CULLEN AND DYKMAN, LLP
100 Quentin Roosevelt Boulevard
Garden City, New York 11530
(516) 357-3700
Matthew G. Roseman, Esq. (MR 1387)
Bonnie L. Pollack, Esq. (BP 3711)

Attorneys for TMCC, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

Jennifer Convertibles, Inc.,

Chapter 11
Case No. 10-13779 (ALG)

Debtor.

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REPLY OF TMCC TO DEBTOR'S OPPOSITION TO MOTION FOR ORDER COMPELLING PAYMENT OF POST-PETITION LEASE OBLIGATIONS, ET AL.

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

TMCC, Inc. ("TMCC"), by and through its undersigned counsel, respectfully submits this reply to the opposition filed to TMCC's motion for an order pursuant to section 365(d)(3) of the Bankruptcy Code, compelling payment of post-petition lease obligations and directing timely performance for all obligations under the Sublease[1] or, in the alternative, compelling the Debtor to immediately reject the Sublease (the "Motion"), and respectfully represents as follows:

INTRODUCTION

1. On July 18, 2010 (the "Petition Date"), Hartsdale Convertibles, Inc. (the "Debtor"), among other debtors, filed a voluntary petition 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.

[1] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed in the Motion.

2. On September 28, 2010, TMCC filed its Motion seeking an order of the Court requiring that the Debtor pay all unpaid post-petition obligations under the Sublease (defined below), and directing the Debtor to timely perform all post-petition obligations under the Sublease, or in the alternative, compelling the Debtor to immediately reject the Sublease. Despite that the issues raised by the Motion were largely, if not wholly, legal in nature, the Debtor requested to conduct discovery. TMCC did not believe discovery was necessary, but acquiesced to the Debtor's request.

3. As part of discovery, among other things the Debtor took the deposition of Gerald McCrystal, TMCC's principal, and TMCC deposed Edward Seidner on behalf of the Debtor. A copy of the transcript of Mr. McCrystal's deposition (the "McCrystral Tr.") was annexed as Exhibit 1 to the Declaration of Debtor's counsel in connection with the Opposition (defined below), and a copy of Mr. Seidner's deposition transcript (the "Seidner Tr.") is annexed hereto as Exhibit "A".

4. On or about November 22, 2010, the Debtor filed its opposition to the Motion (the "Opposition"). As set forth below, there is nothing in the Opposition which negates TMCC's entitlement to the relief sought in the Motion, and the Motion must therefore be granted.

BACKGROUND

5. The Debtor rents the space located at 1821 Route 110, East Farmingdale, New York (the "Premises") pursuant to a Sublease Agreement dated August 18, 2009 (the "Sublease") with TMCC as its landlord. A copy of the Sublease is annexed as Exhibit "B" to the Motion and is incorporated herein by reference. In November 2009, Exhibit B to the Sublease, which itemizes the Fixed Rents to be paid under the Sublease, was amended. A copy of Amended

Exhibit B to the Sublease (the "Fixed Rent Schedule"), is annexed as Exhibit "C" to the Motion and is incorporated herein by reference.

6. Mr. McCrystal was operating a Roma furniture store at the Premises prior to entering into the Sublease with the Debtor. He agreed to sublease the Premises to the Debtor, and moved his own furniture store to a location half the size, on the request of the Debtor, who wanted to move to the Premises because it was a desirable location for a furniture store. (Seidner Tr. 23:18-23; 25:3-8). The Debtor agreed to pay Mr. McCrystal enough rent to compensate for his loss of not being in the more desirable space. (McCrystal Tr. 90:14-19; 123:11-15; Seidner Tr. 38:3-12).

7. As set forth on the Fixed Rent Schedule, the Debtor is obligated to make two distinct monthly rent payments under the Sublease: a payment to TMCC in the amount of $32,000 per month as of filing of the Motion (which amount has now increased to $33,280), and a payment to GMM Consulting ("GMM"), an entity also owned by Mr. McCrystal, in the amount of $20,000 as of the filing of the Motion (which amount has now decreased to $18,000). It is undisputed that the amount paid to TMCC is the same as the amounts required to be paid by TMCC to its landlord, Josalco. It is also undisputed that the payments to GMM represent the additional amounts negotiated to be paid as compensation to Mr. McCrystal for moving to a less desirable and less profitable location. (McCrystal Tr. 90:14-19; 123:11-15; Seidner Tr. 38:3-12). The rental amount in its entirety was negotiated, and the payments were split between TMCC and GMM, both wholly owned by Mr. McCrystal, on advice of his accountant. (McCrystal Tr. 109:20-110:2; 123:12-124:7; 129:23-130:6).

8. The Debtor was well aware of its obligations under the Sublease, both to TMCC and GMM, since the time of the negotiation of the Sublease. Mr. Seidner testified at his

deposition that he negotiated the terms of the Sublease, that the Sublease that was signed contained the terms that were negotiated and that he was satisfied with the terms of the Sublease when he signed it. (Seidner Tr. 21:2-10; 74:22-25). He further testified that the Debtor would not have done a deal that might turn out to be onerous just for the sake of having a store location, and that he did not believe that the deal under the Sublease would turn out to be onerous for the Debtor. (Seidner Tr. 25:20-23; 26:10-16; 74:6-9). The Debtor was willing to pay "top dollar" for the location and negotiated to pay top dollar for the location. (Seidner Tr. 74:16-21).

9. Despite having made all required payments under the Sublease from the inception of the Sublease until May 2010, the Debtor now alleges that the payments to GMM are not required to be made since those payments do not constitute "rent" in the traditional sense of the word and are, according to the Debtor, "gratuitous payments" to GMM (See, Opposition ¶ 1). The Debtor's position is misguided both factually and legally.

THE PAYMENTS AT ISSUE
UNDER THE SUBLEASE ARE RENTS

10. First, contrary to the Debtor's position, the Sublease provides that the payments to be made to GMM are indeed "rent". Paragraph 4(A) of the Sublease, titled Rent, states that "Subtenant covenants and agrees to pay to Sublandlord, during the Term, Fixed Rent in accordance with Exhibit "B" attached hereto and made a part hereof ("Fixed Rent")." (emphasis added). Exhibit B to the Sublease, the Fixed Rent Schedule, is titled just that – "Fixed Rent Schedule". The payments to GMM set forth on the Fixed Rent Schedule, are titled "Additional Monthly Rent" (emphasis added).

11. Under New York law,[2] "it is equally well established that words in a contract are not to be ignored when seeking to arrive at the expressed intent." River View Assoc . v.

[2] Paragraph 45 of the Sublease provides that the Sublease shall be governed, construed and enforced in accordance with the laws of the State of New York.

Sheraton Corp. of America, 306 N.Y.S.2d 153, 156 (1st Dept. 1969), aff'd 314 N.Y.S.2d 181 (1970). In River View, a party to a lease argued that taxes, although delineated as "additional rent" in the lease, were not "additional rent" for the purpose of calculating profits under the lease. The Court rejected this argument, stating that "[t]he description of taxes as additional rent should not be treated as if these words did not appear." Id. Here, as in River View, the description of the payments to GMM as rent in the Sublease cannot be treated as if it does not appear.

12. Similarly, in Zuyder Zee Land Corp. v. United Cigar-Whelan Stores Corp., 79 N.Y.S.2d 49 (1st Dept. 1948), aff'd 300 N.Y. 522 (1949), a lease provided for monthly payments of a rental amount of $5,100 per year, plus $500 per year as reimbursement to the Landlord for the cost of renovating the property at issue, defining both sums as "minimum annual rent". The landlord argued that the $500 reimbursement amount was not "rent", and was not to be included in the "minimum annual rent" figure for the purpose of calculating percentage rent to be paid under the lease. The tenant contended that the $500 was within the meaning of "minimum annual rent" so it only had to pay 5% of its sales over $5,600, not over $5,100. The Court found no ambiguity that the $500 payment was classified as rent and included in the definition of "minimum annual rent". "The words, individually and collectively, are meaningful, and it is not possible to give them all meaning except by treating 'minimum annual rent' as including both [amounts]." Id. at 51. As in Zuyder Zee Land, the Sublease is unambiguous and it is not possible to conclude anything other than that the payments to GMM constitute part of the "fixed rent" under the Sublease.

13. Essentially, the Debtor is attempting to rewrite the Sublease so that the Fixed Rent Schedule no longer includes the payments to GMM by use of parole evidence as to the fact that

the payments to GMM were to compensate Mr. McCrystal for his loss of not being in a more desirable space. Such parole evidence is inadmissible to vary or contradict the terms of the written Sublease. "When parties to a contract reduce their agreement to a writing and the provisions of the writing clearly delineate the parties' legal obligations to one another without any ambiguity as to the subject matter, terms, and conditions thereof, the parole evidence rule bars admissibility to prior or contemporaneous evidence which tends to prove a contract different from the one evidenced in the writing." In re S.E. Nichols Inc., 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990). Here, the Sublease is clear and unambiguous – payments to GMM constitute rent. The Debtor cannot rewrite the Sublease to suit its purposes.

14. The intention of the parties was that the payments to GMM would be part of the rent paid under the Sublease. The contract is clear and unambiguous as to the inclusion of the payments to GMM as part of the Fixed Rent to be paid under the Sublease. "[W]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein. . . . It is well-settled that circumstances extringent to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself -- that is, where the agreement is plain and unambiguous." Playboy Enterprises, Inc. v. Sage Realty Corp., 1980 U.S. Dist. LEXIS 10316*7 (S.D.N.Y. 1980).

15. Moreover, the payments to GMM are within the common definition of "rent". "Rent" is defined in Black's Law Dictionary as "[c]onsideration paid, usu. periodically, for the use in occupancy of property (esp. real property)." This is exactly what the payments under the Fixed Rent Schedule are, and what they were intended to be – consideration paid by the Debtor for the use and occupancy of the Premises, as negotiated between the parties. That is, without doubt, rent.

16. Accordingly, to the extent the Debtor's Opposition is based on its position that the payments to GMM do not constitute "rent", and therefore does not need to be paid, the Opposition must be overruled.

THE PAYMENTS TO GMM CONSTITUTE LEASE OBLIGATIONS REQUIRED TO BE PAID UNDER SECTION 365

17. Importantly, even if the payments to GMM do not constitute "rent", section 365(d)(3) of the Bankruptcy Code does not require that the Debtor merely pay all "rent" obligations but requires that a debtor "timely perform all obligations . . . 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." 11 U.S.C. § 365(d)(3) (emphasis added).

18. In his deposition, Mr. Seidner acknowledged that the payments to GMM are included in the covenant to pay rent contained in Paragraph 4(A) of the Sublease. (Seidner Tr. 28:21-29:3), and that the Debtor entered into the Sublease with the knowledge that the payments to GMM were required thereunder. (Seidner Tr. 75:2-6). Mr. Seidner also acknowledged that the Debtor has an obligation to make all payments required under the Sublease, including those required to be made to GMM. (Seidner Tr. 34:15-20; 35:10-12; 45:18-46:3; 47:21-25). Clearly, by the Debtor's own admission, the payments to GMM constitute a "lease obligation".

19. The Debtor has not cited to any case in which payments such as the one at issue here were not required to be made under section 365(d)(3). To the contrary, as set forth in the Motion, case law requires that all obligations under a lease, not just "rent", must be paid.

20. Thus, even if the Court were to find that despite the clear and unambiguous language of the Sublease, the payments to GMM do not constitute "rent", they certainly constitute lease obligations required to be paid under section 365(d)(3) of the Bankruptcy Code.

THE PAYMENTS TO GMM MUST BE PAID IF THE DEBTOR WERE TO ASSUME THE SUBLEASE

21. Although assumption or rejection of the Sublease is not yet before the Court, the legal principles surrounding same are instructive in this matter. Specifically, if the Debtor were to assume the Sublease, the Debtor will be required to assume all provisions of the Sublease including any provisions requiring the payments to GMM thereunder. If such payments are required to be made once the Sublease is assumed, certainly those payments are required to be made during the pendency of the bankruptcy case under section 365(d)(3) of the Bankruptcy Code.

22. A well-settled tenet of bankruptcy law is, "that a debtor cannot assume part of an unexpired lease while rejecting another part; the debtor must assume the lease *in toto* with both the benefits and burdens intact." S.E. Nichols, 120 B.R. at 747 (denying debtor tenant's request to assume part of a lease agreement and sever and reject that part of the agreement charging additional rent); see also In re Nitec Paper Corp., 43 B.R. 492, 498 (S.D.N.Y. 1984) (holding that "[a] contract assumed in bankruptcy is accompanied by all provisions, and conditions. It may not be assumed in part and rejected in part."). "It is axiomatic that an assumed contract under section 365 is accompanied by all its provisions and conditions. In re Holland Enterprises, Inc., 25 B.R. 301, 303 (E.D.N.C. 1982).

23. In In re Easthampton Sand & Gravel Co., Inc., 25 B.R. 193 (Bankr. E.D.N.Y. 1982), the Court would not allow a debtor to sever a provision of a lease in connection with an assumption. In that case, the lease was conditioned on payments being made under a note executed as part of the same transaction as the lease, and the debtor attempted to assume the lease without the need to pay the note. The Court found that it could "discern no federal policy which requires severance of a lease condition solely because it makes a debtor's reorganization

more feasible." Id. at 199. The Court held that the debtor was not allowed to sever the lease provision that conditioned the lease on payment of the note because to do so would "deny the creditor the benefit of his bargain and would result in an unjust windfall for the debtor." Id. Clearly that would be the case here. Similarly, in Holland Enterprises, the Court held that to allow the debtor to avoid an obligation while it enjoys the benefit that arises from that obligation "would construe the bankruptcy law as providing a debtor in bankruptcy with greater rights and powers under a contract than the debtor had outside of bankruptcy." Holland Enterprises, supra. At 303.

24. Again, while the assumption or rejection of the Sublease is not at issue in this Motion, it is instructive that if the Debtor were to assume the Sublease, it would be required to assume the provisions respecting the payments to GMM. If that is the case, those payments must be required to be made during the pendency of the bankruptcy case under section 365(d)(3) of the Bankruptcy Code as well.

STANDING TO REQUIRE PAYMENTS UNDER SECTION 365

25. Finally, the Debtor argues that since GMM is not a party to the Sublease, it has no standing to compel the Debtor to make the payments under the Sublease. TMCC respectfully submits that this argument is nothing but a red herring.

26. The Debtor ignores the fact that the payments are required under the Sublease document, to which the Debtor is a party. The fact that certain of the payments are made to GMM under the Sublease is of no consequence. Mr. McCrystal, as a principal of GMM and TMCC, has the right to direct the manner in which the payments under the Sublease are to be made. As he testified, the direction to make payments to both TMCC and GMM was made on the advice of his accountant. None of this negates the fact that the payments to GMM constitute

rent, or at the very least a lease obligation, required to be paid by the Debtor under the Sublease, which is an unexpired lease of real property subject to the provisions of section 365 of the Bankruptcy Code. Thus, regardless of how the payments under the Sublease are directed to be made, the fact of the matter is that those payments constitute obligations of the Debtor required to be paid under section 365 of the Bankruptcy Code, necessitating that the Motion be granted.

CONCLUSION

27. As set forth in TMCC's Motion, the Debtor is required under the Bankruptcy Code to pay all obligations under the Sublease from and after the order for relief. The Debtor has failed to do so. The Debtor has not made any payments of the lease obligations required to be made to GMM since the Petition Date, nor has the Debtor made any lease payments for the stub period of the Petition Date through the end of July 2010.

28. The Opposition provides nothing more than the Debtor's opinion that since the monies to the paid to GMM do not constitute "rent" in the usual sense of the word, the Debtor is not required to make such payments. The Debtor's conclusion is belied by the clear and unambiguous language of the Sublease itself, and the fact that regardless of how those payments are delineated, the payments to GMM constitute lease obligations under the Sublease and are required to be paid under section 365 of the Bankruptcy Code.

29. The Opposition is, at best, disingenuous. As testified by Mr. Seidner, the Debtor clearly negotiated the terms of the Sublease knowing the payments that were required to be made thereunder. The Debtor elected to negotiate a Sublease under which it paid "top dollar" and was willing to pay top dollar for the location of the Premises. At all times, the Debtor was completely aware of the payments that were required of it under the Sublease and, in fact, made all such payments under the Sublease from the inception of the Sublease until May 2010. For the

Debtor to now come before the Court and take the position that the payments to GMM under the Sublease are not required is contrary to the clear and unambiguous terms of the Sublease, the intent of the parties and applicable law.

30. Accordingly, for the reasons detailed in the Motion and herein, as a matter of law the Debtor is required to pay all obligations under the Sublease, including the payments to GMM and including stub-rent, and it should be compelled to do so immediately. If the Debtor does not have the ability to make those payments or chooses not to, the Sublease should be immediately rejected.

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
December 16, 2010

CULLEN AND DYKMAN LLP
Attorneys for TMCC, Inc.

By: s/ Bonnie Pollack
Matthew G. Roseman (MR1387)
Bonnie L. Pollack (BP 3711)
100 Quentin Roosevelt Boulevard
Garden City, New York 11530
(516) 357-3700