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**HEARING DATE: NOVEMBER 9, 2010
TIME: 10:00 A.M.**

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

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

**MOTION OF JEROME H. MEYER & CO., AGENT FOR HALSTED-CLYBOURN
LIMITED PARTNERSHIP, ZIFKIN REALTY MANAGEMENT, LLC, AS
SUCCESSOR AGENT FOR THE BENEFICIARIES OF CHICAGO TITLE LAND
TRUST COMPANY, TRUST NUMBER 102676-09, AND JEROME H. MEYER & CO.,
AGENT FOR HALSTED DIVERSEY LLC FOR AN ORDER COMPELLING
PAYMENT OF POST-PETITION RENT PURSUANT TO SECTION 365(d)(3)**

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

Jerome H. Meyer & Co., Agent for Halsted-Clybourn Limited Partnership, Zifkin Realty Management, LLC, as successor Agent for the beneficiaries of Chicago Title Land Trust Company, Trust Number 102674-09, and Jerome H. Meyer & Co., Agent for Halsted Diversey LLC (collectively, the “Landlords”), by their attorneys, Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP (“Platzer”) as and for their motion (the “Motion”) for an order requiring Jennifer Convertibles, Inc. *et al.* (collectively, the “Debtors”) to immediately pay post-petition rent and other charges pursuant to 11 U.S.C. §365(d)(3), respectfully represent as follows:

¹ The Debtors in these chapter 11 cases are: (i) Jennifer Convertibles, Inc.; (ii) Jennifer Convertibles Boylston MA, Inc.; (iii) Jennifer Chicago Ltd.; (iv) Elegant Living Management, Ltd; (v) Hartsdale Convertibles, Inc.; (vi) Jennifer Management III Corp.; (vii) Jennifer Purchasing Corp.; (viii) Jennifer Management II Corp.; (ix) Jennifer Management V Ltd.; (x) Jennifer Convertibles Natick, Inc.; (xi) Nicole Convertibles, Inc.; (xii) Washington Heights Convertibles, Inc.

I. CASE BACKGROUND

1. On July 18, 2010 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) and continue to operate and manage their businesses and property as debtors-in-possession under §§ 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

A. 814-861 WEST NORTH AVENUE, CHICAGO, ILLINOIS

2. On the Petition Date, the Debtor, Jennifer Convertibles, Inc. and Landlord, Jerome H. Meyer & Co., Agent for Halsted-Clybourn Limited Partnership (“Jerome H. Meyer & Co., Agent for Halsted-Clybourn”), were parties to a lease dated July 9, 1991, as amended, for the premises commonly known as 814-861 West North Avenue, Chicago, Illinois (the “West North Avenue Lease”).

3. Section 4.1 to the West North Avenue Lease provides in pertinent part that:

“SECTION 4.1 Rent. Tenant agrees to pay rent, in lawful money of the United States in advance and without demand, deduction or setoff, to the Landlord, at the Landlord’s address or to such other person or at such other place as Landlord may direct by notice in writing to Tenant from time to time, at the following rates and times:

(a) on the first day of each calendar month”

See Exhibit “A”, Section 4.1 to the West North Avenue Lease.

4. On November 22, 1995, the West North Avenue Lease was amended to amend the annual base rent, among other provisions. *See* Exhibit “B”.

5. On September 1, 2000, the West North Avenue Lease was assigned from J.C. Lincoln Park, Inc. to the Debtor, Jennifer Convertibles, Inc. *See* Exhibit “C”.

6. On March 9, 2006, the West North Avenue Lease was further amended to amend the term of the Lease, the annual base rent and the percentage base rent, among other provisions. *See* Exhibit “D”.

7. Pre-petition, the Debtors failed to timely pay July 2010 rent according to the terms of the West North Avenue Lease, as amended.

8. Following the Chapter 11 filings and despite due demand by landlord Jerome H. Meyer & Co., Agent for Halsted-Clybourn, the Debtors have failed and refused to pay any rent for the post-petition period from July 19, 2010 to July 31, 2010 (the “West North Avenue Stub Rent”). The West North Avenue Stub Rent for this period of time totals \$6,152.00. The components of the West North Avenue Stub Rent are set forth in greater detail on Exhibit “E” hereto.

9. Jerome H. Meyer & Co., Agent for Halsted-Clybourn has made several attempts to obtain the payment of the West North Avenue Stub Rent for this period and the Debtors have failed to remit payment of same.

B. 695 EAST GOLF ROAD, SCHAUMBURG, ILLINOIS

10. On the Petition Date, the Debtor, Jennifer Convertibles, Inc. and Landlord, Zifkin Realty Management, LLC, as successor Agent for the beneficiaries of Chicago Title Land Trust Company, Trust Number 102674-09 (“Zifkin Realty”), were parties to a lease dated February 18, 1992, as amended, for the premises commonly known as 695 East Golf Road, Schaumburg, Illinois (the “East Golf Road Lease”).

11. Section 4.1 of the East Golf Road Lease provides in pertinent part that:

“SECTION 4.1 Rent. Tenant agrees to pay rent, in lawful money of the United States in advance and without demand, deduction or setoff, to the Landlord, at the Landlord’s address or to such other person or at such other place as Landlord may direct by notice in writing to Tenant from time to time, at the following rates and times:

(a) on the first day of each calendar month”

See Exhibit “F”, Section 4.1 to the East Golf Road Lease.

12. On November 22, 1995, the East Golf Road Lease was amended to amend the annual base rent, percentage rent rate, among other provisions. *See* Exhibit “G”.

13. On September 1, 2000, the East Golf Road Lease was assigned from J.C. Schaumburg, Inc. to the Debtor, Jennifer Convertibles, Inc. *See* Exhibit “H”.

14. On June 17, 2009, the East Golf Road Lease was further amended to relocate the Tenant, reduce the square footage, among other provisions. *See* Exhibit “I”.

15. On January 25, 2010, the East Golf Road Lease was amended further to amend the early termination provision of the Lease. *See* Exhibit “J”.

16. Pre-petition, the Debtors failed to timely pay July 2010 rent according to the terms of the East Golf Road Lease, as amended.

17. Following the Chapter 11 filings and despite due demand by the Zifkin Realty, the Debtors have failed and refused to pay any rent for the post-petition period from July 19, 2010 to July 31, 2010 (the “East Golf Road Stub Rent”). The East Golf Road Stub Rent for this period of time totals \$4,447.79. The components of the East Golf Road Stub Rent are set forth in greater detail on Exhibit “K” hereto.

18. Zifkin Realty has made several attempts to obtain the payment of the East Golf Road Stub Rent for this period and the Debtors have failed to remit payment of same.

C. **730 WEST DIVERSEY PARKWAY, CHICAGO, ILLINOIS**

19. On the Petition Date, the Debtor, Jennifer Convertibles, Inc. and Landlord, Jerome H. Meyer & Co., Agent for Halsted Diversey LLC (“Jerome H. Meyer & Co., Agent for Halsted Diversey”), were parties to a lease dated July 9, 1991, as amended, for the premises commonly known as 730 West Diversey Parkway, Chicago, Illinois (the “West Diversey Parkway Lease”).

20. Section 4.1 of the West Diversey Parkway Lease provides in pertinent part that:

“SECTION 4.1 Rent. Tenant agrees to pay rent, in lawful money of the United States in advance and without demand, deduction or setoff, to the Landlord, at the Landlord’s address or to such other person or at such other place as Landlord may direct by notice in writing to Tenant from time to time, at the following rates and times:

(a) on the first day of each calendar month”

See Exhibit “L”, Section 4.1 to the West Diversey Parkway Lease.

21. On November 22, 1995, the West Diversey Parkway Lease was amended to amend the annual base rent and percentage rent rate, among other provisions. *See* Exhibit “M”.

22. On September 1, 2000, the West Diversey Parkway Lease was assigned from J.C. Diversey, Inc. to the Debtor, Jennifer Convertibles, Inc. *See* Exhibit “N”.

23. On May 12, 2006, the West Diversey Parkway Lease was further amended to amend the term of the Lease, the annual base rent and the percentage base rent, among other provisions. *See* Exhibit “O”.

24. Pre-petition, the Debtors failed to timely pay July 2010 rent according to the terms of the West Diversey Parkway Lease, as amended.

25. Following the Chapter 11 filings and despite due demand by landlord Jerome H. Meyer & Co., Agent for Halsted Diversey, the Debtors have failed and refused to pay any rent for the post-petition period from July 19, 2010 to July 31, 2010 (the “West Diversey Parkway Stub Rent”). The West Diversey Parkway Stub Rent for this period of time totals \$4,993.52. The components of the West Diversey Parkway Stub Rent are set forth in greater detail on Exhibit “P” hereto.

26. Jerome H. Meyer & Co., Agent for Halsted Diversey, has made several attempts to obtain the payment of the West Diversey Parkway Stub Rent for this period and the Debtors have failed to remit payment of same.

II. JURISDICTION

27. This Court has jurisdiction to grant the Landlords the relief pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (D) and 1334. The statutory predicate for the relief sought herein is 11 U.S.C. § 365(d)(3).

III. LEGAL ARGUMENT

28. In 1984, Section 365 of the Bankruptcy Code was amended to impose an obligation on the debtor-in-possession to pay its post-petition rent during the pendency of Chapter 11 proceedings. Section 365(d)(3) provides in relevant part that the debtor-in-possession “shall timely perform all the

obligations of the debtor ... arising from and after the order for relief under any expired lease of nonresidential real property, until such lease is assumed or rejected ...” 11 U.S.C. § 365(d)(3)²

29. The clear policy purpose driving the Section 365(d)(3) amendment was to alleviate the financial burden on commercial landlords created by the automatic stay after a Chapter 11 filing. *See In re Stone Barn Manhattan LLC*, 398 B.R. 359, 361 (Bankr. S.D.N.Y. 2008).

30. Section 503(b)(1) similarly requires that post-petition rent under a lease for real property must be paid as an administrative expense. 11 U.S.C. § 503(b)(1)(A). Prior to the 1984 amendment to Section 365, landlords would have to argue that rent expenses fell into the narrow realm of administrative expenses under Section 503(b)(1), and would thus have to show that the use of the property was an actual and necessary cost of preserving the debtor’s business. *In re Stone Barn Manhattan LLC*, 398 B.R. at 361-62; 11 U.S.C. § 503(b)(1). Additionally, under Section 503(b)(1), the obligation to pay rent was not immediate and could result in delayed payment while Landlords continued to provide their property and services. *In re Ames Dept. Stores, Inc.*, 306 B.R. 43, *68 (Bankr. S.D.N.Y. 2004).

31. Several appellate courts have addressed the construction of § 365(d)(3) and the proration of lease obligations. *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (7th Cir. 1998); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F. 3d 986 (6th Cir. 2000); *In re Montgomery Ward Holding Corp.*, 268 F. 3d 205 (3d Cir. 2001); *HALO Industries v. Center Point Properties Trust*, 342 F.3d 794 (7th Cir. 2003).

32. *In re Stone Barn Manhattan LLC*, 398 B.R. at 365, this Court also addressed the application of Section 365(d)(3) and the proration of lease obligations. This Court in *In re Stone Barn Manhattan LLC* held the debtors responsible for stub rent “measured on a daily basis as it accrued after the date of the orders for relief ... until the end of that month.” *Id.* at 365. This Court also found that the

² Section 365(d)(3) provides: “The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee’s obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor’s rights under such lease or under this title.”

“plain purpose” of Section 365(d)(3) was to bypass the difficulties facing landlords who seek postpetition rent through § 503(b) and that proration is the appropriate approach to determine the amount due as administrative debt. *Id.* at 367.

33. Accordingly, the Landlords are entitled to immediate payment of post-petition rent for the stub period from July 19, 2010 to July 31, 2010, in the amount set forth on Exhibits “E”, “K” and “P”.

34. Additionally, pursuant to Section 12.11 of the West North Avenue Lease, the East Golf Road Lease and the West Diversey Parkway Lease, the Landlords are entitled to payment of the reasonable attorneys’ fees they have incurred (and will continue to incur) in connection with this Motion and related hearings and related legal services. *See, e.g., Travelers Cas. & Su. Co. of Am. V. Pacific Gas and El. Co.*, 127 S. Ct. 1199, 1203 (2007) (holding that a party is entitled to be reimbursed for its attorneys’ fees when there exists an “enforceable contract” allocating attorneys’ fees); *In re Beltway Medical, Inc.*, 358 B.R. 448, 453 (Bankr. S.D. Fla. 2006) (“Where the trustee or the debtor-in-possession fails to perform the primary obligation under the lease (i.e. to pay rent), and the landlord incurs legal fees seeking to obtain payment, it follows that the attorney’s fees, it authorized under the lease and linked to enforcement of the payment obligation, are entitled to the same administrative priority as the rent obligation”); *In re East 44th Realty, LLC*, No. 07 Civ. 8799, 2008 U.S. Dist. LEXIS 7337 (S.D.N.Y. 2008) (affirming bankruptcy court’s finding that a \$1.7 million settlement of attorneys’ fees to a landlord was reasonable); *In re Entertainment, Inc.*, 223 B.R. 141, 151-154 (Bankr. E.D. Ill. 1998) (interest and attorneys’ fees must be paid as provided for in the assumed lease); *In re Exchange Resources, Inc.*, 214 B.R. 366, 371 (Bankr. D. Minn. 1997) (legal fees incurred by landlord in collecting post-petition rent “give[s] rise to a priority administrative-expense claim allowable and payable now”); *In re MS Freight Distribution, Inc.*, 172 B.R. 976, 978-79 (Bankr. W.D. Wash. 1994) (“the legislative history of [section 365(d)(3)] and the language of the section itself mandate that a lessor be paid interest, late fees, and legal fees incurred in the first 60 days of the bankruptcy case”).

35. The Landlords made several attempts to resolve the outstanding post-petition rent issues without the necessity of incurring attorneys’ fees by the Landlords and the Bankruptcy estates. The

Debtors' attorneys completely ignored all requests made by the Landlords and the Landlords were left with no alternative but to retain counsel. The Landlords should not be penalized because Debtors' counsel failed to even respond to the Landlords and their counsel prior to the filing of this Motion. Accordingly, the Landlords should be reimbursed the attorneys' fees expended with respect to this Motion, related hearings and related legal services.

36. Based on the foregoing, the Landlords are entitled to the entry of an order directing the Debtors to pay the West North Avenue Stub Rent, the East Golf Road Stub Rent, the West Diversey Parkway Stub Rent, plus reasonable attorneys' fees associated with this Motion, related hearings and related legal services.

NOTICE

37. The Landlords have provided a copy of the notice of the relevant hearing and objection dates regarding the Motion to: (a) the Debtors, by their counsel; (b) the Office of the United States Trustee; (c) the Official Committee of Unsecured Creditors, by its counsel; and (d) those parties that filed notices of appearance in these cases. Due to the voluminous nature of the Motion and exhibits, copies of the Motion with exhibits will be provided upon request to Platzer. The Landlords submit such notice is sufficient and appropriate herein³.

NO PREVIOUS REQUEST

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

[INTENTIONALLY LEFT BLANK]

³ Copies of the Motion with Exhibits have been given to (i) the Debtors, by their counsel; (ii) the Office of the United States Trustee; and (iii) the Official Committee of Unsecured Creditors, by its counsel.

WHEREFORE, the Landlords respectfully request that this Court enter an order, substantially in the form annexed hereto as Exhibit “Q”:

- (a) Compelling the Debtors to immediately pay to landlord Jerome H. Meyer & Co., Agent for Halsted-Clybourn Limited Partnership, the West North Avenue Stub Rent (\$6,152.00) due under the West North Avenue Lease;
- (b) Compelling the Debtors to immediately pay to landlord Zifkin Realty Management, LLC, as successor Agent for the beneficiaries of Chicago Title Land Trust Company, Trust Number 102674-09, the East Golf Road Stub Rent (\$4,447.79) due under the East Golf Road Lease;
- (c) Compelling the Debtors to immediately pay to landlord, Jerome H. Meyer & Co., Agent for Halsted Diversey, the West Diversey Parkway Stub Rent (\$4,993.52) due under the West Diversey Parkway Lease;
- (d) Directing immediate payment of reasonable attorneys’ fees incurred by the Landlords in connection with this Motion, related hearings and related legal services; and
- (e) Granting the Landlords such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 7, 2010

**PLATZER, SWERGOLD, KARLIN,
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