

Hearing Date: October 27, 2010
Time: 11:00 a.m.

CULLEN AND DYKMAN, LLP
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Attorneys for TMCC, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

Jennifer Convertibles, Inc.,

Chapter 11
Case No. 10-13779 (ALG)

Debtor.

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on October 27, 2010 at 11:00 a.m., TMCC, Inc. ("TMCC"), by and through its attorneys Cullen and Dykman LLP, will move (the "Motion") before the Honorable Allan L. Gropper, United States Bankruptcy Judge, in the United States Bankruptcy Court for the Southern District of New York, located at Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004-1408, or as soon thereafter as counsel can be heard, for an Order compelling payment of post-petition lease obligations, directing timely performance of all lease obligations, or in the alternative, compelling Debtor to immediately reject lease.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court electronically in

accordance with General Order M-182 which can be found <http://www.nysb.uscourts.gov>, the official website of the Bankruptcy Court, by registered users of the Bankruptcy Court's case filing system and by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and shall be served in accordance with General Order M-182 upon (i) Cullen and Dykman LLP, 100 Quentin Roosevelt Blvd, Garden City, New York 11530, attention: Bonnie L. Pollack, Esq. and (ii) the Office of the United States Trustee, 33 Whitehall Street, 21st Street, New York, New York 10004, in order that they be received no later than October 20, 2010 at 4:00 p.m..

Dated: Garden City, New York
September 28, 2010

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Attorneys for TMCC, Inc.

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**MOTION OF TMCC, INC. FOR AN ORDER COMPELLING
PAYMENT OF POSTPETITION LEASE OBLIGATIONS,
DIRECTING THE TIMELY PERFORMANCE
OF ALL LEASE OBLIGATIONS OR, IN THE ALTERNATIVE,
COMPELLING DEBTOR TO IMMEDIATELY REJECT LEASE**

TMCC, Inc. ("TMCC"), by and through its undersigned counsel, respectfully submits this motion (the "Motion") for an order (a) pursuant to section 365(d)(3) of the Bankruptcy Code, compelling payment of post-petition lease obligations and directing the timely performance of all obligations under the Sublease (as defined below) or, in the alternative, compelling the Debtor to immediately reject the Sublease. In support of the Motion, TMCC respectfully represents:

JURISDICTION AND VENUE

1. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157. This Motion is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).

BACKGROUND

2. On July 18, 2010 (the “Petition Date”), Hartsdale Convertibles, Inc. (the “Debtor”) filed a voluntary petition under chapter 11 of title 11, United States Code (the “Bankruptcy Code”), and has continued in its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. By lease dated September 29, 2007 (the “Master Lease”), the premises located at 1821 Route 110, E. Farmingdale, New York (the “Premises”) were leased by Josalco, Inc. (the “Overlandlord”) to TMCC. A copy of the Master Lease is annexed hereto as Exhibit “A”.

4. By sublease agreement dated August 18, 2009 (the “Sublease”), TMCC subleased the Premises to the Debtor. A copy of the Sublease is annexed hereto as Exhibit “B”. In November 2009, Exhibit B to the Sublease, which itemizes the Fixed Rent Schedule thereunder, was amended. A copy of Amended Exhibit B (the “Fixed Rent Schedule”) is annexed hereto as Exhibit “C”.

5. Josalco, Inc., as Overlandlord, consented to the terms of the Sublease as set forth in the Landlord’s Consent to Sublease, Nondisturbance and Attornment Agreement annexed hereto as Exhibit “D”.

6. As set forth in the Fixed Rent Schedule, TMCC as the Debtor’s landlord directed the payment of the rent to be split between two entities -- TMCC and GMM Consulting, Inc., an entity owned and controlled by the principal of TMCC (the “Fixed Rent Obligations”). The Debtor is also required to pay Additional Rent (as defined in the Sublease), late charges and interest on arrears all as set forth in the Sublease. The Fixed Rent Obligation, Additional Rent, and all other obligations due under the Sublease are collectively hereinafter referred to as the “Lease Obligations”.

7. From the commencement of the Sublease through April 2010, the Debtor paid all Fixed Rent Obligations as required by the Sublease. The Debtor made the payments required to TMCC by check delivered to TMCC and made the separate payment required to GMM Consulting by check delivered to a GMM post office box. Beginning in May 2010, the Debtor stopped paying the Lease Obligation. Thus, for the period prior to the Petition Date, the Debtor owes the following payments pursuant to the Sublease:

- Fixed Rent – May, 2010: \$52,000
- Fixed Rent – June, 2010: \$52,000
- Fixed Rent – July 1 through July 17, 2010: \$28,516.13
- Late Charges: \$4,680.00
- Interest on Arrears: \$11,310.00
- Legal Fees: \$2,500.00

8. In addition, the following post-petition Lease Obligations (including “stub-period” obligations) were due, but remain unpaid:

- July 2010 – Fixed Rent in the amount of \$52,000, pro rated from the period of July 18, 2010 through July 31, 2010;
- August 2010 – Fixed Rent in the amount of \$20,000;
- September 2010 – Fixed Rent in the amount of \$20,000; and
- Such Additional Rent as may be due and owing for such periods.

9. By letter dated September 10, 2010, TMCC made demand for immediate payment for all post-petition unpaid Lease Obligations. Notwithstanding that demand, those obligations remain unpaid.

RELIEF REQUESTED

10. TMCC respectfully requests entry of an order pursuant to section 365(d)(3) of the Bankruptcy Code, compelling the immediate payment of all unpaid post-petition Lease Obligations including stub-period obligations and directing the Debtor to timely perform all post-petition Lease Obligations under the Sublease or, in the alternative, compelling the Debtor to immediately reject the Sublease.

A. The Debtor Should be Compelled to Immediately Pay All Unpaid Post-Petition Obligations and Timely Pay Such Obligations Thereafter

11. As set forth on Exhibit “B”, the Debtor is required under the Sublease to pay \$52,000 per month in Fixed Rent Obligations. Despite that requirement (and the fact that prior to its May 2010 default it always paid the full amount of its Fixed Rent Obligations), post-petition the Debtor has only been paying \$32,000 per month under the Sublease. The Debtor, however, is required to pay all Lease Obligations under the Bankruptcy Code and is required to do so on a timely basis.

12. Section 365(d)(3) of the Bankruptcy Code requires that a debtor “timely perform all obligations ... arising from and after the order of relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” 11 U.S.C. §365(d)(3) (emphasis added).

13. By explicitly calling for timely payment of all nonresidential lease obligations, section 365(d)(3) protects lessors from the danger of ever-increasing losses during the post-petition, pre-rejection period. In In re Pudgies Dev. of NY, Inc., 202 B.R. 832 (Bankr. S.D.N.Y. 1996), the Bankruptcy Court strictly construed section 365(d)(3) to hold that nonresidential lessors were entitled to immediate payment of post-petition, pre-rejection rent at the full rate expressed in the lease. See also In re Child World, Inc., 161 B.R. 571, 575 (S.D.N.Y. 1993)

(stating that section 365(d)(3) “fix[es] the amount to be paid by debtor-tenants pending assumption or rejection of the lease at the amount provided in the lease ... and [requires] these payments to be paid ‘at the time required in the lease’”).

14. Section 365(d)(3) was intended to provide greater protection to landlords than had been the case prior to its enactment in 1984. No longer would a landlord have to move for “use and occupancy”, have to prove that the use of leased premises was an actual and necessary cost of preserving the estate, or debate the amount it was entitled to receive. To the contrary, section 365 was amended to enhance the position of landlords of non-residential real estate, and to provide certainty that the landlord would be compensated for the post-petition use of leased premises. “[U]nlike other administrative expense claims, [claims of landlords for post-petition rent] are allowed in the full amount of rent and other charges due under the lease without a showing by the landlord that the amounts owed are reasonable or of a benefit to the estate.” In re Microvideo Learning Systems, Inc., 232 B.R. 602, 604 (Bankr. S.D.N.Y. 1999) (citations omitted), aff’d, 254 B.R. 90 (S.D.N.Y. 1999). See also In re Pacific-Atlantic Trading Co., 27 F.3d 401 (9th Cir. 1994) (Section 365(d)(3) gives rise to claim for full amount of rent regardless of actual value conferred on estate); In re Wingspread Corp., 116 B.R. 915 (Bankr. S.D.N.Y. 1990). Thus, under section 365(d)(3) of the Bankruptcy Code, until it assumes or rejects the Sublease, the Debtor is obligated to pay TMCC \$52,000 per month plus any additional rental obligations, the full amount of the Lease Obligations.¹

15. The Debtor is also obligated to pay “stub rent” for July 2010, the month of its bankruptcy filing. As this Court stated in In re Stone Barn Manhattan LLC, 398 B.R. 359, 361 (Bankr. S.D.N.Y. 2008)

¹ Upon information and belief, the Debtor will argue that it is only required to pay \$32,000 per month because the Overlandlord did not consent to any amounts greater than that. Such an argument is belied by the Landlord’s Consent annexed as Exhibit “D” hereto.

There is no dispute as to the purpose of §365(d)(3). Congress enacted the statute to ameliorate the perceived inequities that lessors of nonresidential real property had faced during the period after a Chapter 11 filing but before assumption or rejection. As Senator Orrin Hatch, a conferee to the original act, stated: “In this situation, the landlord is forced to provide current services – the use of its property, utilities, security, and other services – without current payment . . . the bill would lessen these problems”

16. Thus, the Southern District has held that compelling a debtor to pay prorated rent during the first month of a proceeding is appropriate, finding that landlords are entitled to immediate payment of such rent while the debtor uses the property. A number of other courts have reached the same conclusion. See In re Ames Dept. Stores, Inc., 306 B.R. 43 (Bankr. S.D.N.Y. 2004); In re Furr’s Supermarkets, Inc., 283 B.R. 60 (B.A.P. 10th Cir. 2002); In re NETtel Corp., Inc., 289 B.R. 486 (Bankr. D.C. 2002); In re Child World, Inc., *supra*. But see, In re R.H. Macy & Co., 152 B.R. 869 (Bankr. S.D.N.Y. 1993); *aff’d*, 1994 WL 482948 *13 (S.D.N.Y. Feb. 23, 1994).

17. While it is true that there are cases on both sides of this issue, those that favor non-compliance with post-petition stub period obligations do so by absolute strict construction without regard to the realities faced by landlords of debtors-in-possession; those which favor proration of stub period obligations, as this Court did in Stone Barn, look to honor the language and intent of section 365(d)(3), and note that (a) proration is fair and equitable, (b) proration is in accord with the pre-amendment practice of prorating lease obligations pending rejection, and (c) proration is consistent with other provisions of the Bankruptcy Code. Stone Barn, *supra*; Ames Dept. Store, *supra*; Furr’s Supermarkets, *supra*.

18. This Court noted in Stone Barn, *supra*, that neither section 365(d)(3) nor prior history distinguishes between stub period lease obligations and those that come due post-petition on a particular date. If Congress had wished to shield debtors from obligations that accrue

during the first month of a case it could easily have done so. Interpreting section 365(d)(3) to require payment of stub rent is thus in accordance with the plain meaning of the statute.

19. As this Court held in Stone Barn, a correct reading of section 365(d)(3) is that rental obligations should be paid as they accrue. “After a careful analysis of §365(d)(3), the many conflicting judicial opinions that apply it, and with the greatest respect for the Loews District Court, the Court remains convinced that the proper construction of §365(d)(3) in this case is to hold the Debtors responsible for the stub rent on a daily basis as it accrued after the date of the order for relief ... and until the end of that month.” Stone Barn, 398 B.R. at 365.

20. This ruling comports with the legislative history of Section 365(d)(3):

A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments under the lease. In this situation, the landlord is forced to provide current services – the use of its property, utilities, security, and other services – without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the debtor. . . .

130 Cong. Rec. S8887, 8895 (daily ed. June 29, 1984) (statement of Sen. Hatch) (emphasis added).

21. The Court in In re Travel 2000, Inc., 264 B.R. 444 (Bankr. W.D. Mich. 2001), relied on this quote, noting in particular the emphasized words, to hold that proration was the only fair and equitable way to reflect congressional intent:

Had a trade creditor of Travel 2000 sent a bill for goods on the first of the month, with the goods arriving on the third; when Travel 2000 filed bankruptcy on the second the creditor would have the option of awaiting payment or demanding return of the goods. The creditor [sic] would not be required to both forfeit the goods and made the payment. If the trade creditor decided to continue dealing with the debtor post-petition, it would do so voluntarily and thus knowingly assume the risk of not being fully compensated. The landlord, on the other hand, is forced,

involuntarily, to deal with the debtor/tenant until the debtor rejects the lease. Under the performance date approach of §365(d)(3), the landlord would not be paid. We believe this result constitutes an iniquitous application of the Bankruptcy Code.

Travel 2000, 264 B.R. at 448-49.

22. The Court in In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125 (7th Cir. 1998) adopted the same approach. “What [the debtor] wanted was the continued occupancy of the leased property until it rejected the lease. To get this benefit it had to pay the full rent under the lease for every day that it continued to occupy the property; section 365(d)(3), changing the prior law . . . requires no less.” Handy Andy, 144 F.2d at 1127. The Court further noted that

[s]tatutory language like other language should be read in context (citations omitted). The context consists not merely of other sentences but also of the real-world situation to which the language pertains. Here that situation concerned a class of postpetition debts. That is all Congress was legislating in reference to. When context is disregarded, silliness results. The rule for which National contends [i.e., billing date approach] would make the rights of creditors turn on the happenstance of the dating of tax bills and the strategic moves of landlords and tenants . . . We don’t see the sense of that.

Id., 144 F.3d at 1128.

23. TMCC recognizes that the authority on these points is not uniform, but believes that the Court’s reasoning in Stone Barn, and the many other cases which apply proration, is clear, logical, and compelling, and achieves a fair and equitable result, something that this Court, as a court of equity, should strive for.

24. There is no ambiguity in the Sublease as to what the Lease Obligations consist of. The Debtor contracted to pay the enumerated and very specific Fixed Rent Obligations as well as all Additional Rent and other items due under the Sublease. The Debtor indeed paid all such

obligations through April 2010, so it cannot argue that it was either unaware of its obligations or did not agree to pay same. The Overlandlord consented to the terms of the Sublease and the payments to be made thereunder.

25. It was not until its bankruptcy filing that the Debtor decided not to pay the full amount of the Fixed Rent Obligations. But the Bankruptcy Code and the law set forth herein require otherwise, and mandate the Debtor to pay all Lease Obligations until it assumes or rejects the Sublease, including “stub rent”, and is required to do so as such obligations become due.

26. Thus, the Debtor should be directed to immediately pay all past due Lease Obligations, and thereafter timely pay all Lease Obligations which come due until the Sublease is assumed or rejected.

B. Alternatively, the Debtor Should be Compelled to Immediately Reject the Sublease

27. If the Debtor is not going to make its required payments under the Sublease, it should be compelled to immediately reject the Sublease. Under section 365(d)(4) of the Bankruptcy Code, the Sublease will be deemed rejected if the Debtor does not assume or reject the Sublease by the earlier of 120 days after the Petition Date or confirmation of a plan, unless extended under section 365(d)(4)(B). The Court, however, can shorten the period within which the Debtor must assume or reject the Sublease. Fed. R. Bankr. P. 6006(b).

28. The determination of what constitutes a reasonable time to assume or reject is within the bankruptcy court’s discretion “in light of the circumstances of each case.” In re Theatre Holding Corp., 681 F.2d 102, 105 (2d Cir. 1982); see also In re Dana Corp., 350 B.R. 144, 147-48 (Bankr. S.D.N.Y. 2006) (citations omitted).

29. Here, if the Debtor is not going to pay all of its Lease Obligations, it should not be permitted to remain in possession of the Premises. The Debtor has many other locations at

which it operates its business. Rejecting one location will not cause the Debtor harm. If the Debtor, however, believes that this location is integral to its operation, it must pay for its use in accordance with the Sublease. The Debtor cannot have it both ways.

30. Accordingly, TMCC submits that if the Debtor does not pay all of its Lease Obligations, cause exists to compel immediate rejection of the Sublease so that TMCC can either retake possession of the Premises or relet same.

NOTICE

31. Notice of this Motion is being given on the date hereof to: (i) counsel to the Debtor; (ii) counsel to the Creditor's Committee; (iii) the Office of the United States Trustee; and (iv) all other parties who have filed a request for notice in this case.

32. No previous request for the relief sought in this Motion has been made to this or any other Court.

CONCLUSION

33. For the reasons discussed above, TMCC requests entry of an order (a) pursuant to section 365(d)(3) of the Bankruptcy Code, compelling payment of the post-petition Lease Obligations and directing the timely performance of all Lease Obligations or, in the alternative, compelling the Debtor to immediately reject the Sublease.

WHEREFORE, TMCC requests that the Court grant the relief requested herein and such other and further relief as the Court deems just and proper.

Dated: Garden City, New York
September 28, 2010

CULLEN AND DYKMAN LLP

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