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Hearing Date: January 11, 2011 at 11:00 a.m.
Objection Deadline: January 4, 2011 at 4:00 p.m.

UNITED STATES BANKRUPTCY COURT
THE SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
JENNIFER CONVERTIBLES, INC.,[1]	Case No. 10-13779 (ALG)
Debtors.	(Jointly Administered)

DEBTORS' MOTION PURSUANT TO 11 U.S.C. § 365 FOR APPROVAL OF THE ASSUMPTION OF EXECUTORY CONTRACTS WITH LICENSOR, EFFECTIVE AS OF THE EFFECTIVE DATE OF A PLAN OF REORGANIZATION

Jennifer Convertibles, Inc. ("Jennifer Convertibles") and its affiliated debtors, as debtors and debtors in possession (together, the "Debtors"), hereby move this Court (the "Motion") for entry of an order pursuant to section 365 of title 11 of the United States Code (the "Bankruptcy Code") approving the Debtors' assumption of the executory contracts, referred to as trademark usage agreements (the "TUAs"), with Ashley HomeStores, Ltd. ("Ashley"), pursuant to 11

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

U.S.C. § 365 and effective as of the effective date of a chapter 11 plan of reorganization (the "Plan"). In support of this Motion, the Debtors respectfully state as follows:

Background

1. On July 18, 2010 (the "Petition Date"), each of the Debtors commenced with the Bankruptcy Court a voluntary case pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. An Official Committee of Unsecured Creditors was appointed in these chapter 11 cases on July 23, 2010.

2. On September 3, 2010, the Debtors filed their Schedules of Assets and Liabilities and Statements of Financial Affairs. On September 15, 2010, the meeting of creditors pursuant to section 341 of the Bankruptcy Code was held.

3. Jennifer Convertibles, Inc. was organized as a Delaware corporation in 1986, and is currently the owner of (i) the largest group of sofabed specialty retail stores and leather specialty retail stores in the United States, and (ii) six big box, full-line furniture stores operated under the Ashley Furniture HomeStore brand (the "Ashley Stores") under a license from Ashley.

4. As of the Petition Date, the Debtors' stores included 130 stores operated by the Jennifer segment. During fiscal 2007, the Debtors opened their first Ashley Store. As of the Petition Date, the Debtors operated seven Ashley Stores. Since the Petition Date, the Debtors have closed approximately fifty (50) of their store locations, including one Ashley Store.

5. As of the date hereof, the Debtors employ 404 people; 248 people in the Jennifer segment (including warehouse personnel), 115 people in the Ashley segment, and 41 corporate employees.

6. On November 19, 2010, the Debtors filed their *Disclosure Statement with Respect to the Chapter 11 Plan of Reorganization of Jennifer Convertibles, Inc. and Its Affiliated Debtors* (the "Disclosure Statement") and *Joint Chapter 11 Plan of Reorganization of Jennifer Convertibles, Inc. and Its Affiliated Debtors* (the "Plan").

7. The factual background relating to the Debtors' commencement of these chapter 11 cases is set forth in additional detail in the Disclosure Statement, incorporated herein by reference.

Jurisdiction

8. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The statutory predicate for the relief requested herein is Bankruptcy Code section 365.

Relief Requested

10. By this Motion, the Debtors request entry of an order pursuant to section 365 of the Bankruptcy Code, whereby upon the effective date of the Plan, the Debtors will be authorized to assume six of the TUAs with Ashley. In connection with assumption of these agreements, the Debtors will work to cure any defaults under the TUAs, as required under section 365 of the Bankruptcy Code. As discussed in greater detail herein, the TUAs are vital to the Debtors' ability to reorganize, and the Debtors' continued ability to generate revenue through sales at the Ashley Stores is a key component of the Debtors' go forward businesses, as set forth in the Reorganized Debtors' Financial Projections, attached as Exhibit B to the Debtors' Disclosure Statement (the "Financial Projections"). Assumption of the TUAs will significantly benefit the Debtors, their estates and creditors. The Debtors believe the relief sough herein is

reasonable, represents an appropriate exercise of their sound business judgment, and is in the best interest of their estates and creditors, and should therefore be approved.

The Ashley Stores and the TUAs

11. The Debtors, in accordance with the TUAs, are the owner and operator of six Ashley Stores. The TUAs are license agreements between Ashley Homestores, Ltd. and Hartsdale Convertibles, Inc. ("Hartsdale"), one of the Debtor subsidiaries in these chapter 11 cases. The Debtors' parent entity, Jennifer Convertibles, Inc., is a guarantor under the TUAs.

12. The Ashley segment of the Debtors' business is a big box, full line home furniture retail store concept, featuring one of the most complete home furnishing lines available, including furniture and accessories for the living/family room, bedroom, dining room (both casual and formal), home theatre and home office. The Debtors' Carle Place, New York location also has an Ashley Sleep Center which offers a complete line of Sealy mattresses. The Ashley Stores generate additional revenue by selling fabric protection to Ashley store customers, which is provided by a third-party.

13. Typically, the Ashley customer provides the Debtors with a deposit of 100% of the purchase price when the sale order is given. The Ashley Stores are highly profitable due to their unique sourcing model, whereby once most sales are executed, Ashley's supplier manages the supply chain process. Under the Ashley sourcing model, the Debtors need for warehouse inventory is reduced, thereby limiting working capital needs and infrastructure requirements: this is a more optimal model compared to traditional full line furniture retailers.

14. Ashley is a sole source supplier for the Ashley product line - pursuant to the terms of the TUAs, Ashley is the exclusive supplier of product to the Ashley segment of the Debtors' business, except for accessories and mattresses. The Debtors may only sell Ashley products at their Ashley Stores, other than accessories and mattresses, which products may only be

purchased directly from Ashley. Thus, a continued working relationship with Ashley is important to the Debtors' continued existence post-confirmation. During the term of the TUAs, the Debtors are required use their best efforts to solicit sales of Ashley products and accessories at the authorized location, and in consultation with Ashley, develop annual sales goals and marketing objectives reasonably designed to assure maximum sales and market penetration of the Ashley products and accessories in the licensed territory.

15. Given the sole source nature of the Ashley relationship, and the key role the Ashley Stores play in the Debtors' go forward businesses, preservation of such business relationship is crucial to Debtors' ability to reorganize.

16. Pursuant to the Plan, the Debtors will (i) assume the TUAs effective as of the effective date of the Plan, and (ii) cure any outstanding monetary obligations under the TUAs.

Basis for Relief Requested

I. Assumption of the TUAs Satisfies the Business Judgment Test of Section 365 of the Bankruptcy Code

17. Section 365(a) of the Bankruptcy Code provides that a debtor "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). Courts routinely approve motions to assume or reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993) (stating that section 365 of the Bankruptcy Code "permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject"); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (stating

that the traditional standard applied by courts under section 365 is that of "business judgment"); In re Gucci, 193 B.R. 411, 415 (S.D.N.Y. 1996) ("A bankruptcy court reviewing a trustee's decision to assume or reject an executory contract should apply its business judgment to determine if it would be beneficial or burdensome to the estate to assume it."). Courts generally will not second-guess a debtor's business judgment concerning the assumption, assumption and assignment, or rejection of an executory contract or unexpired lease. See In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) ("[A] court will ordinarily defer to the business judgment of the debtor's management").

18. The "business judgment" test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor's estate. See, e.g., Westbury Real Estate Ventures, Inc. v. Bradlees, Inc. (In re Bradlees Stores, Inc.), 194 B.R. 555, n. 1 (Bankr. S.D.N.Y. 1996) ("In reviewing a debtor's decision to assume or reject an executory contract, the court must examine the contract and circumstances and apply its best 'business judgment' to determine if the assumption or rejection would be beneficial or burdensome to the estate."). Upon finding that a debtor has exercised its sound business judgment in determining that assumption of an agreement is in the best interests of its estate, the Court should approve the assumption under section 365(a) of the Bankruptcy Code. See, e.g., Gucci, 193 B.R. at 415; In re Child World, Inc., 142 B.R. 87, 89 (Bankr. S.D.N.Y. 1992); In re Ionosphere Clubs, Inc., 100 B.R. 670, 673 (Bankr. S.D.N.Y. 1989).

19. Clearly, assuming the TUAs effective as of the effective date of a Plan is within the Debtors' sound business judgment, as doing so is critical to the Debtors' restructuring efforts and is both necessary and appropriate. The Ashley segment is a profitable segment of the Debtors' operations, and an indispensable part of the Debtors' go forward business. Absent the

Ashley Stores, a successful reorganization simply would not be possible, and distributions to the Debtors' creditors could be adversely affected. The assumption of the TUAs will expedite the Debtors' emergence from chapter 11, and the Plan proposed by the Debtors will include the Ashley Stores as part of the Debtors' continuing operations. Thus, the Debtors believe assumption of the TUAs is beneficial to their estates and should be viewed by this Court as an exercise of their business judgment.

II. Assumption of the TUAs is Permitted in the Southern District of New York

A. The TUAs are Executory Contracts

20. Bankruptcy courts treat nonexclusive licenses as executory contracts, and deal with such licenses in accordance with Bankruptcy Code section 365. See Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985), cert. denied, 475 U.S. 1043 (1986) (nonexclusive technology license was an executory contract); see also In re Footstar, Inc., 323 B.R. 566, 573 -574 (Bankr. S.D.N.Y. 2005) (employing section 365 legal analysis with regard to license agreement on basis that it is an executory contract); In re Patient Education Media, Inc., 210 B.R. 237, 241 (Bankr. S.D.N.Y. 1997) ("Bankruptcy courts have generally treated nonexclusive copyright and patent licenses as executory contracts"); In re Catapult Entertainment, Inc., 165 F.3d 747, 750 (9th Cir. 1999) (court assumed without deciding that nonexclusive patent license was an executory contract); In re CFLC, Inc., 89 F.3d 673, 677 (9th Cir. 1996) (nonexclusive patent license is an executory contract). A license agreement is treated as an executory contract because each party to the license owes material continuing performance to the other. In re Chipwich, Inc., 54 B.R. 427, 430 (Bankr. S.D.N.Y. 1985); In re Novon Intern., Inc., No. 98-CV-0677E(F), 2000 WL 432848, at *4 (W.D. N.Y. March 31, 2000).

21. Without a doubt, both Ashley and the Debtors have remaining material obligations under the TUAs. As discussed above, the Debtors may only sell Ashley products at

their Ashley Stores, which products must be purchased directly from Ashley. Section 6 of the TUAs requires the Debtors to maintain "reasonable quantities" of the Trademark Product Line, and the Debtors are required use their best efforts to solicit sales of Ashley products and accessories at the authorized location. The TUAs clearly contemplate continuing and uninterrupted performance by Ashley and the Debtors, and the TUAs are therefore executory contracts under the law. Thus, the question of whether such agreements can be assumed by the Debtors will be determined in accordance with Bankruptcy Code section 365.

B. The TUAs Can be Assumed

22. Section 365 of the Bankruptcy Code authorizes a debtor to assume, reject, or assume and assign executory contracts. In determining whether a debtor can assume an executory contract, the Southern District of New York utilizes and favors an "actual test", commonly known as the "Footstar Approach" (discussed in greater detail below), pursuant to which the New York bankruptcy courts hold that a debtor may assume an otherwise non-assignable agreement, provided that the debtor does not intend to assign such agreement.

23. Here, the Debtors are not seeking to assign the TUAs, but only to assume them, since the entity performing under the contracts (the Debtors/Hartsdale) will be the same entity that existed prepetition. See Footstar, 323 B.R. at 573 -574, *citing* Bildisco, 104 S.Ct. at 1197 (holding "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing"). A debtor should not "be deprived of its valuable but unassignable contract solely by reason of having sought the protection of the Bankruptcy Court, even though it did not intend to assign it." Footstar, 323 B.R. at 570, citing Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 492 (1st Cir. 1997), *cert. denied*, 521 U.S. 1120, 117 S.Ct. 2511, 138 L.Ed.2d 1014 (1997),

abrogated on other grounds by Hardemon v. City of Boston, No. 97-2010, 1998 WL 148382 (1st Cir. April 6, 1998).

24. In addition, though many licenses and other agreements provide that a change of ownership or control is deemed to be an assignment, the TUAs do not include such language. Consistent with the notion that Ashley was not concerned about the control of Hartsdale is the statement in the Acknowledgement and Addendum to the TUA "that the relationship between the Licensor (Ashley) and Licensee (Hartsdale) is not a fiduciary or similar special relationship, but rather is an ordinary commercial relationship between independent business people with arms length dealings". More importantly, the TUAs will be assumed by the Debtors as debtors-in-possession under the Plan. Even more so, while the Plan filed by the Debtors does contemplate a change of ownership, in that the Debtors' key supplier, Haining Mengnu Group Co. Ltd. ("Mengnu"), will be receiving 90.1% of the equity of the reorganized Jennifer Convertibles, Inc., ownership of Hartsdale post-bankruptcy remains the same. Thus, pursuant to the terms of the TUAs, this transfer of control to Mengnu is not an assignment.

25. Therefore, the Debtors are seeking only to assume, and not to assign, the TUAs, and should be permitted to do so pursuant to the Bankruptcy Code.

1. Limitations Imposed by Section 365(c) of the Bankruptcy Code

26. Pursuant to section 365(f) of the Bankruptcy Code, a debtor's right to assume and assign an executory contract exists even when the contract itself or otherwise "applicable law" prohibits or restricts assignments. By its terms, section 365(f) permits the free assignment by debtors of executory contracts. Bankruptcy Code § 365(c) however, carves out a limitation, by providing that a trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if-

> (1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment....

27. There is a split among bankruptcy courts regarding the construction and application of the Bankruptcy Code, with respect to a debtor's right to assume a contract when the contract is subject to applicable non-bankruptcy law that restricts or prohibits assignment to a third party.[2] However, Second Circuit bankruptcy courts follow an "Actual Test" whereby the assignment limitations under applicable non-bankruptcy law are not triggered unless the debtor actually intends to assign the contract to a third party.[3] As noted above, the Debtors do not intend to assign the contract, thus, the limitations in the Bankruptcy Code § 365(c) do not apply.

2. The "Footstar Approach"

28. In Footstar, supra, the Southern District of New York held that limitations set forth in the Bankruptcy Code § 365(c) are only applicable to situations where a trustee, rather than the debtor in possession, seeks to assume a contract. The facts in Footstar are similar to the facts herein. The debtor in Footstar operated a footwear business with two distinct segments - the more profitable "Meldisco" segment and the "Athletic" segment. Id. at 568. The debtor had

[2] Unlike the Southern District of New York, a majority of courts in other jurisdictions that have examined whether or not a debtor in possession may assume an executory contract have utilized what is known as the "hypothetical" test, whereby if applicable non-bankruptcy law would disallow the non-debtor party from accepting or rendering performance from or to a "hypothetical third party," the debtor would not be allowed to assume the contract in the first instance, regardless of whether it has actually attempted or intends to assign the contract to a third party. See e.g., Catapult Entm't,, 165 at750; In re West Elecs., Inc., 852 F.2d 79 (3d Cir. 1988); In re SunTerra Corp., 361 F.3d 257 (4th Cir. 2004); City of Jamestown v. James Cable Partners (In re James Cable Partners), 27 F.3d 534, 537 (11th Cir. 1994).

[3] Other courts that have utilized the "actual test" include Institut Pasteur, supra; Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608 (1st Cir. 1995); In re Aerobox Composite Structures, LLC, 373 B.R. 135 (Bankr. D. N.M. 2007); In re Ontario Locomotive & Indus. Ry. Supplies (U.S.), Inc., 126 B.R. 146 (Bankr. W.D.N.Y. 1991); In re Mirant Corp., 303 B.R. 319 (Bankr. N.D. Tex. 2003); In re Cajun Elec. Members Comm. v. Mabey (In re Cajun Elec. Power Co-op., Inc.), 230 B.R. 693 (Bankr. M.D. La.1999); In re Lil' Things, Inc., 220 B.R. 583 (Bankr. N.D. Tex. 1998); In re GP Express Airlines, Inc., 200 B.R. 222 (Bankr. D. Neb. 1996); In re American Ship Bldg. Co., Inc., 164 B.R. 358 (Bankr. M.D. Fla. 1994).

a license in the form of a "Master Agreement" with Kmart, whereby each shoe department in a Kmart store was operated by a separate "Shoemart Corporation" owned fifty-one percent by the debtor and forty-nine percent by Kmart. The debtors sought to assume the Master Agreement without the consent of Kmart, arguing that assumption of the agreements was critical to the debtor's reorganization prospects. Id. Kmart counter-argued that assumption should not be allowed, because the Master Agreement was non-assignable under non-bankruptcy law, and thus in violation of Bankruptcy Code § 365(c).

29. The "threshold issue," according to Footstar, consisted of whether the word "or" in "assume or assign" in section 365(c) could be read literally, or should be construed as the functional equivalent of the conjunction "and." Id. at 569. When, as in Footstar and under the facts herein, the debtor is seeking to perform under the contract, the issue becomes relevant. The court held that "a literal interpretation of the disjunctive 'or' is utterly incongruent with the objectives of the Bankruptcy Code," and would be unfair to debtors who never intended to assign the contract. Id. at 570; see also Ontario Locomotive, 126 B.R. at 148 ("Congress did not intend to bar assumption of any contract as long as it will be performed by the debtor or debtor in possession.").

30. The Footstar court further reasoned that the term "trustee" as used in section 365(c)(1) should not automatically be read as a substitute for the term "debtor in possession." The appointment of a trustee in a bankruptcy case separates a debtor from its property interests, and thus appointment of a trustee is in itself a transfer or assignment of the debtor's property from the debtor to the trustee. Because of this, the court ultimately held that section 365(c)(1) is limited to situations where the *trustee*, rather than the debtor in possession, seeks to assume a contract, because "mere assumption [by the debtor in possession] (without assignment) would

not compel the counterparty to accept performance from or render it to 'an entity other than' the debtor." Id. at 573. Therefore, according to Footstar, section 365(c)(1) is inapplicable to a debtor in possession which seeks to assume, but not assign, its non-assignable contract. Id. at 569.

31. The "Footstar Approach" has recently been followed by other courts permitting debtors to assume (but not assign) otherwise non-assignable executory contracts. For example, in In re Adelphia Communications Corp., 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007), the court applied the reasoning in Footstar to franchise agreements. The Adelphia court determined that any right the counter-party to the debtor's franchise agreements had to object to assignment of the agreements did not affect whether the agreements could be assumed in bankruptcy. In another case, Aerobox, supra, the debtor entered into a patent and technology license agreement to which the debtor was granted certain exclusive and non-exclusive licenses. The counterparty to the agreements filed a motion to compel rejection of the license agreements. The Aerobox court ruled in accordance with the Southern District of New York, holding -

> Thus, where the debtor-in-possession seeks to assume, or, as is the situation in the instant case, where the debtor-in-possession has neither sought to assume nor reject the executory contract but simply continues to operate post-petition under its terms, 11 U.S.C. § 365(c)(1) does not prohibit assumption of the contract by the debtor-in-possession and cannot operate to allow the non-debtor party to the executory contract to compel the Debtor to reject the contract. In reaching this conclusion, the Court finds that … the reasoning of the court in Footstar, is the better approach to § 365(c)(1) when determining whether a debtor-in-possession is precluded from assuming an executory contract.

Id. at 142.

32. No trustee has been appointed in the Debtors' chapter 11 cases, and the Debtors do not intend to assign the TUAs, thus the limitations of Bankruptcy Code § 365(c) do not apply.

Accordingly, pursuant to the approach and analysis employed by the Southern District of New York bankruptcy courts, the Debtors should be able to assume the Ashley TUAs, even if Ashley does not consent and/or non-bankruptcy law would prohibit assignment to a hypothetical third party.

III. The Debtors Have Taken Adequate Steps to Assume the TUAs

33. In accordance with section 365(b) of the Bankruptcy Code, before a debtor can assume a contract or license agreement that is in default, a debtor must first (i) cure the default, (ii) compensate for any loss caused by the default, and (iii) give the counterparty adequate assurance of future performance. The failure to comply with this provision gives rise to a postpetition administrative claim that must be paid in full. See In re Genuity, Inc., 323 B.R. 79, 84 (Bankr. S.D.N.Y. 2005).

A. Cure and Compensation for Loss

34. In order to properly cure an agreement to be assumed, a contract in default must be brought back into compliance with its terms. While courts examine the provisions of the underlying contract and non-bankruptcy law to determine the nature of a default and the cure it requires, the Bankruptcy Code provides a broad right to cure, regardless of whether the agreement itself would permit cure. The idea of cure is to provide the counterparty with the benefit of its economic bargain and restore the debtor-creditor relationship to pre-default conditions, thus, if a debtor is able to provide a remedy that offers the counterparty the substantial equivalent to its economic rights under the contract, the debtor will have provided adequate cure.

35. Therefore, in order to cure the Ashley TUAs, the Debtors will need to remedy all monetary obligations under the TUAs for which the Debtors have defaulted, both pre- and post-

petition, monetary and non-monetary.[4] As set forth in the Financial Projections, the Debtors intend to do so, and will pay Ashley in full for amounts owed on account of the TUAs.

B. Adequate Assurance

36. As set forth above, a debtor must provide "adequate assurance" of future performance under the subject executory contract. It is generally left to the court to evaluate a debtor's proposals for assuring future performance, based upon the facts and circumstances of each case. Like the Uniform Commercial Code, adequate assurance under the Bankruptcy Code is provided by showing that resources are likely to be available for the discharge of the contractual obligations, and performance appears to be commercially feasible. Courts give the phrase a pragmatic construction, and "at a minimum, the primary focus of adequate assurance concerns the [debtor's] ability to fulfill the financial obligations" under the contract. In re Martin Paint Stores, 199 B.R. 258, 263 (Bankr. S.D.N.Y. 1996); see also In re R.H. Neil, Inc., 58 B.R. 969, 971 (Bankr. S.D.N.Y. 1986) ("Adequate assurance of a prompt cure requires that there be a firm commitment to make all payments and at least a reasonably demonstrable capability to do so.").

37. In determining adequate assurance, courts have considered some of the following factors: the debtor's payment history, presence of a guarantee, presence of a security deposit, evidence of profitability, a plan which would earmark money exclusively for the counterparty, the general outlook in the debtor's industry, and the willingness and ability of a debtor to fund the cure payments.

[4] Before the 2005 Bankruptcy Code amendments, there was split of authority among the court as to whether non-monetary defaults need to be cured prior to assumption of a license agreement. Since 2005, however, courts in the Southern District of New York have held that a debtor does in fact need to cure such non-monetary defaults, but there has not been specific case law as to the type and scope of the non-monetary defaults to be cured. See In re Empire Equities Capital Corp., 405 B.R. 687, 690 (Bankr. S.D.N.Y. 2009) (noting that 2005 amendments to the Bankruptcy Code "provided no room for the contention that non-monetary defaults in non-lease executory contracts are exempt from the cure obligation").

38. As set forth above, as of the assumption, the Debtors will cure all monetary defaults under the TUAs. The Debtors' go forward financial projections take into account the continued operation and growth of both the Jennifer and Ashley segments, and provide for the Debtors' continued performance under the terms of the TUAs.

39. In view of the foregoing, the Debtors have exercised sound business judgment in determining to assume the TUAs. Thus, for all of the above reasons, the Debtors hereby request authorization of this Court to assume the TUAs, effective as of the effective date of a Plan.

Notice

40. No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion has been provided to: (i) Office of the United States Trustee for the Southern District of New York; (ii) counsel to the Official Committee of Unsecured Creditors; (iii) the SEC; (iv) counsel for Ashley; and (v) any other party who has filed a notice of appearance in these cases. The Debtors submit that such notice is sufficient under the circumstances.

No Previous Request

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

WHEREFORE the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York
December 3, 2010

OLSHAN GRUNDMAN FROME
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By: _/s/ Michael S. Fox_
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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
THE SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
JENNIFER CONVERTIBLES, INC.,[1]	Case No. 10-13779 (ALG)
Debtors.	(Jointly Administered)

ORDER AUTHORIZING THE ASSUMPTION OF EXECUTORY CONTRACTS WITH LICENSOR, EFFECTIVE AS OF THE EFFECTIVE DATE OF A PLAN OF REORGANIZATION

Upon the motion, dated December 3, 2010 (the "Motion")[2] of Jennifer Convertibles, Inc. and its affiliated debtors, as debtors in possession (collectively, the "Debtors"), for entry of an order pursuant to section 365 of title 11 of the United States Code (the "Bankruptcy Code") approving the Debtors' assumption of the executory contracts, referred to as trademark usage agreements (the "TUAs"), with Ashley HomeStores, Ltd. ("Ashley"), pursuant to 11 U.S.C. § 365 and effective as of the effective date of a chapter 11 plan of reorganization (the "Plan"); and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York Any and All Proceedings Under Title 11, dated July 10, 1984; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

[2] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion (the "Hearing"); and the appearances of all interested parties having been noted in the record of the Hearing; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, creditors, and parties in interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. The Debtors are hereby authorized to assume the TUAs and the TUAs are hereby authorized to be assumed by the Debtors, effective upon the effective date of the Plan.

3. No provision of this Order is intended to, or shall be deemed to, enlarge, diminish, alter, amend or otherwise change the terms or provisions of the TUAs or the obligations of the parties thereunder.

4. The Debtors are authorized to take all such actions as are necessary or appropriate to implement the terms of this Order.

5. This Court shall retain jurisdiction to interpret and enforce this Order.

Dated: _____, 2011
New York, New York

UNITED STATES BANKRUPTCY JUDGE