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

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In re: : Chapter 11  
JENNIFER CONVERTIBLES, INC., et al., : Case No. 10-13779 (AJG)  
Debtors. :

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**MOTION OF TODD GARRETT LLC FOR AN ORDER COMPELLING  
PAYMENT OF POST-PETITION LEASE OBLIGATIONS AND  
DIRECTING THE TIMELY PERFORMANCE OF ALL LEASE OBLIGATIONS**

Todd Garrett, LLC ("Todd Garrett"), 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 Lease Agreement (as defined below).

In support of the Motion, Todd Garrett 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. Jennifer Convertibles, Inc., together with several affiliated entities (collectively, the "Debtor") filed their respective voluntary Petitions for Relief ("Petitions") under Chapter 11 of the United States Bankruptcy Code (the "Code") on or about July 18, 2010 (the "Petition Date").

3. Todd Garrett is the owner/landlord of property located at 3121 Route 10, Denville, New Jersey 07834 (the "Property").

4. On May 1, 1987, the Debtor entered into a Lease Agreement for the Property (the "Lease"). A copy of the Lease Agreement is attached hereto as Exhibit "A".

5. In January, 2007, the Debtor executed an Extension Agreement extending the term of the lease to May 31, 2012. A copy of the Extension Agreement is attached hereto as Exhibit "B".

6. After July 18, 2010, the Debtor continued to operate their business and manage the Property as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Code.

7. On or about September 28, 2010, Todd Garrett received a Notice of Proposed Rejection of Unexpired Leases (the "Notice") from the Debtor with respect to their occupancy of the Property. The Notice provided a rejection date of October 22, 2010 ("Rejection Date").

8. On October 8, 2010, Todd Garrett filed an Objection to the Notice. Despite consultation, the parties were been unable to amend the terms of the Lease Agreement and Extension Agreement (collectively referred to herein as "Lease").

9. On October 22, 2010, Todd Garrett filed an amended Proof of Claim for pre-petition rent, post-petition rent and rejection damages. A copy of the Proof of Claim is attached hereto as Exhibit "C".

10. On or about October 23, 2010, the Debtor abandoned the Property and Todd Garret received a check from the Debtor dated October 20, 2010 as a partial payment of the amount due pursuant to the terms of the Lease.

11. As set forth in the Lease, the payment of rent includes basic rent ("Fixed Rent Obligation") and additional rent for utilities, R/E taxes, and CAM ("Additional Rent") and late charges on arrears all as set forth in the Lease. The Fixed Rent Obligation, Additional Rent, and all other obligations due under the Sublease are collectively hereinafter referred to as the "Lease Obligations".

12. From the commencement of the Lease through March 2010, the Debtor paid all Lease Obligations. The Debtor made the payments required by check delivered to Paul Bagoon. Beginning in April 2010, the Debtor stopped paying the Lease Obligations. Thus, for the period prior to the Petition Date, the Debtor owes Todd Garrett the following payments:

a. Fixed Base Rent for April 1, 2010 through June 30, 2010 in the amount of \$14,850.00 (\$4,950.00 x 3 months);

b. Late Fees for April 1, 2010 through June 30, 2010 in the amount of \$742.50 (5 % base rent x 3 months);

c. Utilities/CAM reimbursement from April 1, 2010 through July 18, 2010 in the amount of \$7,630.63;

d. R/E taxes from April 1, 2010 through July 18, 2010 in the amount of \$2,494.08; and

e. Legal Fees in the amount of \$5,227.00.

13. In addition, the following post-petition Lease Obligations (including "stub period" obligations) were due and remain unpaid:

a. Utilities/R/E Tax/CAM Reimbursement from July 18, 2010 through September 30, 2010 in the amount of \$4,370.99 (this amount differs from the \$9,581.35 amount included in Todd Garrett's Proof of Claim as the Debtor's October 20, 2010 check included CAM and utilities for August, 2010 and a partial payment toward the CAM, R/E taxes and utilities for September, 2010);

b. Utilities/CAM for October 1, 2010 to October 21, 2010 have not been received as utilities are received the following month for the previous month's service (the Debtor's October 20, 2010 check included a partial payment of CAM, R/E taxes and utilities for September, 2010 not October 1, 2010 to October 22, 2010); and

c. Such Additional Rent as may be due and owing for such periods.

14. Notwithstanding Todd Garrett's demands for the pre-petition and post-petition unpaid Lease Obligations that demand, those obligations remain unpaid.

15. Moreover, Todd Garrett is entitled to the following rejection damages:

a. Rent for October 22, 2010 to October 31, 2010 in the amount of \$1,596.80;

b. R/E taxes for October 22, 2010 to October 31, 2010 in the amount of \$224.70;

c. Late Fees due for October, 2010 in the amount of \$247.50;

d. Utilities/CAM for October 22, 2010 to October 31, 2010 which have not been received as utilities are received the following month for the previous month's service; and

e. November 1, 2010 to May 31, 2012 lease term in the amount of \$94,050.00; and

f. R/E taxes for November 1, 2010 to May 31, 2012 in the amount of \$13,234.26.

### **RELIEF REQUESTED**

16. Todd Garrett 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 Lease.

17. As set forth in Exhibits "A" and "B", the Debtor is required to pay \$4,950.00 per month in Fixed Rent Obligations as well as Additional Rent for the Property. Despite that requirement (and the fact that prior to its April 2010 default Debtor always paid the full amount of its Lease Obligations), the Debtor failed to meet its Lease Obligations and breached the Lease. The Debtor is required to pay all Lease Obligations under the Bankruptcy Code and is required to do so on a timely basis.

18. 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).

19. 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). 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).

20. 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).

21. In 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 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."

22. Additionally, pursuant to the 19th Paragraph of the Lease Agreement, Todd Garrett is entitled to the 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").

23. There is no ambiguity in the Lease as to the Debtor's Lease Obligations. 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 March 2010, so it cannot argue that it was either unaware of its obligations or did not agree to pay same. The Debtor consented to the terms of the Lease and the payments to be made thereunder.

24. Todd Garrett has made several attempts to resolve the outstanding Lease Obligations without the necessity of incurring attorneys' fees. Todd Garrett was unable to resolve same and was left with no alternative but to retain counsel. Todd Garrett should not be penalized because Debtor failed to perform the Lease Obligations prior to the filing of this Motion. Accordingly, Todd Garrett should be reimbursed the attorneys' fees expended with respect to this Motion, related hearings and related legal services.

25. It was not until its bankruptcy filing that the Debtor decided not to pay the full amount of the Lease Obligations. However, the Bankruptcy Code and the law set forth herein require the Debtor to perform such Lease Obligations until the Lease is assumed or rejected, including "stub rent", as such obligations become due.

26. Accordingly, Todd Garrett is entitled to immediate payment of post-petition rent and stub rent, plus reasonable attorneys' fees associated with this Motion, related hearings and related legal services.

### **NOTICE**

27. Todd Garrett has 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. Todd Garrett submits such notice is sufficient and appropriate herein.

### **NO PREVIOUS REQUEST**

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

## CONCLUSION

29. For the reasons discussed above, Todd Garrett requests entry of an order 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.

**WHEREFORE**, the Landlords respectfully request that this Court enter an order, substantially in the form annexed hereto as Exhibit "D":

- (a) Compelling Debtor to immediately pay to Todd Garrett post-petition rent;
- (b) Compelling Debtor to immediately pay to Todd Garrett stub rent;
- (c) Directing immediate payment of reasonable attorneys' fees incurred by Todd Garrett in connection with this Motion and related legal services in the amount of \$5,227.00; and
- (d) Granting Todd Garrett such other and further relief as this Court deems just and proper.

Dated: November 2, 2010

TODD GARRETT LLC

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