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**Hearing Date: January 25, 2011 at 11:00 am
Objection Date: January 18, 2011 at 4:00 pm**

Counsel for the Debtors and Debtors in Possession

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

In re:

JENNIFER CONVERTIBLES, INC.,¹

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**NOTICE OF DEBTORS' MOTION PURSUANT TO RULES 7023, 9014 AND 9019 OF
THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND BANKRUPTCY
CODE SECTIONS 105(A) AND 363(B) FOR ENTRY OF AN ORDER
AUTHORIZING AND APPROVING SETTLEMENT OF CIVIL ACTIONS**

PLEASE TAKE NOTICE, that on December 30, 2010, Jennifer Convertibles, Inc. ("Jennifer Convertibles") and its affiliated debtors, as debtors in possession (together, the "Debtors"), by and through their undersigned counsel, filed a Motion Pursuant to Rules 7023, 9014 and 9019 of the Federal Rules Of Bankruptcy Procedure and Bankruptcy Code Sections 105(a) And 363(b) for Entry of an Order Authorizing and Approving Settlement of Civil Actions

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).

(the "Settlement Motion") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE, that a hearing to consider approval of the relief requested in the Settlement Motion will be held at the United States Bankruptcy Court, located at One Bowling Green, New York, New York, before the Honorable Allan L. Gropper, United States Bankruptcy Judge, in Courtroom 617, on **January 25, 2011 at 11:00 a.m.** or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE, that any responses or objections (collectively, "Responses") to the Settlement Motion must be in writing, conform to the Bankruptcy Rules and the Local Rules of the Bankruptcy Court, and be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (General Order M-242 and the User's Manual for the Electronic Case Filing System ("ECF") can be found at www.nysb.uscourts.gov, the official website for the Bankruptcy Court), by registered users of the Bankruptcy Court's filing system and, by other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers of Judge Gropper) and shall be served in accordance with General Order M-242 so that they are actually received by no later than **4:00 pm** (prevailing Eastern Time) on **January 18, 2011** upon: (i) counsel to the Debtors, Olshan Grundman Frome Rosenzweig & Wolosky, LLP, Park Avenue Tower, 65 East 55th Street, New York, New York, 10022, Attention: Michael S. Fox, Esq. and David Y. Wolnerman, Esq.; (ii) counsel to the Official Committee of Unsecured Creditors, Kelly Drye & Warren, LLP, 101 Park Avenue, New York, New York 10178, Attention: James S. Carr, Esq. and Jason Adams, Esq.; (iii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor,

New York, NY 10004, Attention: Nazar Khodorovsky Esq.; and (iv) Class Counsel, Harris & Rubble, 6424 Santa Monica Boulevard, Los Angeles, CA 90038, Attention: Alan Harris, Esq. and Matthew Kavanaugh, Esq. Only those parties who have timely filed and served an objection to the Settlement Motion may be heard at the hearing.

PLEASE TAKE FURTHER NOTICE, that any reply to the Responses must be filed with the Bankruptcy Court by no later than **4:00 pm** (prevailing Eastern Time) on **January 21, 2011**.

Dated: New York, New York
December 30, 2010

**OLSHAN GRUNDMAN FROME
ROSENZWEIG & WOLOSKY LLP**

By: /s/ David Y. Wolnerman
Michael S. Fox
Jordanna L. Nadritch
David Y. Wolnerman
Park Avenue Tower
65 East 55th Street
New York, NY 10022

*Counsel for the Debtors and Debtors in
Possession*

Hearing Date: January 25, 2011 at 11:00 a.m.
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

JENNIFER CONVERTIBLES, INC.,¹

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**DEBTORS' MOTION PURSUANT TO RULES 7023, 9014 AND 9019 OF THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE AND
BANKRUPTCY CODE SECTIONS 105(A) AND 363(B) FOR ENTRY OF AN
ORDER AUTHORIZING AND APPROVING SETTLEMENT OF CIVIL ACTIONS**

Jennifer Convertibles, Inc. (“Jennifer Convertibles”) and its affiliated debtors, as debtors and debtors in possession (collectively, the “Debtors”), by and through their undersigned counsel, hereby submit this Motion (the “Motion”) for entry of an order, pursuant to Rules 7023, 9014 and 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and

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).

sections 105(a) and 363(b) of title 11 of the United States Code (the “Bankruptcy Code”), authorizing and approving the settlement (the “Settlement Agreement”)² of the Combs Cases (as defined below). 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 sofa-bed specialty retail stores and leather specialty retail stores in the United States, with stores located throughout the Eastern seaboard, Midwest, West Coast and Southwest, and (ii) seven big box, full-line furniture stores operated under the Ashley Furniture HomeStore brand (the “Ashley Stores”) under a license from Ashley Furniture Industries, Inc.

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.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Settlement Agreement.

5. As of the Petition Date, the Debtors employed 497 people. There are 336 employees in the Jennifer segment, 114 employees in the Ashley segment and 47 corporate employees. None of the employees are represented by a collective bargaining unit.

6. The factual background relating to the Debtors' commencement of these chapter 11 cases is set forth in additional detail in the Declaration of Rami Abada in Support of First Day Motions filed on July 19, 2010 and incorporated herein by reference.

Jurisdiction

7. 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.

8. The statutory predicates for the relief requested herein are Bankruptcy Rules 7023, 9014 and 9019 and sections 105(a) and 363(b) of the Bankruptcy Code.

The Combs Cases

9. On July 16, 2009, a putative class and FLSA collective action, Ayisha Combs v. Jennifer Convertibles, Inc., was commenced in the United States District Court for the Northern District of California, Case No. 3:09-cv-03242-SI (the "Combs I Case").

10. Ms. Combs alleged in the Combs I Case that the Debtors' employment practices were in violation of the Federal employment laws, California Industrial Welfare Commission Order 4-2001, California Code of Regulations, Title 8, Chapter S, section 11040; California Labor Code sections 200, 201, 202, 203, 204, 226, and 226.7; and California Business and Professions Code section 17200, *et seq.* (collectively, the "Employment Laws"). These laws require employers to, among other things, provide their employees with an off-duty meal period of at least 30 minutes for every five hours the employee spends on the job, and with a rest period of at least 10 minutes for every four hours of work or major fraction thereof. Ms. Combs alleged

that the putative class was entitled to \$7,670,000 in damages. In support of the damage calculation, Ms. Combs relied on a statistical analysis based on the number of Jennifer Convertible employees, store location, employee position, and information available regarding actual hours worked.

11. Jennifer Convertibles disputed Ms. Combs' characterization of its employment practices and, in particular, asserted that the position of Ms. Combs failed to consider various exemptions to the above-referenced laws that apply under applicable state and federal law.

12. On December 29, 2009, a second putative FLSA collective action, Ayisha Combs v. Harley Greenfield and Rami Abada, was commenced in the United States District Court for the Northern District of California, Case No. 3:09-cv-06042-SI (the "Combs II Case", and together with the Combs I Case, the "Combs Cases"). Defendant Harley Greenfield is the Chairman of the Debtors' Board of Directors and the Debtors' Chief Executive Officer. Defendant Rami Abada is the Debtors' President, Chief Operating Officer and Chief Financial Officer.

13. Ms. Combs alleges in the Combs II Case that Mr. Abada and Mr. Greenfield, as officers and directors of Jennifer Convertibles, are liable under the Employment Laws for Jennifer Convertibles' alleged violations thereof. Mr. Abada and Mr. Greenfield dispute Ms. Combs' characterization of Jennifer Convertibles' employment practices and assert they have no liability under the Employment Laws.

14. On February 26, 2010, the Combs I Case court denied collective action certification without prejudice. The plaintiffs in the Combs I Case did not seek class certification prior to the Petition Date nor refile a collective action certification motion, and an order closing the Combs I Case was entered on July 28, 2010.

15. On April 2, 2010, the Combs Cases were ordered related.

16. On May 11, 2010, the Combs II Case court dismissed the Combs II Case for lack of personal jurisdiction. A collective action was never certified in the Combs II Case. On June 9, 2010, the Combs II Case plaintiff filed an appeal, which is currently pending before the Ninth Circuit Court of Appeals, Case No. 10-1638.

17. Counsel to Ms. Combs has indicated that, absent approval of the Settlement Agreement, the Combs II Case will be re-commenced in New York in an effort to obtain personal jurisdiction over the defendants therein.

18. Prior to the Petition Date, Combs, Jennifer Convertibles, Abada and Greenfield engaged in settlement discussions regarding the Combs Cases and a proposed settlement agreement was circulated among the parties to the Combs Cases (the “Proposed Prepetition Settlement”). The Proposed Prepetition Settlement provided, among other things, for a \$1.3 million payment by Jennifer Convertibles to Ms. Combs, as class representative, in full and final settlement of the Combs Cases. Prior to the Petition Date, however, this agreement was never executed by the parties.³

19. On June 18, 2010, the Combs II Case was submitted to mediation under the auspices of Ninth Circuit Mediator Roxanne Ashe (the “Circuit Mediator”). On August 16, 2010, counsel for Greenfield, Abada, Jennifer Convertibles and Combs took part in a conference call with the Circuit Mediator and informed her that the parties were engaged in settlement discussions and requested that the Mediation briefing schedule be adjourned to allow the parties to concentrate on settlement discussions. On September 16, 2010, the parties notified the Circuit Mediator of a potential settlement in principle between the parties and again requested that the

³ Out of abundance of caution, the Debtors included in their schedules of assets and liabilities filed with this Court a \$1.3 million contingent, disputed and unliquidated claim in respect of the Combs Cases.

Mediation briefing schedule be adjourned to allow the Bankruptcy Court to consider the new settlement agreement. In light of the settlement reached, the Circuit Mediator vacated the mediation schedule.

20. The parties have since endeavored to reach a consensual resolution of the Combs Cases.

21. On October 25, 2010, Ms. Combs, as representative of the employee class, filed a priority claim against Jennifer Convertibles, Inc. under section 507(a)(4) of the Bankruptcy Code in the amount of \$7,632,100 for unpaid wages and damages (the “Combs Claim”), which Combs Claim was designated as claim number 278 in the Bankruptcy Cases.

22. On October 25, 2010, Harris & Ruble (“H&R”) filed a general unsecured proof of claim against Jennifer Convertibles, Inc. in the amount of \$198,747.00 for attorney’s fees and costs incurred in connection with the Combs Cases (the “H&R Claim”), which H&R Claim was designated as claim number 277 in the Bankruptcy Cases.

23. On October 25, 2010, North Bay Group (“North Bay”) filed a general unsecured proof of claim against Jennifer Convertibles, Inc. in the amount of \$80,759.00 for attorney’s fees and costs incurred in connection with the Combs Cases (the “North Bay Claim”, and together with the H&R Claim, the “Disallowed Claims”), which North Bay Claim was designated as claim number 279 in the Bankruptcy Cases.

Relief Requested

24. The parties have reached an agreement regarding the global resolution of the Combs Cases, the Combs Claim, the H&R Claim, and the North Bay Claim. The proposed settlement (i) relieves the Debtors of the costs incident to further litigation of the Combs I Case, and significantly reduces the Debtors’ exposure to a potential \$7,632,100 judgment and resulting

priority claim; (ii) eliminates the Debtors' exposure to the claims of Class Counsel for their legal fees, totaling approximately \$280,000; and, as explained below, (iii) relieves the Debtors of their obligation to advance litigation costs to, and further indemnify, their officers and directors that are defendants in the Combs II Case.

25. In full and final settlement of the Combs II Case, the Settlement Agreement provides for a one-time payment of \$50,000 by Jennifer Convertibles to Ms. Combs (the "Combs Payment") within 10 days of entry of the Preliminary Approval Order. The Settlement Agreement further provides for certification of the Combs Classes (as defined below) and, in full and final settlement of the Combs I Case, upon the Effective Date, (i) the allowance of the Combs Claim in the amount of \$450,000 as a general unsecured claim to be paid to the Settlement Administrator on behalf of the Combs Classes in accordance with the Debtors' plan of reorganization, and (ii) the withdrawal and disallowance, with prejudice, of the Disallowed Claims.

26. By this Motion, the Debtors request entry of the Preliminary Approval Order, annexed hereto as Exhibit B, (i) approving the Settlement Agreement and authorizing the Debtors to enter into the Settlement Agreement, (ii) authorizing and approving the settlement of the Combs II Case, payment of the Combs Payment, and the related releases, (iii) certifying, for settlement purposes only, a class consisting of the Class Members and a class consisting of the Collective Action Members (together, the "Combs Classes"), (iv) appointing the Settlement Administrator, (v) approving the form and manner of service of the Class Notice to be used in connection with settlement of the Combs I Case, and (vi) approving the procedures for exclusion from and objecting to the proposed settlement

27. In addition, by this Motion, the Debtors request that the Court schedule a final fairness hearing to consider entry of the Final Judgment and Order (i) authorizing and approving the Settlement of the Combs I Case and the related releases, (ii) allowing the Combs Claim in the amount of \$450,000 as a general unsecured claim to be paid in accordance with the Debtors' plan of reorganization, (iii) approving the fees of the Settlement Administrator for services rendered in connection with administering the Settlement in the amount of \$20,000 to be paid from the distributions, if any, made on account of the Allowed Combs Claim; (iv) approving the Fees of Class Counsel in an amount not to exceed forty percent (40%) of and to be paid from the distributions, if any, made on account of the Allowed Combs Claim, (v) approving the proposed manner of distributing to the Combs Class Members the distributions, if any, made on account of the Allowed Combs Claim, and (vi) disallowing, with prejudice, the Disallowed Claims.

Basis for Relief Requested

28. Compromises and settlements are a normal part of the bankruptcy process. Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968), cert. denied, 391 U.S. 909 (1968), citing Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 130 (1939). The structure and provisions of the Bankruptcy Code promote negotiation and settlement for the benefit of creditors in accordance with "the policy of the law generally [which is] to encourage settlements." In re Jackson Brewing Co., 624 F.2d 599 (5th Cir. 1980). Resolution of claims through settlement furthers the goal of bankruptcy administration to liquidate estate assets as rapidly as possible "consistent with obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation." In re Carla Leather, Inc., 44 B.R. 457, 471 (Bankr. S.D.N.Y. 1984), *aff'd*. 50 B.R. 764 (S.D.N.Y. 1985). While the Debtors are free to pursue litigation on behalf of the

estate, it “is to exercise prudence and at the same time be in a position so as to act on a settlement opportunity when that opportunity arises.” In re Carla Leather, Inc., 44 B.R. at 472.

29. Bankruptcy Rule 9019(a) permits the Court to approve a compromise or settlement. The Rule provides:

- (a) Compromise. On motion by the trustee and after notice and a hearing the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. Pro. 9019(a). Neither Bankruptcy Rule 9019 nor any section of the Bankruptcy Code explicitly sets forth the standards by which a court is to evaluate a proposed settlement for approval.

30. However, the standards for approval of settlements in bankruptcy are well established in precedent, focusing on the proposed settlement’s reasonableness and its fairness to creditors. In Anderson, 390 U.S. 414, the seminal case on approval of settlements in bankruptcy cases, the Supreme Court concluded that the trial court must make an informed, independent judgment as to whether a settlement is fair and equitable, stating:

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

Anderson, 390 U.S. at 424 (citations omitted).

31. The United States Court of Appeals for the Second Circuit has stated that the responsibility of the judge “is not to decide the numerous questions of law and fact raised by appellants, but rather to canvass the issues and see whether the settlement ‘fall[s] below the lowest point in the range of reasonableness.’ ” In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983), cert. denied sub. nom. Cosoff v. Rodman, 464 U.S. 822 (1983); In re Purofied Down Products Corp., 150 B.R. 519, 522-23 (S.D.N.Y. 1993); In re Crowthers McCall Pattern, Inc., 120 B.R. 279, 287 (Bankr. S.D.N.Y. 1990); In re Carla Leather, Inc., 44 B.R. 457, 470 (Bankr. S.D.N.Y. 1984), aff’d, 50 B.R. 764 (S.D.N.Y. 1984). The assessment of a settlement only requires identification of the issues in controversy “so that the bounds of reasonableness can be seen with some clarity.” Carla Leather, 44 BR. at 470.

32. In considering a proposed settlement, the court is guided by a lenient standard consistent with the theory that “little would be saved by the settlement process if [in order to approve a settlement] bankruptcy courts [were required to conduct] an exhaustive investigation and determination of the underlying claims” in order to approve a settlement. Purofied Down Products, 150 B.R. at 522-23. In Carla Leather, this Court explained the policy underlying the abridged review of settlements in bankruptcy as follows:

The very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty.

Carla Leather, 44 B.R. at 470; see also Purofied Down Products, 150 B.R. at 522-23.

33. In evaluating the propriety of a settlement in concert with the foregoing factors, the court need not conduct a trial on the merits (nor a “mini-trial,” nor “a rehearsal of the trial”) to actually resolve the extant factual and legal issues. The court must simply determine whether, considering all of the relevant issues, the settlement is reasonable. Newman v. Stein, 464 F.2d

689, 692 (2d Cir. 1972), cert denied sub nom. Benson v. Newman, 409 U.S. 1039 (1972); see also In re International Distribution Centers, Inc., 103 B.R. 420, 423 (S.D.N.Y. 1989); In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991) (“Drexel I”). These issues may include the court’s familiarity with the history of the case, the complexity of the claims alleged, the status of the parties, and the context in which the claims arose. Anderson, 390 U.S. at 444; Purofied Down Products, 150 B.R. at 519, 524; International Distribution Centers, 103 B.R. at 423.

34. The settlement evaluation process is not designed to substitute the court’s judgment for that of a debtor. Carla Leather, 44 B.R. at 465. While a court is not expected to “rubber stamp” the debtor’s proposed settlement, In re Ionosphere Clubs, Inc., 156 B.R. 414, 426 (S.D.N.Y. 1993), the court should give considerable weight to a debtor’s informed judgment that a compromise is fair and equitable. Anderson, 390 U.S. at 444; International Distribution Centers, 103 B.R. at 423; Drexel I, 134 B.R. at 496; Carla Leather, 44 B.R. at 472.

35. As articulated by the District Court in International Distribution Centers, when determining the wisdom of a compromise, the court should give weight to not only the debtor’s opinion, but to those of other counsel to a settlement as well. International Distribution Centers, 103 B.R. at 423. Ultimately, a court should consider both the proponents’ opinions as well as its own independent evaluation of the arguments for and against the settlement in order to determine whether a settlement should be approved. Purofied Down Products, 150 B.R. at 523.

36. The court, apprised of the facts of the controversy and the risks and costs of the litigation, is bestowed with broad discretion to approve settlements that fall within the range of reasonableness. Purofied Down Products, 150 B.R. at 523-24; In re Texaco, Inc., 84 B.R. 893,

901 (Bankr. S.D.N.Y.), appeal dismissed, 92 B.R. 38 (S.D.N.Y. 1988). The proposed settlement need not be ideal, but merely above the lowest point in the range of reasonableness under the circumstances. See W.T. Grant, 699 F.2d at 6 13-14; Newman v. Stein, 464 F.2d at 693; Purofied Down Products, 150 B.R. at 523-24. The concept of a “range of reasonableness” recognizes “the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent to taking any litigation to completion. Newman v. Stein, 464 F.2d at 693. Thus, a court need not insist upon the best possible settlement, but may approve a settlement that is within the range of reasonableness under the circumstances.

37. In deciding whether a proposed compromise is fair and equitable, reasonable and in the best interests of creditors, courts in the Second Circuit follow the analysis first articulated by the Supreme Court in Anderson, as developed and applied by the case law. In so following, courts judge a proposed settlement based on a consideration of some or all of the following factors:

- (i) the relative benefits to be received by creditors under the proposed settlement;
- (ii) the likelihood of success in the litigation compared to the present and future benefits offered by the proposed settlement;
- (iii) the prospect of complex and protracted litigation if settlement is not approved;
- (iv) the attendant expense, inconvenience and delay of litigation;
- (v) the probable difficulties of collecting on any judgment that might be obtained;
- (vi) the competency and experience of counsel who support the proposed settlement;
- (vii) the extent to which the settlement is the product of arm’s-length bargaining, and not the product of fraud or collusion;
- (viii) the nature and breadth of any releases to be issued as a result of the proposed settlement; and
- (ix) the paramount interest of the creditors and proper deference to their reasonable views.

See City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974); In re Ionosphere Clubs Inc., 156 B.R. 414, 427 (S.D.N.Y. 1993); Purofied Down Products, 150 B.R. at 522; International Distribution Centers, 103 B.R. at 422; In re Fugazy, 150 B.R. 103, 106 (Bankr. S.D.N.Y. 1993); Drexel I, 134 B.R. at 497; In re Drexel Burnham Lambert Group, Inc., 134 B.R. 499, 506 (Bankr. S.D.N.Y. 1991) (“Drexel II”); Crowthers McCall, 120 B.R. at 287; Texaco, 84 B.R. at 901; Lion Capital Group Inc., 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985); Carla Leather, 44 B.R. at 466; In re W.T. Grant Co., 699 F.2d 599 (2d Cir. 1983); see also In re Jackson Brewing Co., 624 F.2d 599, 602 (5th Cir. 1980); Drexel v. Loomis, 35 F.2d 800, 808 (8th Cir. 1929).

The Debtors’ Duty to Indemnify and Advance Litigation Costs

38. Pursuant to (i) the Certificate of Incorporation of Jennifer Convertibles (the “Certificate”), (ii) applicable provisions of state and federal law, and (iii) the Debtors’ employment agreements with their officers and directors (the “Employment Agreements”), the Debtors have a duty to indemnify their officers and directors for litigation costs and expenses, including amounts paid in settlement, incurred in connection with the Combs II Case, and to advance related litigation costs to their officers and directors.

a. The Certificate and Employment Agreements

39. In accordance with applicable law, the Certificate and the Employment Agreements,⁴ the Debtors are obligated to indemnify their officers and directors under certain circumstances, as well as to directly pay and/or advance defense costs and expenses incurred by such officers and directors.

40. The Debtors’ Certificate provides in relevant part as follows:

Any person who was or is a party or is threatened to be made a party to any

⁴ Copies of the Certificate and Employment Agreements are available upon request.

threatened, pending, or completed action, suit, or proceeding ... by reason of the fact that he is or was a director, officer ... or is or was serving at the request of the Corporation as a director, officer ... shall be entitled to be indemnified by the Corporation to the full extent then permitted by law against expenses (including attorneys' fees), judgments ... and amounts paid in settlement incurred by him in connection with such action, suit, or proceeding.

41. In addition, Jennifer Convertibles is party to the Employment Agreements with their officers and directors. The Employment Agreements are identical, and provide as follows:

INDEMNIFICATION. To the fullest extent permitted by law, the Company shall indemnify the Executive (including the advancement of expenses) for any judgment, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees, incurred by the Executive in connection with the defense of any lawsuit or other claim to which he is made a party by reason of being an officer, director or employee of the Company or any of its subsidiaries. During the Employment Period and for at least three (3) years thereafter, the Company shall make every reasonable effort to maintain customary director and officer liability insurance covering the Executive for acts and omissions prior to and during the Employment Period.

42. The advancement and indemnification rights discussed herein have been fully disclosed to the Debtors' stockholders and the general public, by way of the Debtors' filings with the Securities and Exchange Commission and the general availability of the Certificate.

b. Applicable State Law

43. Jennifer Convertibles is incorporated in Delaware. Delaware law specifically authorizes the indemnification provisions described above. See 8 Del.C § 145(a) ("A corporation shall have power to indemnify any person ... to any threatened, pending or completed action, suit or proceeding ... by reason of the fact that the person is or was a director [or] officer ... if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation"). Delaware law also provides that:

(e) Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an

undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

* * * * *

(f) The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office.

8 Del.C §§ 145(e), (f).

**The Proposed Settlement is Fair and Equitable,
Reasonable and in the Best Interests of Creditors**

44. The paramount interest of creditors in any bankruptcy case is to recover the greatest amount upon their allowed claims. Accordingly, balanced against the Debtors' desire to emerge as a going concern, the Debtors' primary duties are to marshal, liquidate, preserve and distribute the assets of these estates for the benefit of bona-fide creditors. The Debtors must fulfill these responsibilities expeditiously and in a cost-effective manner. The Debtors submit that the proposed settlement of the Combs Cases furthers the paramount interests of their creditors and of these estates.

45. The immediate benefit under the Settlement Agreement is the final resolution of the Combs Cases in exchange for (i) allowance of the Combs Claim in the amount of \$450,000 as a general unsecured claim; and (ii) the payment of \$50,000 to Ms. Combs by the Debtors.

46. If the settlement is not approved, there is a risk that (i) Ms. Combs may pursue class certification in and prosecution of the Combs I Case, (ii) the Debtors may be exposed to liability from an adverse judgment in the Combs I Case, and (iii) the Debtors', and their officers

and directors most involved in the Debtors' restructuring efforts, will be compelled to expend time, effort and resources in defending against the continued prosecution of the Combs I Case, the appeal of the Combs II Case, mediation in the Combs II Case, and potentially additional litigation by Ms. Combs against Mr. Greenfield and Mr. Abada in another jurisdiction for which the Debtors are required to advance legal costs.

47. From the Debtors' perspective, the litigation costs associated with the Combs I Case, and the costs of advancing litigation expenses to their officers and directors in connection with the Combs II Case, will increase with no guaranty of success on the merits. The Debtors will be compelled to commit scarce administrative resources in connection with defending the Combs Cases. Even if Ms. Combs were unsuccessful in prosecuting the Combs I Case, the appeal of the Combs II Case or other litigation related to the Combs II Case, distributions to creditors in these bankruptcy cases would be reduced by the amount of litigation costs the Debtors would be required to expend on their own behalf and additional amounts the Debtors would be required to advance to their officers and directors. The Debtors submit that the amounts that would be required to be advanced to their officers and directors in the Combs II Case alone may very well exceed the amounts the Debtors will ultimately be required to pay under the Settlement Agreement. Furthermore, the Debtors are exposed to potential liability in the Combs I Case, the amount of which may be entitled to priority status under section 507(a)(4) of the Bankruptcy Code, and may be required to indemnify and advance costs to their officers and directors in the event of an adverse judgment against their officers and directors in the Combs II Case.

48. On the other hand, an immediate settlement of the Combs Cases will free the Debtors' and their officers and directors from the distractions of having to defend themselves

from liability in the Combs Cases, thereby permitting them to focus on continuing to operate and manage the Debtors' business and complete a successful reorganization of these estates. In addition, immediate settlement of the Combs Cases will free up funds for distribution to the Debtors' bona-fide creditors. In this regard, the Combs Claim is to be allowed in a significantly reduced amount and as a general unsecured claim, as opposed to a priority claim entitled to receive distribution in full prior to any payments to the Debtors' general unsecured creditors, and the Disallowed Claims will be disallowed.

49. Given the benefits to be realized under the Settlement Agreement, the Debtors submit that the proposed settlement provides the best possible outcome under the circumstances with the least cost to creditors, consistent with their paramount interests.

50. Even if a court is confident of the debtor's ultimate success on the merits of a particular litigation, it may still approve a settlement. Drexel II, 134 B.R. at 505, citing In re Teltronics Services, Inc., 46 B.R. 426 (E.D.N.Y. 1984), aff'd 762 F.2d 185 (2d Cir. 1985). The Debtors are not commanded to burden the estate with "costs and expenses arising out of all manner of questions that may be presented for litigation." Carla Leather, 44 B.R. at 472 (citation omitted). It is precisely for this reason that courts are not required to resolve factual and legal issues, but merely to "canvas" them, to determine whether a proposed settlement is reasonable.

51. Finally, the proposed settlement is the product of arms'-length, good-faith negotiations and was not the product of fraud or collusion. Ms. Combs was represented by counsel throughout the litigation and negotiation, as were the Debtors, and the parties dealt with each other in good faith and at arms'-length. As a result of these negotiation efforts, both Ms. Combs and the Debtors are giving up significant rights in return for value, certainty, finality and closure.

52. Accordingly, the Debtors submit that the proposed settlement should be approved as fair and equitable, reasonable and in the best interests of their creditors and estates.

**Settlement of the Combs II Case is
Supported by the Debtors' Business Judgment**

53. Alternatively, this Court should approve the relief requested in the Motion with respect to settlement of the Combs II Case if the Debtors demonstrate a sound business justification therefor. See In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983) (“The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him a good business reason to grant the application”); see also In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

54. Once a debtor articulates a valid business justification, “[t]he business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1990). Courts are loath to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence. Id. Here, more than ample business justification exists.

55. Additionally, Bankruptcy Code section 105(a) empowers a court to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]. The purpose of section 105(a) is to ensure a bankruptcy court’s power to take whatever action “is appropriate or necessary in aid of the exercise of [its] jurisdiction.” In re Casse, 198 F.3d 327, 336 (2d Cir. 1999); In re The 1031 Tax Group, LLC, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008).

56. As discussed above, settlement of the Combs II Case will save these estates the advancement and indemnification costs associated with continued prosecution of the Combs II Case. The Debtors submit that the amounts that would be required to be advanced to their officers and directors in the Combs II Case alone may very well exceed the amounts the Debtors will ultimately be required to pay under the Settlement Agreement. This fact alone supports the immediate settlement of the Combs II Case.

57. As part of the global settlement of the Combs Cases, settlement of the Combs II Case also permits the Debtors and their estates to preserve, for the benefit of these estates and their creditors, the amounts that would otherwise be expended in defending the Combs I Case, and to reap the benefits of (i) a reduction of the Combs Claim from a potential \$7,632,100 priority claim to a \$450,000 general unsecured claim; and (ii) disallowance of the Disallowed Claims.

58. In addition, by offering their officers and directors indemnification and advancement of litigation costs when they joined the Debtors, Jennifer Convertibles created an expectation that these individuals would be protected, by way of prompt advancement of any defense fees and costs, for any matters relating to their service. Indeed, the Debtors have existing contractual obligations to advance defense costs to and indemnify their officers and directors for costs associated with the Combs II Case.

59. The Debtors' officers and directors reasonably relied upon the Employment Agreements and the aforementioned advancement and indemnity protections contained in the Certificate at the time they joined the Debtors and throughout the performance of their duties. Any failure to comply with the terms of the Employment Agreements and the Certificate in

connection with the Combs II Case would constitute a breach of the Debtors' obligations thereunder, and would not be in the best interest of the Debtors or their estates.

60. Additionally, the obligations under Delaware statute could not be more clear.

61. The Debtors' obligations to comply with their contractual and statutory obligations do not terminate merely because the Debtors filed for bankruptcy. As courts within this district and courts applying Delaware law have held, provisions in a Debtors' charter and bylaws have continued viability after the filing of the bankruptcy petition. See In re Sahlen & Associates, Inc., 113 B.R. 152, 153 (Bankr. S.D.N.Y. 1989) (holding a debtor had to indemnify its current officers and directors to the full extent provided by its bylaws and the laws of the state of incorporation); Continuing Creditors' Comm. of Star Telecomm., Inc. v. Edgecomb, 385 F.Supp.2d 449 (D. Del. 2004) (granting motion to dismiss claims of the creditors' committee that former directors of debtor had breached fiduciary duties on the basis of exculpation provision in the debtor's charter).

62. Pursuant to the Certificate, the Employment Agreements, and applicable state law, it is clear that the Debtors have an obligation to make advancements to and indemnify their officers and directors for the costs and expenses incurred by their officers and directors in connection with the Combs II Case.

63. Accordingly, the Debtors submit that the proposed settlement of the Combs II Case, as a component of the global resolution of the Combs Cases, is supported by the exercise of their sound business judgment.

Certification of the Combs Classes for Settlement Purposes

64. As discussed above, the Settlement Agreement calls for the certification of two classes, for settlement purposes only, in connection with settlement of the Combs I Case: (i) a

class consisting of the Class Members; and (ii) a class consisting of the Collective Action Members. The need to bifurcate the Combs Class Members into two separate classes is a function of the difference between class actions and collective actions.⁵ The distinctive feature of a collective action, setting it apart from generic class actions under Rule 23 of the Federal Rules of Civil Procedure, is that the members of a collective action may become party plaintiffs only by affirmatively “opting into” the action in writing, 29 U.S.C. § 216(b), whereas the members of a class action automatically become party plaintiffs unless they opt-out of the action. Whereas Class Members asserting claims against Jennifer Convertibles for violations of the Employment Laws, other than violations of the FLSA, are deemed class members unless they affirmatively opt-out of the class, Collective Action Members asserting claims against Jennifer Convertibles for violations of the FLSA must affirmatively opt-in to the class in order to receive the benefits of the Settlement. To address the differing methods in which the Combs Class Members may receive the benefits of, or opt-out of, the Settlement, certification of two classes is requested.

65. Certification of a class claim pursuant to Bankruptcy Rule 7023 is within the discretion of this Court. *In re Worldcom, Inc.*, No. 02-13533 (AJG), 2005 WL 3832063 *2 (Bankr. S.D.N.Y. May 11, 2005), citing *In re Charter Co.*, 876 F.2d 866, 876 (11th Cir. 1989). Recognizing that the commencement of a bankruptcy proceeding “significantly changes the balance of factors to be considered in determining whether to allow a class action and that class certification may be ‘less desirable in bankruptcy than in ordinary civil litigation’”, *In re Ephedra Products Liability Litigation*, 329 B.R. 1, 5 (S.D.N.Y. 2005), quoting *In re American Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988), courts have held that Rule 23 of the Federal

⁵ Collective actions under the Federal Fair Labor Standards Act (“FLSA”) are governed by 29 U.S.C. § 216(b).

Rules of Civil Procedure may be invoked against a debtor only if the bankruptcy court first makes a discretionary ruling under Bankruptcy Rule 9014 to apply Rule 23 to a particular proof of claim. *In re Ephedra Products Liability Litigation*, 329 B.R. at 5.

66. Although neither the Bankruptcy Code nor the Bankruptcy Rules provide express guidance for the Court's exercise of this discretion, "a pervasive theme is avoiding undue delay in the administration of the case." *Id.*; see also *In re Northwest Airlines Corp.*, No. 05-17930, 2007 WL 2815917, * 4 (Bankr. Sept. 26, 2007); *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 376 (Bankr. S.D.N.Y. 1997) ("a bankruptcy case can proceed no faster than its slowest matter ... and a class action may 'gum up the works' because until complete, the bankruptcy court cannot determine the entitlement of the other creditors.").

67. Given that class certification is being requested only in order to implement the Settlement, rather than as a first step to protracted class action litigation, there is little to no risk of potential interference with the timely distribution of estate assets pursuant to the Debtors' plan of reorganization. Certification of the Combs Classes (for settlement purposes only) will not result in the initiation of protracted litigation, pre-certification discovery, discovery on the merits or the bankruptcy equivalent of a trial. Rather, certification of the Combs Classes in connection with approval of the Settlement Agreement will immediately reduce the Combs Claim to a sum certain, thereby permitting distribution of estate assets to the Debtors' other creditors. In short, certification of the Combs Classes will not "gum up the works". Rather, it will allow for the timely distribution of estate assets in accordance with the Debtors' plan of reorganization.

68. Upon the Court's discretionary ruling under Bankruptcy Rule 9014 to apply Rule 23 to a particular proof of claim, a class action may proceed upon a showing that the

requirements of Rule 23 have been met. *In re Worldcom, Inc.*, 2005 WL 3832063, at *2. Rule 23 provides, in pertinent part, that:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
 - (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. Pro. 23(a); *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201-02 (2d Cir. 2008) (“To be certified, a putative class must first meet all four prerequisites set forth in Rule 23(a): numerosity, commonality, typicality, and adequacy.”). Here, each of the requirements of Rule 23(a) is satisfied.

69. First, the numerosity requirement is satisfied. The proposed Combs Class Members are comprised of those individuals who, from July 16, 2005 through July 18, 2010, were employed by Jennifer Convertibles to work in its California stores, excluding general managers and regional managers. It is currently estimated that approximately 230 individuals may be eligible to participate in the Settlement as a Combs Class Member.

70. “The commonality and typicality requirements of Rule 23 tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 158, 102 S.Ct. 2364 (1982). In this regard, “Rule 23(a)(3) is satisfied when each class member’s claim arises from the same

course of events, and each class member makes similar legal arguments to prove the defendant's liability.” *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992). Here, each Combs Class Member’s claim arises from the same alleged violations of the Employment Laws, and each Combs Class Member is required to make similar legal arguments to prove Jennifer Convertibles’ liability for such alleged violations.

71. Finally, adequacy “entails inquiry as to whether: 1) plaintiff’s interests are antagonistic to the interest of other members of the class and 2) plaintiff’s attorneys are qualified, experienced and able to conduct the litigation.” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). The focus is on uncovering “conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2250, 138 L.Ed.2d 689 (1997). Here, there exists no antagonism or other conflict of interest between Plaintiff and the other Combs Class Members. Indeed, the interests of Plaintiff and the Combs Class Members are aligned. Furthermore, the Combs Class Members are represented by qualified, experienced Class Counsel.

72. Rule 23 further provides, in pertinent part, that

A class action may be maintained if Rule 23(a) is satisfied and if:

- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. Pro. 23(b)(3).

73. As discussed above, each Combs Class Member's claim arises from the same alleged violations of the Employment Laws, and each Combs Class Member is required to make similar legal arguments to prove Jennifer Convertibles' liability for such alleged violations. Questions of law and fact common to all Class Members predominate over any questions affecting only individual members.

74. Furthermore, the ability to proceed as a class action is superior to other available methods for fairly and efficiently adjudicating the claims raised in the Combs Cases. First and foremost, the Parties have already entered into the Settlement Agreement which will bring finality to the Combs Cases. Rather than proceed individually against Jennifer Convertibles at this late stage, Combs Class Members have the opportunity to share in the benefits of the Settlement Agreement without further litigation. Alternatively, Combs Class Members are afforded the opportunity under the Settlement Agreement to opt-out of the Settlement.

75. Moreover, the Combs Class Members are comprised of individuals holding potential claims against Jennifer Convertibles in amounts that, individually, are sufficiently small to not warrant the expense of litigation.

76. Finally, maintenance of the proposed class action is minimal. No further litigation is necessary and the Parties merely need to effectuate the terms of the Settlement. In this regard, upon entry of the Preliminary Approval Order, the Class Notice and Claim Form will be distributed to all Combs Class Members, the Combs Class Members will have an opportunity to participate in the Settlement, and a hearing will be held to consider entry of the Final Judgment and Order. Accordingly, pursuant to Rule 23, this Court should certify the Combs Classes for settlement purposes only.

Procedures for Participating in the Combs Classes

77. The Debtors propose the following procedures for the Combs Class Members to participate in the Settlement or, alternatively, exclude themselves from or object to the approval of the Settlement:

A. **Class Notice.** Within five (5) business days after entry of the Preliminary Approval Order and provision by Jennifer Convertibles of the last known names and addresses of each Combs Class Member, H&R will mail, via U.S. first class mail, the Class Notice and Claim Form, in substantially the form annexed as Exhibit 1 to the Settlement Agreement, to each Class Member and Collective Action Member at the last known billing address in Jennifer Convertible's records. The Class Notice will encourage all Combs Class Members to raise all questions about the Settlement to the Settlement Administrator, which the Settlement Administrator will answer using a set of guidelines jointly approved by the Parties. Under no circumstances will the Settlement Administrator, any counsel or Plaintiff encourage a Combs Class Member to opt-out or otherwise not participate in the Settlement. Prior to mailing the Class Notice, the Settlement Administrator will attempt to update the Combs Class Members' addresses utilizing the U.S. Postal Service's National Change of Address database. In the event that the Class Notice is returned undeliverable with no forwarding address, the Parties will have no further obligation to attempt to obtain a forwarding address. In the event that the Class Notice is returned undeliverable with a forwarding address, H&R shall re-mail the Class Notice, via U.S. first class mail, to the indicated forwarding address within five (5) days of receipt of the forwarding address.

B. **Participation in the Settlement.** To be eligible to obtain the settlement benefits identified in the Settlement Agreement, a Settlement Class Member or Collective Action

Member must, within forty-five (45) days of the date of the Class Notice, submit to the Settlement Administrator a fully and correctly executed Valid Claim Form in accordance with the Class Notice and must not have opted out of the Combs Classes. To be deemed a fully and correctly executed Valid Claim Form, the Combs Class Members must provide: (i) current name and address of the Combs Class Member, (ii) declare under penalty of perjury that they were employed by Jennifer Convertibles in a showroom in a capacity other than a store manager or regional manager, during the relevant time period, and (iii) that he/she worked more than (a) eight hours in one day without being paid overtime compensation; and/or (b) forty hours in one week without being paid overtime compensation. Jennifer Convertibles reserves the right to verify the accuracy of information supplied by a Settlement Class Member or Collective Action Member on the Claim Form. Any claim may be denied if the person submitting the Claim Form is not a member of the Combs Classes. At Class Counsel's request the Settlement Administrator will send to Class Counsel all Claim Forms that are not correctly executed or are untimely. Class Counsel will not be responsible for any costs incurred by any Combs Class Member as a result of a denial of any Claim Form for any reason. Jennifer Convertibles will not be responsible for any costs incurred by any Combs Class Member or Class Counsel as a result of a denial of any Claim Form for any reason.

78. **Rights of Exclusion.** The process for exclusion from the Settlement will be as follows: All Class Members who properly submit to the Settlement Administrator a timely written request for exclusion will be excluded from the Settlement, and will have no rights under the Settlement Agreement. A request for exclusion must be in writing and state the Class Member's name and current address. The request for exclusion must be signed. Each request must also contain a signed statement that: "I hereby request that I be excluded from the

proposed settlement class in the Combs Cases,” or similar statement, requesting to not participate in the Settlement. The request must be mailed to the Settlement Administrator at the address provided in the Class Notice and postmarked (or mailed by overnight delivery) within 45 days of the date of Class Notice. A request for exclusion that does not include all of the foregoing information, that is sent to an address other than the one designated in the Class Notice, or that is not sent within the time specified, will be invalid and the person(s) serving such a request will be a member(s) of the class and be bound as a Class Member if the Settlement Agreement is finally approved. No person will purport to exercise any exclusion rights of any other person, or purport to exclude other Class Members as a group, aggregate, or class involving more than one Class Member, or as an agent or representative. Any such purported exclusion will be void, and the Class Members that is or are the subject of the purported opt-out shall be treated as Class Members for all purposes. Any Class Member that fails to properly exclude itself from participation in the Settlement and does not opt-in to the Settlement will be deemed a party plaintiff and be bound by the terms of the Settlement Agreement, including the release provisions thereof, but will not be entitled to the benefits of the distributions proposed thereunder.

79. **Right to Object.** Class Member who wish to object to the proposed Settlement may do so in accordance with the following procedures: Any Class Member who does not request exclusion may object to the Settlement by filing a written objection with the Bankruptcy Court specifically stating his or her objections and grounds thereof. No Class Member will be heard and no papers, briefs, pleadings or other documents submitted by any such Class Members will be received and considered by the Bankruptcy Court unless, within the time specified in the Class Notice (which in no event will be less than forty-five (45) days after such notice is mailed),

such Class Member has both filed with the Bankruptcy Court and mailed to Class Counsel and counsel for Jennifer Convertibles, at the addresses set forth in the Class Notice, a written objection that includes (i) the information specified by the Class Notice and (ii) the specific grounds for the objection and any reasons why such Class Member desires to appear and be heard, as well as all documents or writings that such Class Member desires the Bankruptcy Court to consider. Any Class Member who fails to comply with the Preliminary Approval Order or the Class Notice shall be barred from being heard at the Final Settlement Hearing. Class Members who exclude themselves from the Settlement shall have no right to file an objection.

Final Hearing

80. The Debtors request that the Court schedule a final fairness hearing (the “Final Hearing”) no later than 60 days from the date of the Class Notice to consider entry of the Final Judgment and Order (i) authorizing and approving the Settlement of the Combs I Case and the related releases, (ii) allowing the Combs Claim in the amount of \$450,000 as a general unsecured claim to be paid in accordance with the Debtors’ plan of reorganization, (iii) approving the fees of the Settlement Administrator for services rendered in connection with administering the Settlement in the amount of \$20,000 to be paid from the distributions, if any, made on account of the Allowed Combs Claim; (iv) approving the Fees of Class Counsel in an amount not to exceed forty percent (40%) of and to be paid from the distributions, if any, made on account of the Allowed Combs Claim, (v) approving the proposed manner of distributing to the Combs Class Members the distributions, if any, made on account of the Allowed Combs Claim, and (vi) disallowing, with prejudice, the Disallowed Claims.

Reservation of Rights

81. Nothing herein shall be construed as an admission of any liability or waiver of any rights of the Debtors or any of their officers and directors. Moreover, the Debtors expressly reserve all of their rights to seek to recover any of the costs paid to or for the benefit of their officers and directors from any insurance policy to which the Debtors may be a party or a beneficiary or under which the Debtors may have any rights of recovery. In the event entry of the Preliminary Approval Order and/or Final Judgment and Order is denied for any reason, the Debtors reserve the right to object to the Combs Claim, the H&R Claim and the North Bay Claim, and further reserve the right to object to certification of the Combs Classes.

Notice

82. 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) the LWDA; (v) Class Counsel; and (vi) 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

83. 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 Preliminary Approval Order, annexed hereto as Exhibit B, 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 30, 2010

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