345 of the Bankruptcy Code regarding safeguarding and protecting the property of the estates. 11 U.S.C. § 345(a). It would also avoid the transfer of cash to Mengnu until such time as the Debtors actually receive merchandise from Mengnu.

Second, the proposed order granting the Motion should provide that the 75% Prepayment may not be released to Mengnu without a further order of the Court if the Debtors’ cases are converted to cases under chapter 7. Such a requirement would ensure that a chapter 7 trustee would be readily able to marshal estate assets and fulfill his or her fiduciary duty to “collect . . . the property of the estate” and “be accountable for all property received.” 11 U.S.C. § 704(a)(1)-

¹ Counsel to the United States Trustee has raised the concerns discussed herein with Debtor’s counsel. As of this date, the Debtors have not agreed to the modifications recommended by counsel to the United States Trustee.

(2).

Third, the proposed order granting the Motion should provide that the Debtors retain all of their rights under the UCC if Mengnu provides the Debtors with defective or non-conforming goods. Such a requirement would ensure that the Debtors could more adequately protect their ability to reject defective or non-conforming goods from Mengnu, a foreign vendor, even when the 75% Prepayment has already been remitted to Mengnu.

Fourth, because in the Motion the Debtors are alleging that the relief they are requesting represents the exercise of their business judgment under Section 363(b)(1), *see* Motion at ¶ 18, the Debtors need to provide an affidavit or proffer the testimony of a manager of the Debtors, who would be able to describe in detail the Debtors' negotiations with Mengnu that led to the development of the stipulation the approval of which is being sought. The Motion, as filed, fails to meet the Debtors' evidentiary burden.

Finally, the United States Trustee requests that if the Court is inclined to grant the pending Motion, it should deny the Debtors' pending motion seeking to provide Mengnu with critical vendor status (the "Critical Vendor Motion"). ECF Doc. No. 4. The relief requested in the Motion would ensure that Mengnu continues to provide inventory to the Debtors and ensure that Mengnu gets paid timely. Simply put, if the Motion is granted Mengnu would not need the various forms of artificial priority that it has asked for in the Critical Vendor Motion.

CONCLUSION

WHEREFORE, the United States Trustee respectfully requests that the Court deny the Motion, and enter such other and further relief as it deems just and proper.

Dated: New York, New York
August 30, 2010

Respectfully submitted,

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

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