

Presentment Date: November 9, 2010 at 10:00 a.m.

ROBINSON BROG LEINWAND
GREENE GENOVESE & GLUCK P.C.
875 Third Avenue, 9th Floor
New York, New York 10022
(212) 603-6300
Russell P. McRory
Robert M. Sasloff

Counsel to Restful Furniture Corporation

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

-----X		
	:	
In re:	:	Chapter 11
	:	
Jennifer Convertibles, Inc., <i>et al.</i> ,	:	Case No. 10-13779 (ALG)
	:	
Debtors.	:	(Jointly Administered)
	:	
-----X		

LIMITED OBJECTION OF RESTFUL FURNITURE CORPORATION TO THE DEBTORS' MOTION FOR AN ORDER EXTENDING THE TIME WITHIN WHICH THE DEBTORS MUST ASSUME OR REJECT UNEXPIRED LEASES OF NON-RESIDENTIAL REAL PROPERTY

Restful Furniture Corporation. ("Restful"), by and through its undersigned counsel, respectfully submits its limited objection to the Debtors' motion for an order extending the time within which the Debtors must assume or reject unexpired leases of non-residential real property (Docket No. 292) (the "Motion").

PRELIMINARY STATEMENT

The Debtors seek a ninety-day extension of their time to assume or reject unexpired leases of non-residential real property to February 13, 2011. The Motion should be denied with respect to the Debtors' lease from Restful of premises located in

Patchogue, New York, that the Debtors operate as an Ashley Furniture Home Store location.

The limited denial of the Debtors' motion is warranted because: (a) the Debtors have failed to remain current on their post-petition obligations under the subject lease; (b) the Debtors only operate a handful of Ashley Furniture Home Store locations and, therefore, have had ample opportunity to determine whether to assume or reject this particular lease; and (c) any further delay in assuming or rejecting the subject lease would be inequitable and unduly burdensome to Restful.

The Debtors' pre-petition defaults caused Restful to fall behind on payments to its mortgage lender. Restful's mortgage lender declared an event of default, accelerated the mortgage loan, imposed default interest and invoked its rights under an assignment of leases and rents. Restful's mortgage lender refuses to negotiate a forbearance agreement unless all arrears are brought current, which Restful is unable to do unless the Debtors assume the subject lease. In addition, Restful is unable to refinance or sell its premises so long as the status of the subject lease remains undecided.

As a result of the foregoing, any further delay by Debtors in either assuming or rejecting the subject lease would be inequitable and work a great hardship on Restful.

Accordingly, the Debtors' motion should be denied with respect to Restful.

OBJECTION

A. The Restful Lease

1. By lease dated as of April 1, 2008 (the "Lease"), Debtor Hartsdale Convertibles, Inc. leases from Restful the entire premises located at 700 Sunrise

Highway, Patchogue, New York (the “Restful Premises”). A copy of the Restful Lease is annexed hereto as Exhibit “A.”

2. In connection of the Lease, Debtor Jennifer Convertibles, Inc. executed and delivered a Guaranty of Lease dated March 7, 2008 (the “Guaranty”). A copy of the Guaranty is annexed hereto as Exhibit “B.”

3. The Lease was modified twice pre-petition.

4. First, by Modification Agreement dated as of November 1, 2008 (the “First Modification”), Restful and the Debtor agreed *inter alia*, to set the Fixed Rent due under the Restful Lease to \$40,000 per month until October 31, 2009. A copy of the First Modification is annexed hereto as Exhibit “C.”

5. Second, by Modification Agreement dated as of November 1, 2009 (the “Second Modification”), the Debtor and Restful agreed, *inter alia*, that: “[t]he Fixed Rent shall be...\$44,282.59 per month for the period July 1, 2010 through December 31, 2010. Thereafter the Fixed Rent shall be as set forth in the Lease.” A copy of the Second Modification is annexed hereto as Exhibit “D.”

6. The Lease, First Modification, Second Modification and Guaranty are hereinafter collectively referred to as the “Restful Lease.”

7. The Debtors operate an Ashley Furniture Home Store at the Restful Premises. Therefore, as of the Petition Date, the Restful Premises was one of only seven locations the Debtors operated as an Ashley Furniture Home Store as of the Petition Date. See Motion, at ¶ 3. Presumably, the Debtors have made decisions on whether to assume or reject the leases for at least some of the Ashley Furniture Home Store locations.

**B. The Debtors Have Failed
to Remain Current in Their
Post-Petition Rent Obligations**

8. Notwithstanding the terms of the Restful Lease, post-petition, the Debtors have only been paying \$39,700 per month in Fixed Rent rather than \$44,282.59 as required by the Restful Lease – a shortfall of \$4,582.59 per month.¹

9. In addition, the Debtors owe Restful \$22,423.80, representing the pro-rated Fixed Rent and Additional Rent (pro-rated real estate taxes) for the stub-period July 18, 2010 through July 31, 2010.

10. Restful has duly demanded payment of these post-petition arrears, as set forth in the August 18, 2010 email from Restful’s counsel to Debtor’s counsel, a copy of which is annexed hereto as Exhibit “E.”²

**C. The Debtors Pre- and Post-Petition Defaults
and Their Failure to Timely Assume or Reject
the Restful Lease have Created Great Hardship for Restful**

11. Because of Debtors’ pre-petition defaults under the Restful Lease, Restful in turn was and remains unable to make payments due to its mortgage lender, BoA, N.A. (“BoA”).

12. As a result, BoA served on Restful a Notice of Default and Reservation of Rights dated July 20, 2010, a copy of which is annexed hereto as Exhibit “F.”

13. Thereafter, by letter to the Debtors dated September 14, 2010, BoA purported to exercise its rights under an Assignment of Lease and Rents executed by Restful in connection with its mortgage loan. A copy of BoA’s September 14, 2010 letter

¹ The Debtors have been paying post-petition Additional Rent constituting the pro-rated real estate taxes for the Premises that Debtors are obligated to pay under the terms of the Restful Lease.

² The August 18, 2010 email incorrectly described the fixed rent as \$43,975.32, rather than \$44,282.59. As set forth in paragraph 5 above, pursuant to the Second Modification, the Fixed Rent under the Restful Lease increased in July, 2010 to \$44,282.59 per month.

is annexed hereto as Exhibit "G." BoA filed a foreclosure action in the Supreme Court, County of Suffolk under Index No. 10-38155 on or about October 18, 2010.

14. As a result, the Debtors have failed to remit the October rent to Restful and Restful is unaware whether the Debtors have remitted the October rent to BoA or held it back entirely.

15. For its part, BoA refuses to even negotiate a forbearance agreement with Restful until all arrears are paid – which Restful is unable to do unless and until Debtors assume the Restful Lease and pay all pre-petition defaults.

16. As a result, Restful has been forced to put the Restful Premises up for sale and on September 30, 2010 entered into an Exclusive Agency Agreement with Cleva Philips Real Estate Services Corp., a copy of which is annexed hereto as Exhibit "H."

17. As an alternative to selling, Restful is also actively seeking to refinance the Restful Premises in order to pay-off the BoA mortgage.

18. However, Restful is crippled in its efforts to either sell or refinance the Restful Premises until the Restful Lease is either assumed or rejected. A lender will not lend and a buyer will not buy until the fate of Restful Lease is determined, whether by assumption or rejection.

19. Restful has therefore been placed in an untenable and inequitable position as a result of the Debtors' dithering over whether to assume or reject the Restful Lease: (a) the Debtors' pre-petition defaults caused Restful to go into default with its mortgage lender; (b) post-petition, the Debtors have continued to default in their obligations under the Restful Lease by failing to pay in full the Fixed Rent due under Restful Lease; (c) the Debtors' continued failure to either assume or reject the Restful Lease has placed Restful

in limbo, unable to negotiate a forbearance agreement with BoA, or to sell or refinance the Restful Premises.

20. All of the foregoing subjects Restful to great hardship including, the acceleration of its mortgage, imposition default interest, foreclosure of its mortgage, and substantial penalties arising from a cross-default under an interest rate swap agreement.

**D. The Debtors Should Not
Be Granted an Extension of Time
to Assume or Reject the Restful Lease**

21. The Second Circuit articulated the considerations that the Bankruptcy Court should weigh on a debtors' motion to extend the time to assume or reject a particular lease. These factors include: (1) whether the debtor is making rent payments; (2) whether continued occupation of the premises could damage the lessor beyond the compensation available under the Bankruptcy Code; (3) whether the lease is the debtor's primary asset; (4) whether the debtor has had sufficient time to formulate a plan of reorganization; (5) the complexity of the case facing the debtor; (6) the number of leases the debtor needs to evaluate; and (7) whether a judicial determination is needed if whether the lease exists. In re Burger Boys, 94 F.3d 755, 761 (2d Cir. 1996); citing Theatre Holding Corp. v. Mauro, 681 F.2d 102 (2d Cir. 1982); In re Wedtech Corp., 72 B.R. 464, 471-472 (Bankr. S.D.N.Y. 1987).

22. Here, the Burger Boys factors tip decidedly in favor of denying the Motion with respect to the Restful Lease. Here, the Debtors are not current on their monthly rent obligations (factor 1); continued delay is causing and will continue to cause great hardship to Restful that is not compensable under the Bankruptcy Code (factor 2); the Restful Lease is not the Debtors' primary asset (factor 3); and the Restful

Premises is, at best, one of only seven Ashley Furniture Home Store locations as operated by the Debtors (factor 6).

23. The undue burden placed upon Restful by delay is also relevant. District Judge Broderick of the Southern District of New York acknowledged that a previously granted extension of time to assume or reject leases could be shortened where the landlord is unduly burdened. In re Child World Inc., 147 B.R. 854 (S.D.N.Y. 1992). If an extension can be shortened because of undue burden on the landlord, certainly an extension can be denied in the first instance on that ground.

24. District Judge Sweet's decision in Escondido Mission Village L.P. v. Best Products Co., Inc., 137 B.R. 114 (S.D.N.Y. 1992) is instructive. Like Restful here, the Escondido landlord had a mortgage that had come due, and was unable to refinance or sell the premises because of the uncertainty surrounding the lease due to the bankruptcy. The Bankruptcy Court granted debtor's motion to extend the period to assume or reject over the Escondido landlord's objection. The landlord appealed to the District Court and Judge Sweet found "exceptional circumstances" to allow an interlocutory appeal of the Bankruptcy Court's order. Judge Sweet did so because the Bankruptcy Court treated all landlords as one and failed to consider the evidence submitted by each individual objecting landlord. Judge Sweet then remanded the matter back to the Bankruptcy Court stating that "the focus on [the debtor's] desire to formulate and test its business plan at the expense of [the landlords], and without a proper consideration of their concerns, is improper under § 365(d)(4). Thus, here, Restful is entitled to have its facts and circumstances individually weighed against the factors set forth in Burger Boys. The

Debtors should not be permitted to keep all landlords in limbo, regardless of individual circumstances, while the Debtors' work out this plan.

25. Moreover, it appears that the Debtors ultimately intend to reject the Restful Lease and have already secured an alternate location for the Ashley Furniture Home Stores located at the Restful Premises.

26. On August 31, 2010 this Court granted the Debtors' motion authorizing the Debtor to enter into a new lease (the "Coram Lease") at premises located in Coram, New York (Docket No. 159) (the "Coram Lease Motion"). A copy of the Coram Lease Motion is annexed hereto as Exhibit "I". A copy of the Coram Lease is annexed hereto as Exhibit "J." The Restful Premises is 8.8 drive miles from the Coram Facility.

27. As set forth in the Coram Lease Motion, "the Debtors will be closing three (3) Jennifer stores located in the same general area as the Coram Facility, with the intention of consolidating operations into one single store location." Coram Lease Motion, at ¶ 9.

28. The Debtors further describe the Coram Lease as permitting the Coram Facility be used as a Jennifer Convertibles store and an Ashley Furniture Home Store. Coram Lease Motion, at ¶ 11.

29. In the Coram Lease itself, the Debtors represent that they operate two Jennifer Convertible locations and one Ashley Furniture Home Store location within ten (10) miles of the Coram Facility, and covenant that they shall not open any new Ashley Furniture Home Stores within a 10-mile radius of the Coram Facility during the term of that lease. Coram Lease, at ¶ 6.a.

30. Thus, the Debtors have themselves made clear that they are in a position at this time to assume or reject the Restful Lease.

WHEREFORE, Restful respectfully requests that the Court deny the Motion with respect to the Restful Lease and grant to Restful such other and further relief as the Court deems just and proper.

Dated: November 1, 2010
New York, New York

ROBINSON BROG LEINWAND GREENE
GENOVESE & GLUCK P.C.

/s/ Russell P. McRory
By: Russell P. McRory.
Robert M. Sasloff
875 Third Avenue, 9th Floor
New York, New York 10022
Telephone: (212) 603-6300
Facsimile: (212) 956-2164