

**KELLEY DRYE & WARREN LLP**

Hearing Date: Wednesday, July 21, 2010 (3:00 p.m. ET)

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

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In re:	)	Chapter 11
	)	
JENNIFER CONVERTIBLES, INC., <sup>1</sup>	)	Case No. 10-13779 (ALG)
	)	
Debtors.	)	(Joint Administration Pending)
	)	
	)	Re: Docket Entry No. 20
	)	

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**OBJECTION OF ATLAS PARTNERS, LLC AND BRENT MAKO REAL ESTATE GROUP TO DEBTORS’ MOTION FOR ENTRY OF AN ORDER SHORTENING TIME OF NOTICE WITH RESPECT TO A HEARING ON DEBTORS’ REQUEST FOR AN ORDER (A) APPROVING BIDDING PROCEDURES FOR THE SALE TO THE HIGHEST BIDDER, (B) APPROVING CERTAIN BIDDER PROTECTIONS AND (C) SCHEDULING A FINAL HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF**

Atlas Partners, LLC and Brent Mako Real Estate Group (collectively, the “Landlords”), by and through their counsel, Kelley Drye & Warren LLP, hereby object (the “Objection”) to the “Motion for Entry of an Order Shortening Time of Notice with Respect to a

<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).

Hearing on Debtors' Request for an Order (A) Approving Bidding Procedures for the Sale to the Highest Bidder, (B) Approving Certain Bidding Protections and (C) Scheduling a Final Hearing and Approving the Form and Manner of Notice Thereof" (the "Motion to Shorten")<sup>2</sup> filed by Jennifer Convertibles and its affiliated debtors (collectively, the "Debtors").

On July 20, 2010, the United States Trustee filed its "Omnibus Response and Objections to Certain of the Debtors' First Day Motions" (the "U.S. Trustee Objection"), which included an objection to the relief requested in the Motion to Shorten. By this Objection, the Landlords join in the U.S. Trustee Objection and respectfully state as follows:

### **PRELIMINARY STATEMENT**

The Landlords object to the Debtors request for a hearing on a sale motion on two days' notice rather than the typical 21-day notice period because there is no showing of exigent circumstances justifying a shortened notice period as required by Rule 6003(b) and the sale motion completely fails to disclose which of the Debtors' landlords and creditors are affected by the relief requested or provide any guidelines for the conduct of the liquidation sales at the closing locations. As a result, it is impossible for the Landlords and other parties in interest to effectively respond to either the Motion to Shorten or the Sale Motion (as defined below). In addition, the hearing has been scheduled before an official committee of unsecured creditors (the "Committee") will have been appointed and had an opportunity to retain counsel and financial advisors.

If the Motion to Shorten is approved, parties in interest would have less than one business day and a total of 72 hours to obtain counsel, review the Sale Motion and file an objection thereto. This timeframe, in and of itself, offends the fundamental notion of due

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<sup>2</sup> Docket No. 20.

process. Here, the Committee will not be appointed until the early afternoon of July 23, the same day and time that the Debtors seek to have the Sale Motion heard. As a result, it will be virtually impossible for the Committee to participate in this critical hearing.

### **BACKGROUND**

1. On July 18, 2010 (the “Petition Date”), each of the Debtors commenced a voluntary case with the Bankruptcy Court 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 section 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or statutory creditors’ committee has been appointed in these cases.

2. The Landlords are the owners, or managing agents for the landlords, of numerous shopping centers located throughout the United States. The Debtors lease retail space from the Landlords pursuant to written leases (the “Leases”) at the four locations identified in the chart annexed hereto as Exhibit A (the “Leased Premises”).

#### **A. The Sale Motion and the Motion to Shorten**

3. On July 20, 2010, the Debtors filed the “Motion of the Debtors to Approve Sale Process Including Sale to the Highest Bidder and to (A) Approve Bid Procedures and Protections; (B) Schedule a Sale Hearing; (C) Approve the Form and Manner of Notice Related Thereto; (D) Authorize Sale Free and Clear of All Liens, Claims, Encumbrances and Interests; and (E) Grant Related Relief” (the “Sale Motion”). Within the Sale Motion, the Debtors request (i) authority to, among other things, (a) implement bidding procedures (the “Bid Procedures”) in connection with the sale of certain assets of the Debtors (the “Asset Sale”) and (b) enter into an agency agreement (the “Agency Agreement”) with Great American Furniture Supplier (“GFAS”) pursuant to which GFAS will consummate the Asset Sale by running liquidation sales at each of

the retail locations the Debtors have chosen to shut down and (ii) schedule a hearing to approve the Asset Sale for July 26, 2010.

4. In order for the Debtors to meet the unjustifiably expedited timeline they agreed to with GFAS, the Debtors must obtain Court approval of the Bid Procedures by no later than July 23, 2010. Accordingly, on July 19, 2010 (one day prior to filing the Sale Motion), the Debtors filed the Motion to Shorten, in which they request a shortening of the notice period with respect to the relief sought in the Sale Motion. Specifically, the Debtors request that the Court schedule a hearing to approve the Sale Motion for July 23, 2010 at 3:00 p.m.

### **OBJECTION**

#### **A. The Debtors Have Not Identified Exigent Circumstances Justifying Shortened Notice**

5. Bankruptcy Rule 6003(b) provides that “a court, shall not, within 21 days after the filing of [a] petition, grant relief...regarding a motion to use, sell, lease or otherwise incur an obligation regarding property of the estate” except to the extent the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. Here, the Debtors have made no showing of irreparable harm. In fact, there is no indication in any of their moving papers that the liquidation sales must commence by July 26, 2010. Rather, they argue that the notice period should be shortened by more than fifteen days simply because the Agency Agreement requires it. The only exigencies in these cases are those voluntarily created by the Debtors.

6. As of the date of this Objection, the Committee formation meeting is scheduled for Friday, July 23, 2010. There is no reason the Sale Motion cannot be heard after a Committee has been appointed and has had an opportunity to select counsel and advisors. The Debtors should not unilaterally agree to an expedited timeframe that restricts Landlords ability to

respond and the Committee's ability to comply with its statutory duties. A hearing to approve the sale and auction procures should be delayed until Landlords have been provided with reasonable notice of whether the motion affects their Lease Premise and the Committee and other parties in interest have had a chance to properly review and respond to the Sale Motion and all exhibits thereto. The proposed schedule would not only violate the Bankruptcy Code and Bankruptcy Rules, but offend fundamental notions of due process, notice and an opportunity to be heard.

**B. The Sale Motion Denies Landlords Due Process and Adequate Protection**

7. In addition to the numerous grounds to object to both the Motion to Shorten and the Sale Motion set forth in the Objection of the United States Trustee, the Landlords draw the Court's attention to two particularly egregious shortcomings: (1) the Debtors' failure to include critical information in the Sale Motion that would allow parties in interest to determine whether they are affected by the relief requested therein and (2) the failure to provide basic store closing guidelines which results in a total lack of adequate protection to Landlords as required by section 363(e) of the Bankruptcy Code even though the Debtors are requesting authority to run liquidation sales outside the ordinary course of business pursuant to section 363(b) of the Bankruptcy Code.

**(a) The Motion to Shorten and the Sale Motion Violate Due Process**

8. The Motion to Shorten seeks an expedited hearing on the Sale Motion, which in turn seeks entry of an order authorizing the sale of inventory at locations the Debtors intend to close. Unfortunately, the Debtors have not indicated in any of their moving papers which locations they actually intend to close. They reference a schedule of "Exiting Territories" and indicate that such schedule is attached to the Agency Agreement; however, no such

attachment was filed with the Sale Motion. Therefore, it is impossible for any landlord (or other creditor) to determine whether and how it will be affected by the Sale Motion.

9. The Debtors' failure to indicate which parties in interest are affected by the Sale Motion is a clear violation of the due process to which they are entitled. Fundamental concepts of due process require that "notice must be reasonably calculated to apprise interested parties of the pendency of an action and to afford them an opportunity to present objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also Sullivan v. Barnett*, 139 F.3d 158, 171 (3d Cir. 1988) (due process requires notice and a meaningful opportunity to be heard).

10. The Debtors cannot expect the Court to hear such an important motion on shortened notice when they have not even included critical information in the motion, such as the nature of the inventory being sold, the purchase price for such inventory, and most importantly, the identity of the creditors affected by the proposed Asset Sale.

**(b) The Bid Procedures Fail to Adequately Protect the Landlords**

11. Although styled as a motion to approve an asset sale, the Sale Motion is nothing more than a request to run liquidation sales at each of the Debtors soon-to-be closed locations. The proper ground for such relief is section 363(b) of the Bankruptcy Code, which authorizes the use, sale or lease of estate property outside the ordinary course of business. Anytime section 363(b) is implicated, a debtor is required to comply with the requirements of section 363(e), including providing adequate protection to parties entitled to such relief..

12. Section 363(e) of the Bankruptcy Code states in pertinent part:  
"Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold or leased, or proposed to be used, sold, or leased, by the trustee,

the court, with or without a hearing, shall prohibit or condition such use sale, or lease as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e). The statute makes clear that this section is applicable landlords. *Id.*; *see also In re Ames Department Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) (“Section 363(e) of the Bankruptcy Code reserves for bankruptcy courts the discretion to condition the time, place and manner of Store Closing Sales, thereby providing adequate safeguards to protect shopping center landlords and their other tenants, while allowing the Trustee to fulfill its fiduciary obligations”).

13. Adequate protection takes many forms, including the granting of super-priority administrative expense claims, reimbursement of fees and expenses, and periodic post-petition payments. *See, e.g.*, 11 U.S.C. § 361. The Sale Motion fails to identify which, if any, of these protections will be afforded to the Landlords in connection with the Asset Sale.

14. Rather, the Debtors rely on allegations in the Sale Motion that the Asset Sale is within the Debtors’ “business judgment” and has been undertaken in “good faith” in an attempt to satisfy the burdens of section 363(e). Unfortunately, business judgment and good faith do not constitute adequate protection.

15. Each of the Leases contain bargained-for-protections that are intended to shield landlords from the deleterious effects of unregulated liquidation sales.<sup>3</sup> The Landlords are entitled to authentic forms of adequate protection, including, but not limited to, a requirement that the Asset Sale will be conducted in accordance with the terms of the Leases or reasonable guidelines that protect the Landlords interest at their shopping centers.

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<sup>3</sup> Although Section 8.1 of the Agency Agreement alludes to “Sale Guidelines” that will purportedly regulate the liquidation sales, the Debtors have failed to include any such sale guidelines in the Sale Motion.

**RESERVATION OF RIGHTS**

The Landlords hereby reserve their rights to further object to the Motion to Shorten and the Sale Motion and expressly reserve their right to supplement this Objection at any time prior to or during the hearing on the Sale Motion.

**CONCLUSION**

**WHEREFORE**, the Landlords respectfully request that the Court deny the Motion to Shorten and grant such other and further relief as the Court deems just and proper.

Dated: July 21, 2010  
New York, New York

KELLEY DRYE & WARREN LLP

By: /s/ Robert L. LeHane  
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*Counsel to Atlas Partners, LLC and Brent Mako Real Estate Group*



**EXHIBIT A**

**STORE CLOSING LOCATIONS**

<b><u>ATLAS PARTNERS, LLC</u></b>		
<b><u>Mall Name</u></b>	<b><u>Location</u></b>	<b><u>Landlord</u></b>
814 W. North Avenue	Chicago, Illinois	Halsted-Clybourn Limited Partnership
830 W. Diversey Parkway	Chicago, Illinois	Halsted Diversey LLC
697 E. Golf Road	Schaumburg, Illinois	Chicago Title Land Trust Company Trust Number 102674-09

<b><u>BRENT MAKO REAL ESTATE GROUP</u></b>		
<b><u>Mall Name</u></b>	<b><u>Location</u></b>	<b><u>Landlord</u></b>
164 Glen Cove Road	Carle Place, New York	Brent Associates, Inc.
168A D Glen Cove Road	Carle Place, New York	Brent Associates, Inc.
168 D Glen Cove Road	Carle Place, New York	Brent Associates, Inc.

**CERTIFICATE OF SERVICE**

On July 21, 2010, the *OBJECTION OF ATLAS PARTNERS, LLC AND BRENT MAKO REAL ESTATE GROUP TO DEBTORS' MOTION FOR ENTRY OF AN ORDER SHORTENING TIME OF NOTICE WITH RESPECT TO A HEARING ON DEBTORS' REQUEST FOR AN ORDER (A) APPROVING BIDDING PROCEDURES FOR THE SALE TO THE HIGHEST BIDDER, (B) APPROVING CERTAIN BIDDER PROTECTIONS AND (C) SCHEDULING A FINAL HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF* was filed and served upon the parties receiving CM/ECF notice including those parties appearing and requesting service.

*/s/ Vikki Bollettino*  
Vikki Bollettino