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

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In re:	:	Chapter 11
JENNIFER CONVERTIBLES, INC.,	:	Case No. 10-13779 (ALG)
Reorganized Debtor.	:	
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**MOTION OF BMC GROUP, INC., THE DEBTORS' COURT-APPOINTED  
NOTICING AND CLAIMS AGENT, FOR ENTRY OF AN ORDER  
COMPELLING IMMEDIATE PAYMENT OF ITS FEES  
AND EXPENSES INCURRED IN THESE CHAPTER 11 CASES**

TO: THE HONORABLE ALLAN L. GROPPER,  
UNITED STATES BANKRUPTCY JUDGE

BMC Group, Inc. ("BMC"), the Court-Appointed Noticing and Claims Agent in the Chapter 11 Cases of Jennifer Convertibles, Inc. ("Jennifer Convertibles" or the "Debtor") and its affiliated debtors (together with Jennifer Convertibles, collectively, the "Debtors"), for its Motion for Entry of an Order Compelling Immediate Payment of its Fees and Expenses Incurred in these Chapter 11 Cases (the "Motion"), respectfully represents:

**I. INTRODUCTION**

1. The situation in which BMC finds itself is bizarre and outrageous. As a result of the Debtors' (and their representatives' and/or counsel's) actions, BMC must resort to seeking this Court's intervention in order to receive payment of its post-petition fees and expenses

incurred as the official noticing and claims agent in the Debtors' chapter 11 cases. Pursuant to an Order of this Court, BMC provided integral services to the Debtors throughout their chapter 11 cases - - services which were, indisputably, necessary for the Debtors to confirm their Chapter 11 Plan and successfully reorganize. In violation of this Court's Order and the Debtors' contractual obligations to BMC, however, the Debtors have blatantly and consistently failed to uphold their obligations to BMC.

2. Despite BMC's repeated attempts to collect the amounts owed, since August 2010, the Debtors have not paid in full a single monthly invoice submitted by BMC for its fees and expenses incurred during the Debtors' cases. Indeed, the Debtors have paid an aggregate of *less than one percent (1%)* of the total amount owed to BMC for that time period, while at the same time (upon information and belief) paying their professionals (and other administrative creditors) in full and providing a distribution to the Debtors' general unsecured creditors under the Debtors' Plan. As shown on the summary chart attached hereto as Exhibit A and the monthly invoice summary sheets for the period from August 1, 2010 through December 31, 2011 attached hereto as Exhibit B, the Debtors have paid \$2,113.74 out of a total of \$282,412.27 owed for BMC's services and incurred expenses over that time period.<sup>1</sup> As a result, as of the date hereof, the Debtors collectively owe BMC \$280,298.53 (the "Outstanding Claim"). Of the aggregate Outstanding Claim amount, \$172,753.53 constitute expenses that BMC incurred in advance on behalf of the Debtors (and for which the Debtors have not reimbursed BMC).

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<sup>1</sup> As shown on the attached Exhibit A, the Debtors have paid a total of \$75,000.00 to BMC. That amount represents the total fees incurred and expenses advanced by BMC during the first month of the Debtors' cases (July 2010), as well as \$2,113.74 incurred in August 2010. The Debtors have not paid BMC for any of its fees and expenses since making the partial payment for August 2010.

3. It is outrageous for the Debtors, apparently with the complicity of their retained counsel, to be permitted to breach their undisputed postpetition administrative obligations to BMC, particularly because the Debtors have already reaped the benefit of BMC's services. Accordingly, because the Debtors and their agents and representatives have inexplicably chosen to ignore BMC's "out-of-court" requests for payment, BMC hereby submits this Motion to compel immediate payment by the Debtor of all outstanding and unpaid fees and expenses incurred by BMC. In addition, BMC asks this Court to direct the Debtors to reimburse BMC for all of BMC's legal fees and expenses incurred in connection with BMC's attempts to collect the amounts owed from the Debtors and, if in the Court's judgment, circumstances warrant, sanctions on the Debtors' representatives and counsel.

## **II. RELEVANT FACTUAL BACKGROUND**

4. On July 18, 2010 (the "Petition Date"), the Debtors commenced cases pursuant to chapter 11 of title 11 of the Bankruptcy Code with this Court. 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. On July 23, 2010, an Official Committee of Unsecured Creditors (the "Committee") was appointed in the Debtors' chapter 11 cases.

5. On July 19, 2010, the Debtors filed their *Application Pursuant to 28 U.S.C. § 156(c) For Authorization to Employ and Retain Official Claims and Noticing Agent* [Docket No. 19] (the "Retention Application"), seeking to employ BMC as the Debtors' official claims and noticing agent. In the Retention Application, the Debtors stated that BMC would "provide the most cost effective and efficient service as a claims and noticing agent for these chapter 11 cases..." and that retention of BMC would be both in the best interests of the Debtors' creditors and their estates and necessary to the administration of the Debtors' cases. *See Retention*

*Application*, at ¶ 16. The Debtors acknowledged that BMC's rates were "reasonable and appropriate" and sought authorization to pay BMC's fees and expenses on a monthly basis without the necessity of filing formal fee applications with this Court. *See Retention Application*, at ¶ 18 and ¶ 19.

6. On July 22, 2010, this Court entered the *Order Authorizing Retention and Appointment of BMC Group, Inc. as Claims and Noticing Agent Under 28 U.S.C. § 156(c) and Granting Related Relief* [Docket No. 54] (the "Retention Order"), granting the Debtors' Retention Application and approving the Debtors' retention of BMC on the terms set forth in the Retention Application. In the Retention Order, this Court recognized that retention of BMC was in the best interests of the Debtors' estates and the Debtors' creditors and specifically appointed BMC as the "custodian of court records." *See Retention Order*, at p. 2. Moreover, this Court expressly directed BMC to "perform all related tasks to process the proofs of claim and maintain a claims register," including numerous actions which are typically performed by noticing and claims agents in bankruptcy cases. *See Retention Order*, at pp. 3-5. The Court also authorized the Debtors to pay BMC its fees and expenses on a monthly basis, subject to BMC providing detailed monthly invoices. *See Retention Order*, at p. 5.

7. On December 21, 2010, the Debtors filed their *Amended Joint Chapter 11 Plan of Reorganization of Jennifer Convertibles, Inc. and its Affiliated Debtors* [Docket No. 399] (the "Amended Plan").<sup>2</sup> Under the Amended Plan, holders of general unsecured claims were entitled

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<sup>2</sup> On January 24, 2011, the Debtors filed their Second Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and its Affiliated Debtors [Docket No. 466] (the "Second Amended Plan"). Although the Second Amended Plan was the latest filed version of the Debtor's proposed Plan prior to the confirmation hearing, it was not referenced in the Confirmation Order. As a result, it is unclear which version of the Plan was confirmed. In any event, the difference between the Amended Plan and the Second Amended Plan is immaterial to the relief requested by BMC.

to receive their pro rata share of: (i) the proceeds of a \$1,400,000 one-year secured note, at 3% interest per annum; (ii) the proceeds of a \$950,000, three-year secured note, at 5% interest per annum; (iii) 9.9% of the new common stock of the Reorganized Debtors, and (iv) 70% of the proceeds from a newly-formed litigation trust. Holders of allowed administrative claims against the Debtors were entitled to be paid in full, in cash. On February 9, 2011, this Court entered its *Findings of Fact, Conclusions of Law, and Order Confirming the Amended Joint Chapter 11 Plan of Reorganization of Jennifer Convertibles, Inc. and its Affiliated Debtors* [Docket No. 491] (“Confirmation Order”).

8. On July 5, 2011, the Debtors, by and through their counsel, filed the Debtors’ *First Post-Confirmation Status Report* [Docket No. 599] (the “First Confirmation Report”). Among other things, the First Confirmation Report stated that “the Reorganized Debtors have made distributions as required with respect to all claims that have been allowed thus far.” *See* First Confirmation Report, at ¶ 13. At the time Debtors’ counsel made this statement to this Court, the Debtors owed BMC an aggregate of \$272,470.09<sup>3</sup> for its post-petition fees and advanced expenses.

9. On July 7, 2011, upon the motion of the Reorganized Debtors, this Court entered the *Final Decree Closing Cases of Certain of the Reorganized Debtors* [Docket No. 601] (the “Partial Final Decree”), pursuant to which the chapter 11 cases for all of the Debtors other than Jennifer Convertibles were closed. Presumably this was done in order to avoid paying further United States Trustee fees, or the like. The Partial Final Decree, however, specifically stated that

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<sup>3</sup> This amount represents the amounts owed by the Debtors to BMC through June 2011.

the closing of the closed cases would in no way prejudice the rights of any of the Debtors' claimholders to be paid.

10. Upon information and belief, as of the date hereof, all of the Debtors' professionals, including their counsel, have been paid in full. The Debtors, however, owe BMC \$280,298.53, or more than 99% of the amount invoiced by BMC, for BMC's post-petition fees and advanced expenses from August 2010 through December 2011. Despite repeated inquiries by BMC and the undersigned, neither the Debtors nor their counsel have provided any reason for the Debtors' refusal to pay BMC what it indisputably is owed.

11. In early December 2011, the undersigned contacted Debtors' counsel in an effort to get BMC paid without the need to file the present Motion with this Court. Debtors' counsel basically ignored the undersigned's communications, leaving the undersigned with the impression that counsel was somehow complicit in the failure to pay BMC.

### **III. REQUEST FOR IMMEDIATE PAYMENT OF OUTSTANDING CLAIM**

12. In requesting payment of the Outstanding Claim, BMC is merely asking that the Court direct the Debtor to comply with this Court's Retention Order that the Debtors themselves sought.<sup>4</sup> The clear terms of the Retention Order require the Debtors to pay BMC on a monthly basis upon submission of invoices detailing BMC's incurred fees and expenses. The Debtors have egregiously failed to abide by their obligations thereunder. In failing to do so, the Debtors are acting in direct violation of this Court's Retention Order and are in breach of their obligations to BMC.

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<sup>4</sup> Bankruptcy Code section 105(a) specifically contemplates that a court may use the authority granted under that section "to enforce or implement court orders" and to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *11 U.S.C. § 105(a)*.

13. As shown on the attached Exhibits A and B, the continued failure by the Debtors to compensate BMC for its services and reimburse BMC for its advanced expenses cannot be an oversight. From the outset of the Debtors' cases, BMC provided numerous essential services to, and incurred substantial expenses on behalf of, the Debtors. The Debtors, however, have completely disregarded their obligations to BMC, all while simultaneously paying their other administrative creditors, including their counsel. This appears to be an orchestrated fraud perpetrated by the Debtors against one of their agents that was essential to the Debtors' efforts to reorganize. How else can the Debtors explain their failure to pay less than one percent (1%) of the total amount owed to BMC for the period from August 2010 through December 2011, while at the same time paying their professionals (and other administrative creditors) in full and providing a distribution to the Debtors' general unsecured creditors under the Debtors' Plan?

14. Even if payment of the Outstanding Administrative Claim were not the specific subject of a prior Order of this Court, it is well within this Court's discretion to compel its immediate payment as an administrative expense. *See, e.g., In re Garden Ridge Corp.*, 323 B.R. 136, 143 (Bankr. D. Del. 2005); *see also* 4 COLLIER ON BANKRUPTCY ¶ 503.03 (16th Ed.) (noting that Bankruptcy Code section 503(b) is silent as to the timing of payment of administrative expenses and stating that “[g]enerally courts have held that the timing for payment of administrative claims is a matter to be determined within the discretion of the bankruptcy court.”) (citing *In re Midway Airlines Corp.*, 406 F.3d 229, 54 (4th Cir. 2005); *Varsity Carpet Servs., Inc. v. Colortex Indus., Inc. (In re Colortex Indus., Inc.)*, 19 F.3d 1371, 1384 (11th Cir. 1994); *In re Verco Indus.*, 20 B.R. 664 (B.A.P. 9th Cir. 1982)). In determining whether to award immediate payment, courts have considered the following three factors: (1) prejudice to the

debtor; (2) hardship to the claimant; and (3) potential detriment to other creditors. *Garden Ridge*, 323 B.R. at 143.

15. This analysis is made simple in these cases by the fact that this Court already weighed the harm to the Debtors and other creditors in connection with entering the Retention Order. As a result, the first and the third *Garden Ridge* factors are satisfied. In authorizing the Debtors to retain BMC - - and incur administrative expense obligations to BMC that the Debtors would be required to pay on a monthly basis - - this Court already determined that the services provided by BMC are sufficiently necessary and valuable to, and in the best interest of, the Debtors' estate. It cannot now be said, after BMC played a role in facilitating the Debtors' reorganization (and incurred substantial fees and expenses on behalf of the Debtors), that the Debtors' or any other parties would be harmed by immediate payment to BMC. With respect to the second *Garden Ridge* factor - - harm to BMC - - BMC submits that the circumstances speak for themselves. The equities simply do not permit BMC to remain unpaid while the Debtors and their other administrative creditors are paid in full (and while general unsecured creditors receive a distribution). As all three *Garden Ridge* factors weigh in favor of granting BMC immediate payment, the Court should order the Debtors to pay the Outstanding Claim in full.

#### **IV. WAIVER OF SEPARATE MEMORANDUM OF LAW**

16. As legal authorities are included in the text of this Motion, BMC respectfully requests that the requirement of filing a separate memorandum of law be waived.

#### **V. CONCLUSION**

17. Pursuant to the authority and the reasons cited above, the facts here can lead this Court to only one conclusion - - the Debtors must comply with this Court's Retention Order and immediately pay BMC's claim in full.



WHEREFORE, BMC hereby requests that the Court enter an order (i) compelling immediate payment by the Debtors of (a) all amounts owed to BMC in connection with BMC's services to the Debtors in their chapter 11 cases (including advanced expenses) and (b) all of BMC's legal fees and expenses incurred in connection BMC's attempts to collect on such amounts owed, (ii) imposing sanctions against the Debtors' representatives and/or counsel, as this Court deems appropriate, and (iii) granting such further relief the Court deems just and proper.

Dated: January 24, 2012

Respectfully submitted,

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