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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---X
In Re:

Jennifer Convertibles, Inc.,

Debtor.
---X

Chapter 11
Case No. 10-13779 (ALG)

OBJECTION TO APPROVAL OF
DEBTORS' DISCLOSURE STATEMENT

To the Honorable Allan L. Gropper, United States Bankruptcy Judge:

TMCC, Inc. ("TMCC"), by and through its attorneys Cullen and Dykman LLP, as and for its objection to the adequacy of the Debtors' Disclosure Statement filed in the above matter, respectfully alleges as follows:

INTRODUCTION AND BACKGROUND

1. On July 18, 2010 (the "Petition Date"), Jennifer Convertibles, Inc. ("Jennifer"), ten (10) affiliated entities (the "Affiliates"; together with Jennifer, the "Jennifer Debtors") and Hartsdale Convertibles, Inc. ("Hartsdale"; together with the Jennifer Debtors, the "Debtors"), filed voluntary petitions for relief under chapter 11 of title 11, United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Southern District of New York.

2. By order dated July 22, 2010, the Debtors' cases were consolidated for procedural purposes only.

3. TMCC is Hartsdale's landlord with respect to the property located at 1821 Route 110, East Farmingdale, New York pursuant to a sublease agreement between Hartsdale and TMCC dated August 18, 2009 (the "Sublease"). On or about October 5, 2010, TMCC filed a claim for pre-petition rents due and owing under the Sublease in the amount of $151,006.13. Additionally, TMCC and Hartsdale are presently engaged in litigation with respect to Hartsdale's lease obligations to TMCC. Depending on the outcome of that litigation, TMCC is likely to have additional claims against Hartsdale's estate. The Sublease has not yet been assumed or rejected by Hartsdale.

4. On or about November 19, 2010, the Debtors filed a Joint Chapter 11 Plan of Reorganization (the "Plan"), together with a Disclosure Statement in connection therewith (the "Disclosure Statement"). As set forth below, the Disclosure Statement filed by the Debtors describes an unconfirmable Plan and should therefore not be approved. Additionally, the Disclosure Statement does not provide adequate information to enable creditors to determine whether to vote to accept or reject the Plan and must therefore be denied on that basis as well.

THE DISCLOSURE STATEMENT DOES NOT PROVIDE ADEQUATE <u>INFORMATION AND DESCRIBES AN UNCONFIRMABLE PLAN</u>

5. Section 1125 of the Bankruptcy Code requires that a disclosure statement provide "adequate information", defined as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, . . . to enable . . . a hypothetical investor of the relevant class to make an informed judgment about the plan . . ." 11 U.S.C. §1125(a). Case law has held that "[t]he Bankruptcy Code requires a debtor to engage in full and fair disclosure during the reorganization

process." In re Momentum Manufacturing Corp., 25 F.3d 1132, 1136 (2d Cir. 1994). The standard for adequate disclosure is flexible and is determined on a case-by-case basis. See, e.g., In re Aspen Limousine Service, Inc., 193 B.R. 325, 334 (D. Colo. 1996); In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988). The Bankruptcy Court enjoys a wide amount of latitude in determining what constitutes adequate information in a disclosure statement. See, Kirk v. Texaco, Inc., 82 B.R. 678, 681 (S.D.N.Y. 1988) (holding that "Factual findings of the bankruptcy judge on 'core matters' such as the adequacy of disclosure under section 1125(a) should be set aside by the district court only if those findings represent an abuse of discretion"). However, when the disclosure is wholly inadequate, the court has a duty to reject the disclosure statement to protect the creditors and the estate.

6. Moreover, "disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible." In re Cardinal Congregate I, 121B.R. 760, 764 (Bankr. S.D. Ohio 1990), citing In re Monroe Well Service, Inc., 80 B.R. 324 (Bankr. E.D. Pa. 1987); In re Pecht, 57 B.R. 137 (Bankr. E.D. Va. 1986); In re Kehn Ranch, Inc., 41 B.R. 832 (Bankr. D.S.D. 1984).

7. In this case, the Disclosure Statement is inadequate in several respects, and also describes what may be a patently unconfirmable Plan and should therefore not be approved by the Court.

A. Substantive Consolidation

8. As set forth above, the Debtors' bankruptcy cases were consolidated for procedural purposes only by order dated July 22, 2010. The Plan is premised, however, on substantive consolidation of all of the Debtors' cases and combines all Debtors' assets and seeks

to pay all Debtors' liabilities without differentiating between the various cases, particularly the Hartsdale case.

9. There is very little discussion in the Disclosure Statement regarding the basis upon which the Debtors propose to consolidate their cases substantively. The Disclosure Statement states merely that consolidation will "avoid the onerous costs and substantial delay that would result from attempting to confirm 12 separate plans of reorganization" and that since "the Debtors are not managed operationally on an individual entity basis, it may be difficult or impossible to allocate value and operational costs and benefits on a legal entity basis. In addition, the Debtors filed consolidated Schedules in these Chapter 11 Cases." (See, Disclosure Statement §5.04).

10. Based on this, the Debtors' conclude, without further analysis, that "no creditor will receive a recovery inferior to that which it would receive if they proposed a plan that was completely separate as to each entity," and that "substantive consolidation . . . benefits general unsecured creditors." (See, Id.).

11. TMCC submits that this information is not adequate to enable creditors to make an informed decision on whether substantive consolidation is warranted or beneficial. There is absolutely no disclosure as to what the distributions would be to the creditors of the respective entities absent consolidation. Indeed, if such information were contained in the Disclosure Statement, it would readily be seen that there are significant issues with substantive consolidation, especially as to Hartsdale.

12. Hartsdale operates the "Ashley Furniture" stores, while Jennifer and/or other of the Jennifer Debtors operate the "Jennifer Convertible" stores. Six (6) "Ashley" stores remain in operation (the "Hartsdale Stores") and, upon information and belief, approximately 80 Jennifer

Convertible stores are operational (the "Jennifer Stores"). As described in detail by Ashley HomeStores, Ltd. and Ashley Furniture Industries, Inc. ("Ashley") in their objection to the Debtors' recent motion to authorize a DIP Credit Agreement, the Hartsdale Stores are extremely profitable while the Jennifer Stores operate at a huge deficit. As set forth in Ashley's objection, even with the Debtors' 25% allocation of miscellaneous revenue and general, administrative and chapter 11 expenses to Hartsdale (itself a questionable allocation), the Hartsdale Stores had positive cash flow of $301,644 from October 1, 2010 through November 19, 2010, while the Jennifer Stores operated at a negative cash flow of $1,775,343 for that same time period.

13. Moreover, and discussed in Ashley's objection, the Hartsdale estate has an equity cushion of $1,426,593 per the Debtors' schedules and an equity cushion of $5,882,373 per Exhibit "C" to the Disclosure Statement, while the Jennifer Debtors have a negative equity cushion of more than $18,000,000 per the schedules and more than $24 million per Exhibit "C" to the Disclosure Statement. A substantive consolidation would clearly have an extremely negative impact on the Hartsdale creditors, which is not discussed in the Disclosure Statement at all.

14. Accordingly, the Disclosure Statement cannot be approved without a description of the assets and liabilities of each of the entities and an analysis of what the creditors of each estate would receive in a distribution under the scenarios of substantive consolidation versus separate plans (or at a minimum Hartsdale versus the Jennifer Debtors), to enable creditors to make an informed decision in this regard. Simply concluding that consolidation benefits creditors merely on the basis of cost and delay is not sufficient.

B. Improper Classification of Claims

15. The Plan on its face also appears to improperly classify the unsecured claims of Menghu separately from the claims of all other unsecured creditors in these cases. Through that separate classification, Menghu will receive a proposed distribution of approximately 93% of its unsecured claims versus the approximately 18% distribution to all other unsecured creditors. The fact that Menghu may be a key supplier of the Jennifer Debtors is not in and of itself a proper reason for separate classification of its claims under the Plan. Indeed, the Debtor has not provided any rationale in the Plan or Disclosure Statement as to why Menghu's claims have been separately classified and why Menghu is entitled to such a dramatically different distribution than that being proposed to other unsecured creditors. Thus, the Plan is not likely to be able to satisfy the requirements of sections 1122 and 1129(a)(1) of the Bankruptcy Code and is therefore unconfirmable. At a minimum, there is inadequate disclosure as to the rationale for such separate classification to enable creditors to determine whether or not to accept or reject the Plan as proposed, or whether to object to confirmation on that basis.

C. Disenfranchisement and Timing Issues

16. The record date for voting on the Plan is December 20, 2010, the day before the Disclosure Statement hearing. Thus, unless a creditor holds a claim as of that date, that claim would not be permitted a vote in connection with the Debtor's Plan. However, the Debtor is not required to file a schedule of the unexpired leases and executory contracts which they propose to reject under the Plan (the "Rejection Schedule") until ten (10) days prior to the confirmation hearing, which will not be held until at least the end of January, 2011. Thus, any creditors who will hold rejection damage claims based upon the Debtor's ultimate rejection of leases and contracts will not know of such rejection damage claims prior to the record date, and will

therefore not be able to cast a vote in connection with such damage claims. This has the effect of disenfranchising a possibly substantial number and amount of creditor's claims which could certainly impact confirmation of the Plan one way or the other.

17. It is therefore submitted that the record date should be amended to allow the holders of rejection damage claims which are not known until the filing of the Rejection Schedule to vote those claims either in favor of or against the Plan despite that the claims were not in existence on the record date.

18. Moreover, it is unclear whether the estimated percentage distribution to unsecured creditors takes into account rejection damage claims, which may be significant. If it does not, the percentage paid to creditors may be drastically decreased, a fact which creditors are entitled to know before voting. This information should therefore be disclosed.

19. Finally, it is not clear from the Disclosure Statement as to when the Debtors propose that ballots be returnable and that objections to confirmation be filed. It is submitted that those dates should not occur until after the Rejection Schedule is filed so that creditors will have that knowledge in deciding whether to accept or reject the Plan.

CONCLUSION

20. For the reasons set forth above, TMCC believes that certain aspects of the Plan are unconfirmable and that the Disclosure Statement should therefore not be approved. Additionally, the Disclosure Statement provides inadequate information with respect to substantive consolidation, the proposed classification of claims and the amount of unsecured claims, and the proposed record date for voting and other timing issues are also problematic requiring amendment. Accordingly, TMCC believes that approval of the Disclosure Statement should be denied at this juncture.

WHEREFORE, TMCC respectfully requests that the Court grant the relief sought herein, together with such other and further relief as the Court deems just and proper.

Dated: Garden City, New York
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