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

In re:

JENNIFER CONVERTIBLES, INC.,<sup>1</sup>  
  
Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

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

Jennifer Convertibles, Inc. (“Jennifer Convertibles”) and its affiliated debtors, as debtors and debtors in possession (together, the “Debtors”), file this response (the “Response”) to the *Motion of Todd Garrett LLC for an Order Compelling Payment of Post-petition Lease Obligations and Directing the Timely Performance of All Lease Obligations* (docket no. 312) (the “Motion to Compel”). In support of this Response, the Debtors respectfully state as follows:

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<sup>1</sup> 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).

## 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 August 9, 2010, the Debtors filed their *Motion To Establish Procedures For The Rejection Of Executory Contracts And Unexpired Leases Of Nonresidential Real Property And Abandonment Of Related Personal Property* (docket no. 144). The *Order Approving Expedited Procedure for Rejection of Certain Unexpired Leases of Nonresidential Real Property* was entered on August 31, 2010 (docket no. 199) (the "Rejection Procedures Order").

3. Todd Garrett LLC ("Garrett") is the owner/landlord of property located at 3121 Route 10, Denville, New Jersey 07834 (the "Premises"). On May 1, 1987, the Debtors and Garrett entered into a lease agreement (the "Lease") for the Premises. In January, 2007, the Debtor executed an agreement extending the term of the Lease to May 31, 2012.

4. Subsequent to the Petition Date, the Debtors attempted to engage in negotiations with Garrett in order to modify the terms of the Lease, with the understanding that if terms more favorable to the Debtors were reached, the Debtors would assume the Lease. Garrett refused to negotiate with the Debtors. Consequently, on or about September 28, 2010, the Debtors served Garrett with a Notice of Proposed Rejection of Unexpired Leases (the "Rejection Notice") with respect to Premises, in accordance with the Rejection Procedures Order. The Rejection Notice provided a rejection date of October 22, 2010 (the "Rejection Date").

5. On October 8, 2010, Garrett filed an Objection to the Rejection Notice, requesting additional time to consult with the Debtors as to the terms of the Lease and requesting that the court deny the Debtors the right to reject the Lease. On several occasions subsequent to the filing of the Objection to the Rejection Notice, the Debtors have reached out to Garrett to attempt to negotiate the terms of the Lease. Regrettably, the Debtors' efforts were unfruitful, and the Motion to Compel was filed.

6. On October 22, 2010, Garrett filed an amended Proof of Claim for prepetition rent, post-petition rent and rejection damages.

7. On or about October 22, 2010, the Debtors surrendered the keys and abandoned the Premises in accordance with the Rejection Procedures Order and the Rejection Notice. The Debtors have no interest in assuming this Lease or any of the obligations related thereto.

8. Curiously, on November 2, 2010, Garrett filed the Motion to Compel. The Debtors do not dispute that Garrett has a general unsecured claim for the lease rejection damages under Code section 502(b)(6).

### **Summary of Objection**

9. The Debtors object to the Motion to Compel on the grounds that the Lease for the Premises was rejected in full compliance with the Rejection Procedures Order. Pursuant to the terms of the Rejection Procedures Order, the Debtors are authorized to reject unexpired leases of real property through the procedures set forth therein. Because the Debtors have fully complied with these procedures, the lease is deemed rejected on the Rejection Date, and the Debtors are no longer liable for post-petition rent. Garrett cannot compel the Debtors to assume the Lease. Moreover, the Debtors believe they are current on all post-petition rental obligations with regard to the Premises, and at best, Garrett has an unsecured claim for prepetition amounts owed under the Lease, and an unsecured claim for rejection damages calculated pursuant to Bankruptcy Code

section 502(b)(6). Accordingly, the Debtors were well within their rights to reject the Lease, and would ask this Court to deny the Motion to Compel.

### **Argument**

10. The Debtors believe they are current on all rental obligations for the post-petition period of July 18, 2010 through and including the Rejection Date. Garrett claims he is owed, \$4,370.99 for unpaid utilities, real estate taxes and CAM reimbursements during this period. This amount is not “stub rent,” and Garrett does not dispute that he has received rent due for this period.

11. Moreover, because the Debtors have fully complied with the procedures set forth in the Rejection Procedures Order, the Lease is deemed rejected on the Rejection Date, and Garrett is not entitled to payment of rent and related costs for the post-rejection period. See In re Ames Dept. Stores, Inc., 306 B.R. 43 (Bankr. S.D.N.Y. 2004) (holding the debtor liable to a landlord only for the portion of the unpaid post-petition rent allocable to the period through the date of rejection); see also In re Swanton Corp., 58 B.R. 474, 475 (Bankr. S.D.N.Y. 1986) (“There is no reason why a debtor who rejects a lease after three months should be required to pay a full year's rental, particularly when the lessor has regained possession of its property”).

12. Should Garrett believe he is entitled to rejection damages, the Rejection Procedures Order states that Garrett may file a proof of claim, which he has done. However, any such rejection damages must be calculated in accordance with the relevant Bankruptcy Code provisions, specifically, Bankruptcy Code section 502(b)(6). See In re PCH Associates, 949 F.2d 585, 598 (2d Cir. 1991); In re Episode USA, Inc., 202 B.R. 691, 696 (Bankr. S.D.N.Y. 1996). Garrett has failed to do so. This proof of claim will be objected to. Any amounts for rejection damages in excess of the cap implemented by section 502(b)(6) will be disallowed in accordance with the provision, in order to “prevent a landlord's single unsecured claim-which,

depending on the length of the lease, may be enormous-to elbow aside the other unsecured creditors.” In re Klein Sleep Products, Inc., 78 F.3d 18, 28 (2d Cir. 1996).

13. Thus, the Debtors do not believe they are liable to Garrett for the amounts set forth in the Motion to Compel, and would therefore request that the court deny same.

#### **Notice**

14. 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; and (iv) any other party who has filed a notice of appearance in these cases. The Debtors submit that such notice is sufficient under the circumstances.

#### **Waiver of Memorandum**

15. In as much as the relevant legal authorities are set forth herein, no novel issues of law are raised and the Debtors request that they not be required to file a separate memorandum of law in support of its response.

WHEREFORE, the Debtors respectfully request that the Court deny the Motion to Compel, and grant such further relief as may be equitable under the circumstances of this case.

Dated: New York, New York  
December 13, 2010

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