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Objection Deadline: May 10, 2011 at 4:00 p.m.

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

In re:

JENNIFER CONVERTIBLES, INC., et al.,¹

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**MOTION OF MICO ARCHIBALD PARTNERS, LLC FOR
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

Creditor MICO Archibald Partners, LLC ("MICO" or "Landlord") – by and through its undersigned counsel – hereby requests that this Court enter an order, pursuant to sections

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).

503(b)(1)(A) and 365(d)(3) of title 11 of the United States Code (the "**Bankruptcy Code**"), allowing and directing payment of MICO's administrative expense claim, as further described below. In support of this Motion, MICO states as follows:

I.
JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and pursuant to Section 13.01 of the *Second Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and Its Affiliated Debtors*, dated January 24, 2011 [Docket No. 466], confirmed by this Court on February 9, 2011 [Docket No. 491]. Venue in this district is proper pursuant to 28 U.S.C. § 1409(a). This motion concerns a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested in this Motion are sections 503(b)(1)(A) and 365(d)(3) of the Bankruptcy Code.

II.
BACKGROUND

3. On July 18, 2010 (the "**Petition Date**"), Jennifer Convertibles, Inc. ("**Jennifer**" or "**Tenant**"), along with several affiliated entities (collectively, the "**Debtors**"), filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, which case is pending before this Court as case number 10-13779 (ALG).

4. Jennifer and the Debtors have continued to operate their business and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. MICO, as landlord, and Jennifer, as tenant, entered into a commercial real property lease agreement, dated July 15, 2007, (the "**Lease**") under which Jennifer occupied the

commercial premises located at 2530-A Lindsay Privado, Ontario, California (the "**Premises**"). A true and correct copy of the Lease is attached to this Motion as Exhibit A.

6. Under the Lease, Jennifer agreed and promised to pay all charges for "Base Rent" and "Additional Rent", as those terms are defined in the Lease and as are more specifically described below and in the attached exhibits.

7. Specifically, Section 1.10 of the Lease provides that Base Rent during the period after the Petition Date was to be paid at the rate of \$32,173.93 per month. Under Sections 3.01 and 4.01 of the Lease, all Base Rent and Additional Rent charges are to be paid in full on the first day of each month in advance. Section 4.01 of the Lease also defines Additional Rent as "[a]ll charges payable by Tenant other than Base Rent. . . . The term "rent" or "Rent" shall mean both Base Rent and Additional Rent."

8. Under Section 4.02 of the Lease, Tenant is required to pay, as Additional Rent, all real property taxes assessed against the Premises. Under Section 4.03 of the Lease, Tenant is required to pay, as Additional Rent, all utility charges assessed by Landlord. Under Section 4.05 of the Lease, Tenant is also required to pay, as Additional Rent, all asphalt reserve charges, all painting reserve charges, all roof reserve charges, all common area maintenance charges and all property management charges assessed by Landlord.

9. In addition, Section 12.01 of the Lease requires Tenant to pay any costs, expenses and liability Landlord incurs in any proceeding necessary to protect Landlord's interests under the Lease in a bankruptcy proceeding and to reimburse Landlord for any costs and expenses Landlord incurs in connection with any defaults under the Lease, including without limitation, Landlord's legal fees and costs.

10. Under Section 6.04 of the Lease, Tenant is also required – at Tenant's sole cost and expense – to keep all portions of the Premises "in good condition, order, and repair. . . ." Section 6.04 further provides that "[i]t is the intention of Landlord and Tenant that, at all times during the Lease Term, Tenant shall maintain the Property in an attractive, first-class, and fully operative condition."

11. On August 31, 2010, this Court entered its *Order Approving Expedited Procedures for Rejection of Certain Unexpired Leases of Nonresidential Real Property* [Docket No. 199] (the "**Lease Rejection Procedures Order**").

12. On January 10, 2011, pursuant to the Lease Rejection Procedures Order, Tenant filed its *Notice of Proposed Rejection of Unexpired Leases* [Docket No. 422] (the "**Lease Rejection Notice**") under which it rejected the Lease. Under the terms of the Lease Rejection Procedures Order and the Lease Rejection Notice, the effective date of Tenant's rejection of the Lease was the date Tenant returned the Premises keys to Landlord.

13. On February 8, 2011, Tenant returned the Premises keys to Landlord.

III. RELIEF REQUESTED

14. Section 365(d)(3) of the Bankruptcy Code provides, in pertinent part, that Jennifer shall "timely perform all the obligations...arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). Section 503(b)(1) of the Bankruptcy Code provides that the actual, necessary costs and expenses of the estate shall be paid as administrative expenses of a bankruptcy estate after notice and a hearing. 11 U.S.C. § 503(b)(1). Until February 8, 2011, the Lease was an unexpired lease of nonresidential real

property, and Jennifer was obligated to timely pay, in full, all post-petition Lease charges accruing from the Petition Date through February 8, 2011 (the "**Pre-Rejection Period**").

15. In this case, Jennifer repeatedly failed to pay post-petition Base Rent and Additional Rent required by both the Bankruptcy Code and the Lease. Those unpaid post-petition lease charges total \$146,562.68 – plus unliquidated amounts for attorney's fees and costs (the "**Claim**") – during the Pre-Rejection Period. Landlord now requests that the Court approve the Claim as an administrative expense of the Debtor's estate under the Lease and pursuant to sections 365(d)(3) and 503(b)(1)(A) of the Bankruptcy Code, and direct that the Claim be paid by the Debtors.

16. The Claim includes (1) \$17,519.88 in "Stub Rent" charges for the post-petition period of July 18, 2010-July 31, 2010, (2) \$14,131.95 in post-petition real property taxes invoiced and owed in November, 2010, (3) \$107,125.71 in unpaid base rent and additional rent lease charges for the post-petition and pre-rejection months of December 2010, January 2011, and February 2011, (4) \$7,785.14 for site repair and maintenance defaults occurring during the post-petition and pre-rejection period, and (5) unliquidated amounts for legal costs recoverable under the Lease as additional rent, further broken down as follows:

July 18-July 31, 2010 ("Stub Rent") Lease Charges	\$17,519.88
November 1, 2010 Real Estate Tax Additional Rent Charges	\$14,131.95
December, 2010 Base Rent Charges	\$32,173.93
December, 2010 Painting Reserve Additional Rent Charges	\$204.06
December, 2010 Roof Reserve Additional Rent Charges	\$1,001.42
December, 2010 CAM Additional Rent Charges	\$758.00
December, 2010 Property Management Additional Rent Charges	\$1,040.10

December, 2010 Utility Additional Rent Charges	\$327.00
January, 2011 Base Rent Charges	\$32,173.93
January, 2011 Painting Reserve Additional Rent Charges	\$204.06
January, 2011 Roof Reserve Additional Rent Charges	\$1,001.42
January, 2011 CAM Additional Rent Charges	\$758.00
January, 2011 Property Management Additional Rent Charges	\$1,040.10
January, 2011 Utility Additional Rent Charges	\$327.00
February, 2010 Base Rent Charges	\$32,173.93
February, 2010 Painting Reserve Additional Rent Charges	\$204.06
February, 2010 Roof Reserve Additional Rent Charges	\$1,001.42
February, 2010 CAM Additional Rent Charges	\$758.00
February, 2010 Property Management Additional Rent Charges	\$1,040.10
February, 2010 Utility Additional Rent Charges	\$327.00
Dock and Door Repair Additional Rent Charges	\$2,695.00
Warehouse Ceiling Foil/Lighting Repair Additional Rent Charges	\$4,908.00
HVAC Repair Additional Rent Charges	\$182.14
TOTAL	\$146,562.68

17. More specifically, the rental rate for the Premises during the "Stub Month" period of July 18-July 31, 2010 amounts to \$1,251.42 per day. Accordingly, the total Base Rent owed by Tenant for the 14-day period of July 18-July 31, 2010 amounts to \$17,519.88. A detailed explanation of the "Stub Rent" calculations is attached to this Motion as Exhibit B.

18. In addition, Tenant failed to keep the Premises "in good condition, order, and repair" and Tenant failed to maintain the Premises "in an attractive, first-class, and fully

operative condition" during the post-petition and pre-rejection period as required by Section 6.04 of the Lease. This default under the Lease has forced Landlord to incur \$7,785.14 in Premises maintenance and repair costs. These costs are completely independent from more than \$13,378.55 in additional site restoration and cleaning costs resulting from Tenant's February 8, 2011 rejection of the Lease and abandonment of the Premises. Accordingly, the \$7,785.14 in repair charges are payable by Tenant as administrative costs.

19. Finally, Landlord has incurred—and is currently incurring—legal costs and expenses in protecting its rights to payment of Base Rent and Additional Rent during the Pre-Rejection Period despite its attempts to collect these amounts without having to resort to the filing of this Motion. As those amounts are continuing to accrue, they are currently unliquidated. Notwithstanding the currently unliquidated nature of this portion of the Claim, Landlord is prepared to provide a liquidated amount upon request, but without prejudice to the Landlord's right to assert additional amounts for on-going costs and expenses of this Motion and any other efforts undertaken to collect the Claim amounts.

IV. **ARGUMENT**

20. Section 365(d)(3) of the Bankruptcy Code provides that a debtor "shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any expired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1)." 11 U.S.C. 365(d)(3); *see Omni Partners, L.P. v. Pudgie's Dev. of NY, Inc. (In re Pudgie's Dev. of NY, Inc.)*, 239 B.R. 688, 692 (S.D.N.Y. 1999); *In re P.J. Clarke's Restaurant Corp.*, 265 B.R. 392, 396-97 (Bankr. S.D.N.Y. 2001); *In re Microvideo Learning Systems, Inc.*, 232 B.R. 602, 604 (Bankr. S.D.N.Y. 1999); *In re Wingspread Corp.*, 116

B.R. 915, 925-26 (Bankr. S.D.N.Y. 1990); *see also Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.)*, 27 F.3d 401, 405 (9th Cir. 1994).

21. Under section 365(d)(3), Tenant was required to pay all post-petition Lease charges in full and on time during the Pre-Rejection Period. Because Tenant repeatedly failed to meet its obligations under the Bankruptcy Code and the Lease, Landlord respectfully requests payment of all outstanding Base Rent, Additional Rent and other Lease charges in the amount of \$146,562.68—plus unliquidated amounts for further costs and fees under Section 12.01 of the Lease—as an administrative expense claim.

22. That those administrative amounts include "Stub Rent" for the post-petition period from July 18, 2010 through July 31, 2010 is clear. In *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 365 (Bankr. S.D.N.Y. 2008), the court ruled that tenants were obligated to pay "Stub Rent" "measured on a daily basis as it accrued after the date of the orders for relief . . . until the end of that month." As explained above, those "Stub Rent" charges total \$17,519.88 in this case.

23. Both the Bankruptcy Code and the Lease require payment of each of the post-petition Lease charges making up the Claim filed by MICO. Accordingly, this Claim is payable as an administrative expense of the estate. In making this request, MICO reserves the right to amend its Claim to assert additional and other administrative expense claims against the Tenant, or to make any other claims or assert any defenses in these bankruptcy cases.

V.
LOCAL RULE 9013-1(a) CERTIFICATION

24. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and the legal authorities that support the requested relief. Accordingly, Landlord submits that the Motion satisfies Local Rule 9013-1(a).

VI.
NO PRIOR REQUEST

25. No prior motion for the relief requested herein has been made to this Court or any other court.

VII.
CONCLUSION

WHEREFORE, for all of the reasons set forth above, MICO Archibald Partners, LLC, as Landlord, respectfully requests that the Court grant the Motion and enter an Order pursuant to sections 365(d)(3) and 503(b)(1)(A) of the Bankruptcy Code, substantially in the form attached hereto as Exhibit C, (i) allowing the Claim as an allowed administrative claim in an amount equal to \$146,562.68, plus unliquidated attorneys' fees and costs; (ii) directing the Debtors to pay the Claim in an amount equal to \$146,562.68, plus unliquidated attorneys' fees and costs; and (iii) granting such other and further relief as may be just and proper.

Dated: New York, New York
April 25, 2011

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