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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
JENNIFER CONVERTIBLES, INC., *et al.*[1]	)	Case No. 10-13779 (ALG)
Debtors.	)	(Jointly Administered)

REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN FURTHER SUPPORT OF THE COMMITTEE'S MOTION FOR AN ORDER DIRECTING ORAL EXAMINATIONS AND PRODUCTION OF DOCUMENTS PURSUANT TO BANKRUPTCY RULE 2004

The Official Committee of Unsecured Creditors (the "Committee") of Jennifer Convertibles, Inc., *et al.*, the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, Kelley Drye & Warren LLP, hereby submits this reply (the "Reply") in support of the motion (the "Motion")[2] of the Committee for an order directing oral examinations and production of documents pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and to respond to the objections filed by Harley Greenfield (the

[1] The Debtors in these chapter 11 cases are: (i) Jennifer Convertibles, Inc.; (ii) Jennifer Convertibles Boylston MA, Inc.; (iii) Jennifer Chicago Ltd.; (iv) Elegant Living Management, Ltd.; (v) Hartsdale Convertibles, Inc.; (vi) Jennifer Management III Corp.; (vii) Jennifer Purchasing Corp.; (viii) Jennifer Management II Corp.; (ix) Jennifer Management V Ltd.; (x) Jennifer Convertibles Natick, Inc.; (xi) Nicole Convertibles, Inc.; and (xii) Washington Heights Convertibles, Inc.

[2] Docket Entry No. 495.

"Greenfield Objection")[3] and the Reorganized Debtors (the "Debtors' Objection").[4] In support of this Reply, the Committee respectfully states as follows:

INTRODUCTION

1. The Committee's Motion seeks to obtain documents, information and the authority to conduct examinations that the Debtors agreed in December 2010 to provide to the Committee. Had the Debtors not promised to voluntarily cooperate with the Committee's informal requests for documents and examinations and informed the Committee in December 2010 or in the months that followed that they would not cooperate, the Committee would have filed its Motion in December 2010. Instead, only on the eve of confirmation did the Debtors inform the Committee that they would not comply with their prior agreement, necessitating the filing of the Motion.

2. The Committee is unquestionably entitled to the relief sought in the Motion in connection with its investigation of potential causes of action against the Debtors' directors and officers (the "D&O Action"). The D&O Action is property of the Debtors' estates which is now assigned to the Jennifer Convertibles Litigation Trust ("Trust") as part of the consideration that general unsecured creditors will receive under the Plan. The results of the document review and examinations will aid the Trust in determining whether to pursue the D&O Action and, if it does, file a well-pleaded complaint sufficient to withstand any potential motion to dismiss by the directors and officers. Without the documents and information, the Trust can only base its decision and draft its complaint using the Debtors' publicly available information concerning the transactions and relationship between Jara and the Debtors.[5]

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[3] Docket Entry No. 502.

[4] Docket Entry No. 505.

[5] Terms not defined herein shall have the meaning ascribed to them in the Motion.

3. In connection with the negotiation of the Plan, the Committee agreed to fund the Trust with only $100,000 because the Debtors agreed to provide the Committee, prior to the Effective Date, with documents, information and examinations regarding potential causes of action that the Trust could bring, including the D&O Action. Notwithstanding the Debtors' agreement, the Debtors, Mr. Abada and Mr. Greenfield now have refused to cooperate, unfairly shifting the costs of any document review and examinations to the Trust. That was not the agreement and will now cause undue prejudice and hardship to the cash-poor Trust and the Debtors' general unsecured creditors.

4. The Committee has endeavored since its formation to preserve potentially valuable assets that will ultimately be distributed to the Debtors' general unsecured creditors, including the D&O Action. The Trust should not be prejudiced in pursuing such actions as a result of the Debtors' refusal to abide by their prior agreement. Whether it be the Committee or the Trust pursuing the discovery sought in the Motion, the Reorganized Debtors should bear the expense that the Debtors would have borne had the Debtors lived up to the agreement they made.

THE RELIEF REQUESTED IS APPROPRIATE UNDER BANKRUPTCY RULE 2004

5. As a general proposition, Bankruptcy Rule 2004 examinations are appropriate for revealing the nature and extent of the bankruptcy estate and for discovering assets, examining transactions, and determining whether wrongdoing has occurred. *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002). As such, courts have acknowledged that Bankruptcy Rule 2004 examinations are "broad and unfettered and in the nature of fishing expeditions." *Id.* Furthermore, as this Court determined in *In re Recoton Corp.*, 307 B.R. 751, 756 (Bankr. S.D.N.Y. 2004), the Committee is expressly authorized to investigate the acts, conduct, assets, liabilities and financial condition of the debtors under sections 1103 of the

Bankruptcy Code and, in connection therewith, it has long been held proper to examine a debtor's existing or former officers to investigate potential causes of action against them. *Id.* at. 756 (*citing In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939)).

6. Here, the Committee's requested documents, information and examinations fall squarely within these parameters and therefore is "*prima facie* consistent with the Rule's above-stated purposes of allowing the Committee to obtain information necessary to determine whether claims beneficial to the estates exist and whether to pursue such claim." *Recoton*, 307 B.R at 756. Accordingly, the Committee's request for documents, information and examinations are completely appropriate under the circumstances.

I. The Court Has Jurisdiction to Hear the Motion and Order Bankruptcy Rule 2004 Discovery

7. The Greenfield Objection incorrectly argues that post-confirmation Bankruptcy Rule 2004 examinations should be limited to matters solely related to the modification or revocation of a confirmed plan.[6] Courts have held otherwise. Indeed, post-confirmation examinations may be conducted concerning issues that the bankruptcy court still has power to entertain and the administration of the estate post-confirmation. *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 515 (Bankr. E.D.N.Y. 1991); *In re Express One International, Inc.*, 217 B.R. 215, 216-17 (Bankr. E.D. Tex. 1998); *In re Bellville*, 2002 WL 31761279 at *2 (Bankr. D. Vt. Aug. 9, 2002). It has long been recognized that the bankruptcy court's jurisdiction continues post-confirmation. *In re Cinderella Clothing Industries, Inc.*, 93 B.R 373, 376 (Bankr. E.D. Pa. 1988); *In re Lobard-Wall, Inc.*, 44 B.R. 928, 934-35 (Bankr. S.D.N.Y. 1984). For example, in *In re Daisytek, Inc.*, 323 B.R. 180 (N.D. Tex. 2005), the District Court upheld the bankruptcy court's ruling that it had jurisdiction to authorize the post-confirmation

[6] Greenfield Objection at pg. 6.

Bankruptcy Rule 2004 discovery of the debtors' pre-petition auditor that was sought by the creditors' trust, created by the plan. *Id*. at 185-86. Under the plan, the creditors' trust had been transferred the authority to investigate and bring claims and causes of action for the benefit of general unsecured creditors. *Id*. at 185. The creditors trust sought the Bankruptcy Rule 2004 examination to investigate whether facts might exist to support future claims against the auditor. *Id*. at 183-84. The district court held that jurisdiction was appropriate over the objection of the auditor that the court lacked jurisdiction because the investigation did not relate to the post-confirmation administration of the estate. *Id.* at 184.

8. Here, Article XIII of the Plan gives the Court broad jurisdiction, notwithstanding entry of the confirmation order and the occurrence of the effective date, over "all matters arising out of, arising in or related to" the Debtors' Chapter 11 cases, the Plan and the confirmation order.[7] This explicitly includes jurisdiction to: (i) hear and determine motions, applications, adversary proceedings, contested matters and other litigated matters pending on, filed on or commenced after the effective date, (ii) decide any claims or disputes which may arise from, or be connected with the transactions contemplated by the Litigation Trust Agreement; (iii) recover all property of the Debtors' estates; and (iv) hear any other matter not inconsistent with the Bankruptcy Code.

9. The Motion and requested documents, information and examinations are directly tied to the Committee's efforts, as authorized by the Plan and the Litigation Trust Agreement, to recover property of the Debtors' estates, through the investigation and prosecution of the D&O Action, for distribution to unsecured creditors. The Motion, therefore, properly

[7] Plan at § 13.01.

seeks an investigation of matters that the Court retains jurisdiction over and, in the event that a litigation is commenced, will preside over.

II. The Requested Bankruptcy Rule 2004 Discovery is Permissible

10. Further, contrary to the Greenfield Objection's contentions, discovery under Bankruptcy Rule 2004 is permissible even after confirmation of the Plan. While the Greenfield Objection argues that the Motion should be denied because the Committee cannot obtain "post-confirmation discovery,"[8] it mischaracterizes the Committee's Motion and seeks to improperly elevate form over substance. Indeed, in December 2010, the Debtors promised the Committee the requested documents, information and examinations. The Motion was only necessitated because, on the eve of confirmation of the Plan, the Debtors informed the Committee that they would not produce the requested documents and information or submit to examinations after previously agreeing to do so. The Debtors' gamesmanship – using the entry of the confirmation Order to their advantage – to bar the Committee from the full breadth of Bankruptcy Rule 2004 should not be permitted.

11. Both the Greenfield Objection and the Debtors' Objection further argue that the Motion should be denied because Bankruptcy Rule 2004 cannot be used to preempt the normal rules of discovery in an adversary proceeding or other post-confirmation litigation.[9] While the Greenfield and Debtors' Objections contend that the Committee or Trust should have filed a complaint and pursued discovery in the context of an adversary proceeding,[10] the directors and officers would likely have filed a motion to dismiss the complaint on the grounds that it does not sufficiently plead facts and causes of action against them. The documents, information and

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[8] Greenfield Objection at pg. 6.

[9] Greenfield Objection at pg. 8-9; Debtors' Objection at ¶20.

[10] *Id*.

examinations sought by the Committee will assist the Trust in assessing any discovered facts and drafting a well-pleaded complaint, as required by Rule 8 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7008. *See, e.g., Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Official Committee of Unsecured Creditors of Hydrogen LLC v. Blomen, et al. (In re Hydrogen LLC)*, No. 08-14139, 2010 WL 1609536 (Bankr. S.D.N.Y. Apr. 20, 2010).

12. Accordingly, the Committee's request for documents and examinations is entirely appropriate in these circumstances.[11] Indeed, in *Recoton*, this Court authorized a committee's Bankruptcy Rule 2004 examination of former directors and officers of the debtors in order to determine whether potential claims existed against them or others in favor of the debtors and their estates. *In re Recoton*, 307 B.R. at 755. In that case, this Court rejected the argument of the former directors and officers that the Bankruptcy Rule 2004 motion was an impermissible attempt to obtain discovery relating to upcoming litigation certain to be brought by the committee. *Id.* at 755-56.

13. Moreover, Bankruptcy Rule 2004 requires that the court balance the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination. *In re Drexel Burnham Lambert Group, Inc.*, 132 B.R. 702, 712 (Bankr. S.D.N.Y. 1991). The need to investigate the 2009 Transactions and the relationship between Jara and Debtors outweighs any interest of Mr. Greenfield articulated in the Greenfield Objection. Without the information sought by the Committee, the Trust may not be able to ascertain whether sufficient facts exist to draft a well-pleaded complaint and commence a litigation that could provide substantial recoveries for the general unsecured creditors. On the

[11] *See also* Motion at ¶¶ 29-30.

other hand, Mr. Greenfield faces little to no risk from the investigation and to cooperate with the requested examination. Indeed, as part of the deal struck by the Committee, the Debtors and Mengnu, as embodied in the Plan, the Trust has waived any right of collection against the Debtors in connection with any D&O Action that may be commenced.

III. The Debtors' Tactics Have Unduly Prejudiced the Committee and Unsecured Creditors

14. The Greenfield Objection incorrectly asserts that the Committee is engaging in stalling tactics to maximize strategic advantage[12] by having waited to file the Motion. The timing of the Motion, however, was dictated by the Debtors' continued insistence that they would cooperate with the Committee. Tactically, the Committee would have been better off filing its Motion in December 2010. Yet, based upon the Debtors' agreement, the Committee chose not to do so in order to save the cash-strapped Debtors the expense. The Committee has gained no strategic advantage by taking the Debtors at their word. In fact, it is the Committee that is being unduly prejudiced by the Debtors' stalling tactics, putting the general unsecured creditors at risk of having to bear the costs associated with the document review and examinations that the Debtors previously promised would occur prior to the Effective Date.

15. Finally, the Greenfield Objection states that the relief requested in the Motion is unwarranted because Mr. Greenfield will be a consultant of the Debtors going forward and has agreed to reasonable cooperation in any litigation. This is exactly the cooperation that was promised to the Committee in December 2010, the lack of which forced the Committee to file the Motion. The Committee has been willing to work with Mr. Abada and Mr. Greenfield to schedule mutually convenient times for their examinations. The Committee also has no

[12] Greenfield Objection at pg. 7.

objection to counsel for Mr. Abada or Mr. Greenfield being present at any such examination. However, the cost of the refusal to cooperate by the Debtors, Mr. Abada and Mr. Greenfield should not be borne by the general unsecured creditors. All costs associated with any document review and the examinations should be paid by the Reorganized Debtors, as would have occurred if the Debtors had lived up to the bargain they struck with the Committee in December 2010.

CONCLUSION

16. For the reasons set forth herein and in the Motion, the Committee respectfully request that the Court overrule the Greenfield Objection and the Debtors' Objection and grant the relief requested in the Motion.

Dated: New York, New York
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