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Hearing Date: November 16, 2011 @ 10:00 a.m.  
Objection Deadline: November 14, 2011 @ 4:00

*Counsel to 376 Boylston Street Realty Trust  
Claimant With Respect To Claim # 315*

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

**376 BOYLSTON STREET REALTY TRUST’S RESPONSE IN OPPOSITION TO  
THE TRUST ADMINISTRATOR’S SECOND (SUBSTANTIVE) OMNIBUS  
OBJECTION TO CERTAIN (A) OVERSTATED CLAIMS;  
(B) NO LIABILITY CLAIMS; AND (C) REJECTION DAMAGES CLAIMS  
(Document 620) AS SAME RELATES TO CLAIM # 315**

NOW COMES, 376 Boylston Street Realty Trust (“Boylston”), by and through its counsel and as and for its Response In Opposition To The Trust Administrator’s Second (Substantive) Omnibus Objection To Certain Claims (Document 620) As Same Relates To Claim #315, states as follows:

A. Background

1. Each of the Debtors herein filed their respective voluntary Petition for Relief (“Petition”) under Chapter 11 of the Bankruptcy Code (“Code”) on July 18, 2010 (the “Petition Date”).

2. Subsequent to the Petition Date, the Debtors continued to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. No trustee or examiner has been appointed in these cases.

4. This Court entered an Order (the "Confirmation Order") confirming the Debtors' Amended Joint Chapter 11 Plan of Reorganization For Jennifer Convertibles, Inc. and its Affiliated Debtors (the "Plan") on February 8, 2011.

5. Pursuant to §9 of the Plan, a trust ("Trust") was established on February 22, 2011, which was the date the Plan became effective (the "Effective Date").

6. The Trust was formed for the purpose of, among other things, pursuing objections to general unsecured claims.

7. Pursuant to section 8.01 of the Plan, on the Effective Date the Debtors were deemed to have assigned to the Trust the exclusive right to object to disputed general unsecured claims.

8. The appointment of the Trust Administrator was approved pursuant to paragraph 17 of the Confirmation Order.

9. Pursuant to section 8.01 of the Plan, the original deadline for the Trust Administrator to file objections to general unsecured claims was August 21, 2011 (180 days after the Effective Date) (the "Objection Deadline"), subject to the right to seek an extension of the Objection Deadline from the Court.

10. The Trust Administrator sought and received an extension of the Objection Deadline from the Court such that the ultimate Objection Deadline was established, pursuant to an Order of this court as October 20, 2011.

B. The Trust Administrator's Objection

11. On October 11, 2011, the Trust Administrator filed his Second (Substantive) Omnibus Objection To Certain Claims (identified as Document 620 on the Docket of this case) (the "Objection") wherein, among other things, the Trust Administrator objected to Claim # 315, the Claim filed by and on behalf of Boylston.

12. The basis upon which the Trust Administrator interposes his Objection to Claim 315 is that the claim allegedly (a) asserts amounts that are higher than the actual amount of liabilities of the Debtors, or (b) asserts charges, fees, interest or other amounts to which the respective claimant is not entitled to under contract or applicable law.

13. The Trust Administrator goes on to allege that the amount of Claim 315 (the "Claim") should be "adjusted" downwards, such that instead of being in an amount equal to the amount for which the Claim was filed (i.e. \$1,038,299.42), the Claim would be in the face amount of \$470,031.66.

14. The Trust Administrator seeks this downward "adjustment" of the Claim while reserving his right to assert other, unspecified objections to this "adjusted Claim in the future.

15. The Trust Administrator offers no basis, authority, citation or other legal basis for the relief sought in connection with the Claim other than the naked assertion that the Claim allegedly (a) asserts amounts that are higher than the actual amount of liabilities of the Debtors, or (b) asserts charges, fees, interest or other amounts to which the respective claimant is not entitled to under contract or applicable law. This is not enough to constitute a valid objection to a claim that was properly and timely filed.

16. A properly filed proof of claim is *prima facie* evidence of the validity and the amount of the claim. The party objecting to the claim has the burden of introducing evidence

sufficient to rebut the presumption of validity. *In re Cluff*, 313 B.R. 323, 337 (Bankr. D. Utah 2004).

17. For the Trust Administrator's Objection to rise to a level where Boylston should be required to respond, the Trust Administrator must first marshal and present evidence, as part of that Objection, that is sufficient to demonstrate a true dispute with probative force equal to the contents of the Claim. *In re Wells*, 51 B.R. 563, 566 (D. Colo. 1985).

18. A proof of claim in a bankruptcy proceeding should be treated as sworn evidence and "...cannot be defeated by mere formal objection..." See *In re Sabre Shipping Corp.*, 299 F. Supp. 97, 99 (S.D.N.Y. 1969).

19. If the objector does not "introduce[] evidence as to the invalidity of the claim or the excessiveness of its amount, the claimant need offer no further proof of the merits of the validity and the amount of the claim." 4 *Collier On Bankruptcy* 502.03[3][f] (rev. ed. 2007).

20. The Trust Administrator's formal, conclusory and unsupported allegation that the Claim allegedly (a) asserts amounts that are higher than the actual amount of liabilities of the Debtors, or (b) asserts charges, fees, interest or other amounts to which the respective claimant is not entitled to under contract or applicable law is, therefore, insufficient to shift the burden of proof as to the validity of the Claim to Boylston and is equally, if not more so, insufficient to support the relief sought in the Objection.

21. The Claim contains and provides adequate documentation and support to establish the Debtor is indebted to Boylston in the amount of at least \$1,038,299.42 for the reasons set forth therein.

C. The Claim Reflects Boylston's Breach of Contract Damages

22. The Claim complies with and satisfies all of the requirements imposed by the Code and the Federal Rules of bankruptcy Procedure in the computation of damages. Rejection of a lease makes the non-debtor party to the lease an unsecured creditor entitled to damages.

*NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984).

23. The non-debtor party has (1) a claim against the debtor for damages for breach of contract, which claim is deemed to have arisen immediately before the filing of the petition and is a prepetition claim, and (2) an expense of administration claim for any benefits received by the debtor in possession prior to rejection. *In re Bridgeport Plumbing Prods., Inc.*, 178 B.R. 563 (Bankr. M.D. Ga. 1994) (creditor may file administrative expense claim for the "reasonable value of the use" of the creditor's property prior to rejection); *In re Hooker Investments*, 145 B.R. 138, 144 (Bankr. S.D.N.Y. 1992); *see also Texaco Inc. v. Louisiana Land and Exploration Co.*, 136 B.R. 658, 663 (M.D. La. 1992) (rejection of the prepetition contract does not cancel the contract; it constitutes a breach of the contract and grants the other party a claim against the estate as an unsecured creditor).

24. The amount of the damages may be controlled by state law or the remedies specified in the contract. *In re Yasin*, 179 B.R. 43, 49-50 (Bankr. S.D.N.Y. 1995) (After rejection parties must resort to state law to determine their rights as a result of the breach.); *In re Independent American Real Estate, Inc.*, 146 B.R. 546, 553 (Bankr. N.D. Tex. 1992) (state law specifies the remedies of a non-breaching party to a contract, to the extent state law does not contravene the Code); *In re Audra-John Corp.*, 140 B.R. 752, 757 (Bankr. D. Minn. 1992) (state law, not federal bankruptcy law, controls remedies available to non-rejecting party upon a breach).

25. Rejection does not extinguish the contract. It merely constitutes a breach of the contract, and the terms of the contract still control the relationship of the parties. *In re Flagstaff Realty Assocs.*, 60 F.3d 1031 (3d Cir. 1995) (Rejection of a lease does not alter the substantive rights of the parties to the lease. Hence, creditor-lessee could rely on lease provision permitting it to make repairs to leased property and deduct the cost of those repairs from its rent payments to the debtor-landlord.); *In re Austin Development Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994) (rejection breaches rather than terminates the contract), *cert. denied*, 115 S. Ct. 201 (1994); *In re Continental Airlines*, 981 F.2d 1450, 1459-61 (5th Cir. 1993) (rejection does not invalidate or extinguish contract); *In re Printronics, Inc.*, 189 B.R. 995, 1000 (Bankr. N.D. Fla. 1995) (Rejection of an executory contract does not terminate the contract, it merely breaches the contract.)

26. The Trust Administrator's Objection to the Claim is facially insufficient as a matter of law, and cannot justify the reduction of the claim sought.

WHEREFORE, 376 Boylston Street Realty Trust prays this Court for the entry of an Order denying the Trust Administrator's Objection to Claim 315 and granting Boylston such additional and further relief as the court deems appropriate.

Dated: New York, New York  
November 14, 2011

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By: 

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