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

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

**APPLICATION IN SUPPORT OF REQUEST FOR
PAYMENT OF ADMINISTRATIVE CLAIM**

CROSSPOINTE PLAZA, LLC (“Landlord”) by and through its attorney Wasserman, Jurista & Stolz P.C., respectfully moves before this Court for an Order directing payment of administrative rent by JENNIFER CONVERTIBLES, INC. (the “Debtor,” or “Tenant”) pursuant to 11 U.S.C. §§ 503(b)(1)(A) and 365(d)(3) and in support thereof respectfully sets forth as follows:

BACKGROUND

1. On July 18, 2010 (the "Petition Date"), the Debtor 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).

2. The Debtors have continued to operate their business and manage their properties as debtors-in-possession.

3. The Debtor was the Tenant under a lease dated February 14, 1995 (the "Lease") with the Landlord, which Lease was extended by an Addendum to Lease Agreements (the "Addendum," collectively with the Lease, the "Lease Agreement"), signed in January of 2005.

4. Under the Lease Agreement, the Debtor occupied a portion of the shopping center located at 285-291 Route 18 South, East Brunswick, New Jersey (the "Premises"). Pursuant to the terms of the Lease Agreement (annexed hereto as Exhibit A), Debtor is obligated to pay a fixed annual rent ("Fixed Rent"), as well as "Additional Rent," defined as "any sums other than Fixed Rent...required under the lease." See Exhibit A, Art. I, § 1.01. Additional Rent includes, but is not limited to, taxes, common area maintenance ("CAM"), and hold-over rent ("Hold-Over Rent") in the event the Debtor fails to vacate the Premises at the expiration of the original lease term. See Exhibit A.

5. Pursuant to the Lease Agreement, if the Tenant fails or refuses to vacate the Premises at the expiration of the original lease term, the Lease shall continue and be deemed a month-to-month tenancy terminable on thirty days' notice by either party. See Exhibit A, Art. XX, § 20.01. Moreover, the Tenant shall be obligated to pay all rent required by N.J.S.A. 2A:42-5, which statute provides for double rent to be paid by hold-over tenants.¹

6. Also pursuant to the Lease Agreement, the Landlord is entitled to reasonable attorneys fees resulting from the Landlord's exercise of its rights under the Lease Agreement. See Exhibit A, Art. XVIII, § 18.01(E).

7. The original lease term expired on February 28, 2010.

8. As of the expiration of the original lease term, the Tenant is obligated under the Lease Agreement to pay Fixed Rent and Additional Rent, which includes Hold-Over Rent, on a

¹ Article XXXI, § 31.04, entitled "Governing Law," states that the Lease Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

month-to-month basis for as long as the Debtor remains on the Premises (the “Hold-Over Period”).

9. After the Petition Date, the Debtor continued to operate on the Premises as a hold-over tenant.

10. It was not until November of 2010 that the Debtor surrendered the Premises back to the Landlord.

11. Therefore, as of the date hereof, the Debtor is in arrears under the Lease for obligations arising post-petition during the Hold-Over Period in the amount of \$107,482.32. A summary compilation of the amount due is annexed hereto and made a part hereof as Exhibit B.

12. As early as January 12, 2011, the Landlord’s counsel communicated by e-mail with counsel for the Debtor requesting that the Debtor comply with the provisions of the Bankruptcy Code and the Lease Agreement, and bring its post-petition arrears current. Despite the request, and a number of subsequent communications via email and telephone with Debtors’ counsel, the post-petition arrears still remain unpaid.

RELIEF REQUESTED

13. The Landlord respectfully requests that this Court enter an order allowing the Landlord an administrative expense claim for the full amount of the rental obligation owed by the Debtor under the Lease Agreement, plus unliquidated attorney fees.

BASIS FOR RELIEF

14. Section 365(d)(3) of the Bankruptcy Code clearly mandates that the Debtor is obligated to make all post-petition payments that are due under the Lease and to make those payments in a timely manner. “The trustee shall timely perform all the obligations of the debtor...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).

15. The law is clear that the Debtor's obligation is to perform under the lease for all periods of time from the Petition Date until such time as the lease is rejected. See Urban Retail Properties v. Loews Cineplex Entertainment Corporation, 2002 WL 535479 (S.D.N.Y. 2002); BH S&B Holdings, LLC, 426 B.R. 478 (Bankr. S.D.N.Y. 2010).

16. Pursuant to § 365(d)(4), an unexpired nonresidential lease is deemed rejected, and shall be immediately surrendered to the lessor, if the lease is not assumed or rejected by the earlier of: (i) 120 days after the order for relief; or (ii) entry of an order confirming a plan. Prior to the advent of either of the automatic rejection dates referenced in § 365(d)(4), the Debtor vacated the premises.

17. Under New Jersey law, courts must ascribe contractual terms their "plain and ordinary meaning" and enforce unambiguous terms as written. Keiffer v. Best Buy, 14 A.3d 737, 743 (N.J. 2011).

18. Where a party agrees to pay a specified amount in the event of a breach, the test for enforceability is whether the agreement is "reasonable under the totality of the circumstances" Metlife Capital Fin. Corp. v. Washington Ave. Assoc. L.P., 732 A.2d 493, 499 (N.J. 1999); accord Wasserman's Inc. v. Township of Middletown, 645 A.2d 100, 106 (N.J. 1994).

19. Where no evidence of "fraud, duress or other unconscionable acts" is present, New Jersey courts will enforce that bargained-for clause against a commercially sophisticated party. Metlife, 732 A.2d at 502. The Debtor can advance no such argument considering the Hold-Over Rent provision is codified law in the State of New Jersey.

20. Because "a commercial landlord is generally required to provide ongoing services to the debtor (e.g., the use of its property, utilities, security, and other services) until the lease is assumed or rejected by the debtor, § 365(d)(3) essentially insures that each party will get the benefit of its bargain under the lease." (Urban Retail Properties v. Loews Cineplex Entertainment Corporation, 2002 WL 535479 at *15.

21. Further, courts have consistently held that landlords are entitled to administrative priority for debtor's unpaid postpetition, pre-rejection lease obligations under § 365(d)(3). See BH S&B Holdings, LLC, 426 B.R. 478 (Bankr. S.D.N.Y. 2010) (holding that claims for postpetition, pre-rejection obligations arising under a nonresidential lease are administrative expense claims under § 365(d)(3)); In re Ames Department Stores Inc., 306 B.R. 43, 69 (Bankr. S.D.N.Y. 2004) (section 365(d)(3) was enacted to fix the amount to be paid by debtor tenants pending assumption or rejection at the amount provided in the lease; to require payments to be made at the time required under the lease (and not after confirmation); and to remove the bankruptcy court's power to review the amount to be paid as administrative rent for reasonableness.").

22. In addition, "recovery of attorneys' fees...under § 365 is appropriate where the lease at issue provides for such recovery as an obligation of the debtor." Urban Retail Properties v. Loews Cineplex Entertainment Corporation, 2002 WL 535479 at *26 (noting that such attorneys' fees are afforded administrative priority status).

23. By failing to pay the Fixed Rent and Additional Rent due under the Lease Agreement during the administrative period, the Debtor has failed to comply with its obligations under § 365(d)(3) of the Bankruptcy Code and should be compelled to do so.

WHEREFORE, it is respectfully requested that the Court enter an order as requested by the Landlord pursuant to 11 U.S.C. § 365(d)(3) directing the Debtor's payment of post-petition administrative rent in the amount of \$107,482.32, plus unliquidated attorneys fees to Landlord.

Respectfully submitted,

WASSERMAN, JURISTA & STOLZ, P.C.
Attorneys for *Crosspointe Plaza, LLC*

/s/ STEVEN Z. JURISTA

Dated: November 8, 2011

STEVEN Z. JURISTA