

Hearing Date: May 4, 2011
Hearing Time: 10:00 a.m.

SANDAK HENNESSEY & GRECO LLP

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Marc J. Kurzman, Esq.
Susan R. Briggs, Esq.

Attorneys for Acadia Cortlandt, LLC

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

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

PLEASE TAKE NOTICE that on **May 4, 2011 at 10:00 a.m.**, Acadia Cortlandt, LLC (“Acadia”), by and through its undersigned attorneys, will move before the Honorable Allan L. Gropper, United States Bankruptcy Judge, in the United States Bankruptcy Court for the

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. (7913); (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).

Southern District of New York, located at One Bowling Green, New York, New York 10004-1408, or as soon thereafter as counsel can be heard, for permission to file a late Objection to the Debtors' Amended Cure Schedule. Acadia will further move the Court to sustain Acadia's Objection to the Amended Cure Schedule and to enter an Order directing Reorganized Debtor Jennifer Convertibles, Inc. to cure its default under its Lease with Acadia for non-residential real property by making immediate payment to Acadia of outstanding post-petition rent.

PLEASE TAKE FURTHER NOTICE that any responses or objections to Acadia's Motion must be in writing, conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, shall be filed electronically with the Bankruptcy Court in accordance with General Order M-399, and shall be served upon (i) Sandak Hennessey & Greco, LLP, 707 Summer Street, Stamford, CT 06901, Attention: Susan R. Briggs, and (ii) Office of the United States Trustee, 33 Whitehall Street, 21st Floor, New York, NY 10004, Attention: Nazar Khodorovsky, in order that they are received no later than **April 29, 2011 at 4:00 p.m.**

Dated: Stamford, Connecticut
April 13, 2011

SANDAK HENNESSEY & GRECO, LLP

By: /s/ Susan R. Briggs

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In re:	: Chapter 11
	: :
JENNIFER CONVERTIBLES, INC., <i>et al.</i> , ²	: Case No. 10-13779 (ALG)
	: :
Reorganized Debtors.	: (Jointly Administered)
	: :
	: :
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**MOTION OF ACADIA CORTLANDT, LLC FOR PERMISSION TO FILE A
LATE OBJECTION TO THE DEBTORS’ AMENDED CURE SCHEDULE, AND
REQUESTING THE COURT TO SUSTAIN ACADIA’S OBJECTION AND TO ENTER
AN ORDER DIRECTING JENNIFER CONVERTIBLES, INC. TO CURE ITS
DEFAULT UNDER THE LEASE BY MAKING IMMEDIATE PAYMENT OF
OUTSTANDING POST-PETITION RENT**

Acadia Cortlandt, LLC (“Acadia”), by and through its undersigned counsel, hereby
moves this Court for permission to file a late Objection to the Debtors’ Amended Cure Schedule.

² 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. (7913); (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).

Acadia further requests this Court to sustain Acadia's Objection and to enter an Order directing the Reorganized Debtor, Jennifer Convertibles, Inc., to cure its default under its Lease with Acadia for non-residential real property by making immediate payment to Acadia of outstanding post-petition rent.

In support of its Motion, Acadia states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157. In addition, Section 13.01 of the Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and its Affiliated Debtors dated January 24, 2011, as amended (the "Amended Plan") states that this Court shall retain exclusive jurisdiction of all matters arising out of, in or related to these cases to the fullest extent permitted by applicable law.

2. This Motion is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

3. By Lease dated as of December 19, 1997 (the "Master Lease"), Jennifer Peekskill, Inc. leased premises in the Cortlandt Town Center in the Town of Cortlandt, New York (the "Original Premises") from Cortlandt Town Center Limited Partnership (the "Original Landlord"). Relevant excerpts of the Master Lease are filed herewith as Exhibit "A".

4. The Master Lease was amended by (a) the First Amendment to Lease dated as of March 13, 2009 between Acadia (the successor-in-interest to the Original Landlord) and

Jennifer-Peekskill, Inc., and (b) a Letter Agreement dated February 25, 2010 between Acadia and Jennifer-Peekskill, Inc.

5. By Assignment and Assumption of Lease dated as of May 17, 2010, Jennifer-Peekskill, Inc. assigned its interest under the Master Lease, as amended, to Jennifer Convertibles, Inc. A copy of the Assignment and Assumption of Lease is filed herewith as Exhibit “B”.

6. Following assignment of the Master Lease to Jennifer Convertibles, Inc., the Master Lease was further amended (a) by the Second Amendment to Lease dated as of May 17, 2010 between Acadia and Jennifer Convertibles, Inc. (the “Second Amendment to Lease”), and (b) by a Letter Agreement dated July 28, 2010 (ten days after the Debtors filed their Chapter 11 petitions) from Acadia to Jennifer Convertibles, Inc. A copy of the Second Amendment to Lease is filed herewith as Exhibit “C”. The Second Amendment to Lease provided, *inter alia*, for the relocation of Jennifer Convertibles, Inc. from the Original Premises to new premises within the Cortlandt Town Center (the “New Premises”).

7. The Master Lease, as amended, will hereinafter be referred to as the “Lease”.

8. On July 18, 2010, Jennifer Convertibles, Inc. and its affiliated debtors (the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York and continued the operation of their respective businesses as Debtors-in-possession.

9. In connection with formally assuming the leases for the stores which the Debtors would continue to operate after emerging from bankruptcy, the Debtors filed an Amended Cure Schedule for Assumed Executory Contracts and Unexpired Leases on January 13, 2011 (the

“Amended Cure Schedule”). The notice accompanying the Amended Cure Schedule (the “Cure Notice”) stated that objections to the cure amount listed on the Amended Cure Schedule were to be filed within twenty (20) days of the date of the Cure Notice, which was February 2, 2011.

10. On February 9, 2011, the United States Bankruptcy Court for the Southern District of New York entered an order confirming the Amended Plan. The Amended Plan became effective on February 22, 2011.

FACTS RELEVANT TO ACADIA’S MOTION

11. In accordance with the Lease, Jennifer Convertibles, Inc. (hereinafter, “Jennifer”) was obligated to commence paying rent to Acadia ninety (90) days from the date Acadia delivered possession of the New Premises to Jennifer. *See* Second Amendment to Lease, Paragraph 8(A).

12. Pursuant to the Delivery Date Notice dated August 17, 2010, Acadia delivered possession of the New Premises to Jennifer, with Landlord’s Work (as defined in the Second Amendment to Lease) substantially completed, as of August 27, 2010. *See* Affidavit of Robert Masters, Senior Vice President of Acadia (“Masters Affidavit”), filed herewith as Exhibit “D”, at paragraph 4. A copy of the Delivery Date Notice is filed herewith as Exhibit “E”.

13. Accordingly, Jennifer was obligated to commence paying rent to Acadia on November 25, 2010, which was ninety (90) days after Acadia delivered possession of the New Premises to Jennifer. Masters Affidavit, paragraph 5.

14. Jennifer’s obligation to commence paying rent for the New Premises was not conditioned upon Jennifer’s occupancy of the New Premises or upon the issuance of occupancy

permits,³ or upon the opening or operation of Jennifer's business in the New Premises; rather, in accordance with the Lease, it was an unconditional obligation dependent only upon the transfer of possession of the New Premises from Landlord to Tenant. *See* Second Amendment to Lease, paragraph 8(A).

15. Jennifer accepted delivery of the New Premises pursuant to the Delivery Date Notice and thereafter commenced preparing the New Premises for the opening and operation of its store ("Tenant's Work"). Masters Affidavit, paragraph 6.

16. In connection with the Lease, Acadia and Jennifer established a successful course of dealing prior to the Debtors' bankruptcy and continued to have an open dialogue thereafter regarding Tenant's Work at the New Premises and Jennifer's plans to open and operate its business at the New Premises. Masters Affidavit, paragraph 7. By email dated October 18, 2010, Jennifer notified Acadia that it was ready to begin Tenant's Work in the New Premises. Masters Affidavit, paragraph 8. Jennifer continued to keep Acadia apprised of its progress at the New Premises. Masters Affidavit, paragraph 9. Jennifer finished Tenant's Work and opened for business at the New Premises on January 13, 2011, and received its Certificate of Occupancy on January 20, 2011. Masters Affidavit, paragraph 10.

17. Because Jennifer made it clear to Acadia that it was preparing the New Premises for its business and would operate the New Premises as a Jennifer Convertibles store, Acadia did not hire bankruptcy counsel to monitor the Debtors' bankruptcy but rather dealt directly with

³ Pursuant to the Lease, it is Tenant's responsibility to obtain all certifications, including a certificate of occupancy, with respect to the New Premises. *See* Second Amendment to Lease, Paragraph 10, pp. 10-11, and Exhibit 2, Landlord's Work and Tenant's Work. *See also* Master Lease, Article III, p. 9.

Jennifer on all issues concerning the Lease. Masters Affidavit, paragraph 11. Thus, when Jennifer failed to pay rent to Acadia for the period commencing on November 25, 2010 in accordance with its obligations under the Lease, Acadia attempted to contact Jennifer's bankruptcy counsel to resolve the issue of outstanding rent, but to no avail. Masters Affidavit, paragraph 12.

18. Due to a personnel termination in the legal department at Acadia on or around the date of the Cure Notice, Acadia was unaware that it had received the Cure Notice. Masters Affidavit, paragraph 13. Thus Acadia never filed an objection to the cure amount listed on the Amended Cure Schedule for the Lease – which the Debtors listed as \$0, even though Jennifer, as a party to the Lease, was fully aware that the proper cure amount as of January 13, 2011 was \$36,660, representing two (2) months outstanding rent under the Lease. Masters Affidavit, paragraph 14.

19. By Invoice dated February 1, 2011, mailed on or around January 23, 2011 (the "Invoice"), Acadia billed Jennifer \$54,989.83 in back rent and related charges for the three (3) month period commencing on November 25, 2010.⁴ Masters Affidavit, paragraph 15. A copy of the Invoice is filed herewith as Exhibit "F". Jennifer did not object to the Invoice. Masters Affidavit, paragraph 15.

20. Although Jennifer did not object to the Invoice, Jennifer did not remit payment of the outstanding rent to Acadia. Accordingly, in early February 2011, Acadia engaged the undersigned counsel to pursue payment through this Court of outstanding post-petition rent due

⁴ In accordance with the Lease, rent is payable in advance. *See* Master Lease, Section 2.1.

under the Lease. Masters Affidavit, paragraph 16. At that time, Acadia was still unaware that the Cure Notice had been served. Masters Affidavit, paragraph 16.

21. The undersigned Counsel attempted to resolve this matter with Jennifer's bankruptcy counsel by telephone during the month of February, but was unsuccessful. Jennifer's bankruptcy counsel claimed that no rent was due to Acadia under the Lease but never mentioned the Cure Notice or claimed that Acadia's claim was barred by operation of any orders entered by this Court.

22. By email dated March 3, 2011 from the undersigned counsel to Jennifer's bankruptcy counsel, Acadia made demand upon Jennifer for the payment of back rent and related charges in the amount of \$54,989.83, representing post-petition rent for the period November 25, 2010 through February 28, 2011. As of the date of this Motion, Acadia's demand has not been met.

23. Jennifer commenced paying rent in March 2011.

24. The undersigned counsel discovered the Cure Notice in March 2011 while preparing the instant Motion for an order directing Jennifer to pay Acadia outstanding post-petition rent.

25. Jennifer has been in possession of the New Premises since August 27, 2010 but has failed to pay rent in accordance with the terms of the Lease. Accordingly, Jennifer is in default under the Lease.

RELIEF REQUESTED

26. Acadia requests permission from this Court to file a late Objection to the Debtors' Amended Cure Schedule. Acadia further requests this Court to sustain its Objection and to enter an Order directing Jennifer to cure its default under the Lease by making immediate payment to Acadia of \$54,989.83 in outstanding post-petition rent.

A. This Court Should Permit Acadia to File a Late Objection to the Cure Notice Because Acadia's Failure to File a Timely Objection to the Cure Notice Constitutes Excusable Neglect and Because the Equities of the Situation Strongly Favor Acadia.

27. Section 365(b)(1)(A) of the Bankruptcy Code provides that “[i]f there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee – cures, or provides adequate assurance that the trustee will promptly cure, such default ...” 11 U.S.C. § 365(b)(1)(A).

28. In accordance with Section 11.01 of the Amended Plan,⁵ the Debtors assumed the Lease as of February 9, 2011, the date when the United States Bankruptcy Court for the Southern District of New York entered an order confirming the Amended Plan (the “Confirmation Date”).

29. (a) Even though Jennifer, as a party to the Lease, was fully aware that the proper cure amount under the Lease as of January 13, 2011 was \$36,660, representing two (2) months outstanding rent under the Lease, Jennifer listed the cure amount on the Amended Cure Schedule as \$0. Masters Affidavit, paragraph 14.

⁵ “Subject to the occurrence of the Effective Date, entry of the Confirmation Order by the Bankruptcy Court shall constitute approval of such assumptions and rejections pursuant to sections 365(a) and 1123 of the Bankruptcy Code.”

(b) As of February 2, 2011, the bar date for objections to the Cure Notice, Jennifer was in default under the Lease in the amount of \$54,989.83. Masters Affidavit, paragraph 17. Jennifer, as a party to the Lease and having been sent the Invoice, was fully aware of the amount of outstanding rent under the Lease as of February 2, 2011. Masters Affidavit, paragraph 17.

(c) As of the Confirmation Date, Jennifer was still in default under the Lease in the amount of \$54,989.83. Masters Affidavit, paragraph 18.

30. Acadia's failure to timely object to the Cure Notice constitutes "excusable neglect" under Bankruptcy Rule 9006(b)(1), which provides that "when an act is required ... to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion ... (2) on motion made after the expiration of the specified period permit the act to be done where the failure was the result of excusable neglect." Fed. R. Bankr. P. 9006(b)(1).

31. "The determination [as to what sorts of neglect will be considered 'excusable'] is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include ... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 113 S.Ct. 1489, 1498 (1993). See also *In re Goody's Family Clothing, Inc.*, 443 B.R. 5, 15 (Bkrcty.D.Del. 2010).

32. Danger of Prejudice to Jennifer. Here, there is no danger of prejudice to Jennifer. Within weeks after filing for bankruptcy protection, Jennifer made the business decision to “build out” the New Premises and operate a Jennifer Convertibles store at the Cortlandt Town Center after emerging from bankruptcy. Jennifer’s decision did not turn on Acadia’s response to the Cure Notice. There can be no question that Jennifer is obligated under the Lease to pay rent for the post-petition period of November 25, 2010 to February 28, 2011. Requiring Jennifer to honor its obligation under the Lease will not prejudice Jennifer – but relieving Jennifer of its obligation will create a \$54,989.83 windfall to Jennifer at Acadia’s expense. This Court should not permit Jennifer to obtain the benefit of possession and occupancy of the New Premises without paying rent to Acadia in accordance with the Lease.

33. Length of Delay/Potential Impact on Judicial Proceedings. The bar date for filing objections to the Cure Notice was February 2, 2011; the date of this Motion is less than three (3) months past the bar date. Thus, this factor should not weigh against Acadia. (*See In re Goody’s Family Clothing, Inc.*, 443 B.R. at 16, wherein the Court notes that delays of five (5) months or longer may weigh against a lessor.) Furthermore, even though the Amended Plan was confirmed in the interim, the Court should take into account the fact that, as a party to the Lease, Jennifer was fully aware of its obligations to Acadia under the Lease and that Acadia put Jennifer on notice of Acadia’s claim for outstanding rent by issuing the Invoice dated February 1, 2011. This Court should not allow Jennifer to use the length or potential impact of Acadia’s delay in objecting to the Amended Cure Schedule as an excuse to possess and occupy the New Premises free of charge.

34. Reason for Delay. In *Pioneer*, the United States Supreme Court affirmatively compared Bankruptcy Rule 9006(b) to Federal Rule of Civil Procedure 6(b), noting that “it is clear that ‘excusable neglect’ under Rule 6(b) is a somewhat ‘elastic concept’ and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” *Pioneer*, 113 S.Ct. at 1496. The Supreme Court held that “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Id.*, at 1495. In accordance with the Supreme Court’s reasoning in *Pioneer*, the circumstances set forth above surrounding Acadia’s delay in objecting to the Amended Cure Schedule thus fall within the parameters of “excusable neglect”.

35. Good Faith of Movant. Finally, Acadia has acted in good faith in all of its dealings with Jennifer, by engaging in an ongoing dialog with Jennifer and making every effort to amicably resolve the issue of payment of outstanding rent directly with Jennifer.

36. Thus, in accordance with *Pioneer*, the equities of the situation clearly favor Acadia, and this Court should permit Acadia to file a late objection to the Debtors’ Amended Cure Schedule.

B. This Court Should Sustain Acadia’s Objection to the Amended Cure Schedule and Enter an Order Directing Jennifer to Cure Its Default Under the Lease by Making Immediate Payment to Acadia of \$54,989.83 in Outstanding Post-Petition Rent.

37. The Amended Cure Schedule lists the cure amount for the Lease as \$0, notwithstanding Jennifer’s knowledge, as a party to the Lease, that as of January 13, 2011 (the date of the Cure Notice) the proper cure amount under the Lease was \$36,660, representing two

(2) months outstanding rent under the Lease. Masters Affidavit, paragraph 14.

38. As of February 2, 2011, the bar date for objections to the Cure Notice, the proper cure amount under the Lease was \$54,989.83. Masters Affidavit, paragraph 16. Jennifer, as a party to the Lease and having been sent the Invoice, was fully aware of the amount of outstanding rent under the Lease as of February 2, 2011. Masters Affidavit, paragraph 17.

39. Accordingly, Acadia hereby objects to the Amended Cure Schedule. The proper cure amount for the Lease as of the Cure Notice bar date and the Confirmation Date is \$54,989.83. Masters Affidavit, paragraphs 17 and 18.

40. Jennifer has enjoyed continuous possession of the New Premises from August 27, 2010 through the present. The Lease rate for the period August 27, 2010 through February 28, 2011 was \$54,989.83, representing three (3) months rent under the Lease. Jennifer has failed to pay rent to Acadia for this period and thus is in default under the Lease. Masters Affidavit, paragraph 19.

41. Acadia has no objection to the Debtors' assumption of the Lease except that, pursuant to Section 365(b)(1)(A) of the Bankruptcy Code, Jennifer is obligated to cure all defaults under any lease it chooses to assume.

42. Accordingly, Acadia requests this Court to sustain its Objection to the Amended Cure Schedule and to enter an Order directing Jennifer to cure its default under the Lease by making immediate payment to Acadia of \$54,989.83 in outstanding post-petition rent.

WHEREFORE, Acadia requests this Court to enter an Order:

1. Permitting Acadia to file a late objection to the Amended Cure Schedule;
2. Sustaining Acadia's Objection to the Amended Cure Schedule;
3. Ordering Jennifer to cure its default under the Lease by making immediate payment to Acadia of \$54,989.83 in outstanding post-petition rent; and
4. Granting Acadia such other and further relief as this Court deems appropriate.

Dated: Stamford, Connecticut
April 13, 2011

SANDAK HENNESSEY & GRECO, LLP

By: /s/ Susan R. Briggs

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Attorneys for Acadia Cortlandt, LLC, Landlord

CERTIFICATION OF SERVICE

I certify that on April 13, 2011 a copy of the foregoing Notice of Motion and Motion were filed electronically and served on all counsel/parties who have registered to receive notice of filings in this matter through the Court's ECF filing system, and served by first class mail, postage prepaid, on the following counsel/parties:

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