

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: _____ :
: :
: CASE NO. 10-13779(ALG)
JENNIFER CONVERTIBLES, INC., :
: :
: CHAPTER 11
Debtor s. :

: :

**RESPONSE OF SCI COBB PLACE FUND, LLC TO TRUST ADMINISTRATOR'S
FOURTH (SUBSTANTIVE) OMNIBUS OBJECTION TO CERTAIN (A) OVERSTATED
CLAIMS; (B) NO LIABILITY CLAIMS; (C) MISCLASSIFIED CLAIMS; (D)
REJECTION DAMAGES CLAIMS; (E) MISCLASSIFIED CLAIMS; AND (F)
OVERSTATED CLAIMS**

COMES NOW, SCI Cobb Place Fund, LLC ("SCI"), holder of Proof of Claim Number 295, by and through counsel, who hereby responds to "Trust Administrator's Fourth (Substantive) Omnibus Objection To Certain (A) Overstated Claims; (B) No Liability Claims; (C) Misclassified Claims; (D) Rejection Damages Claims; (E) Misclassified Claims; and (F) Overstated Claims" ("Fourth Omnibus Objection") as follows:

BACKGROUND FACTS

1.

On or about April 7, 2006 SCI and Jennifer Convertibles, Inc. ("Debtor") entered into a Shopping Center Lease Agreement ("Lease Agreement") for approximately 6,282 square feet of gross leasable area in Cobb Place Shopping Center located at 840 Ernest W. Barrett Parkway, NW, Suite 494, Kennesaw, Georgia 30144 ("Premises"). Attached hereto as Exhibit "A-1" through "A-32" and made a part hereof by reference is a true and correct copy of the Lease Agreement.

2.

On or about June 13, 2006 SCI and Debtor executed a "Lease Commencement Date Agreement" acknowledging and agreeing that:

a) August 6, 2006 was the Rental Commencement Date under the Lease Agreement;
and

b) August 31, 2011 was the expiration date of the Term of the Lease Agreement.

Attached hereto as Exhibit "B-1" through "B-2" and made a part hereof by reference is a true and correct copy of the Lease Commencement Date Agreement.

3.

Under the Lease Agreement Debtor was required to pay its proportionate share of real property and ad valorem taxes ("Taxes") levied or assessed against the land and building comprising Cobb Place Shopping Center.

4.

Under the Lease Agreement Debtor was required to pay its proportionate share of Shopping Center Operating Costs ("CAM" and "Insurance") incurred by SCI in operating, managing, equipping, lighting, repairing, replacing, and maintaining the Common Areas of Cobb Place Shopping Center and incurred in insuring Cobb Place Shopping Center.

5.

On or about March 16, 2010, SCI billed Debtor for \$606.51, that being the balance due from Debtor for its proportionate share of 2009 CAM charges ("Reconciled 2009 CAM").

6.

Pursuant to the Lease Agreement payment of the Reconciled 2009 CAM (\$606.51) charges were due within twenty (20) days of March 16, 2010.

7.

Debtor never made payment of the Reconciled 2009 CAM charges of \$606.51.

8.

Under the Lease Agreement, in the event Debtor's monthly estimated payments of Insurance and Taxes were greater than Landlord's actual Insurance and Tax expenses for Cobb Place Shopping Center, such excess was to be credited to Debtor's next due estimated monthly installment of Insurance and Taxes.

9.

On or about March 16, 2010, SCI issued Debtor a credit of \$84.02 for Debtor's overpayment of its proportionate share of 2009 Insurance charges ("Reconciled 2009 Insurance").

10.

On or about March 16, 2010, SCI issued Debtor a credit of \$296.70 for Debtor's overpayment of its proportionate share of 2009 Taxes ("Reconciled 2009 Taxes").

11.

Pursuant to the Lease Agreement, Debtor's monthly minimum fixed rent for April, May, June, July, and August 2010 was \$10,867.86 per month.

12.

Pursuant to the Lease Agreement, Debtor's monthly estimated CAM for April, May, June, July, and August 2010 was \$731.00 per month.

13.

Pursuant to the Lease Agreement, Debtor's monthly estimated Insurance for April, May, June, July, and August 2010 was \$90.00 per month.

14.

Pursuant to the Lease Agreement, Debtor's monthly estimated Taxes for May, June, July, and August 2010 was \$1,269.00 per month.

15.

After crediting the Reconciled 2009 Insurance and Taxes overpayments to the estimated monthly Insurance and Taxes payments due for April 2010, Debtor's total Rent obligation (the term "Rent" shall include monthly fixed minimum rent, estimated CAM, estimated Insurance, and estimated Taxes) for April 2010 was \$12,577.14.

16.

Pursuant to the Lease Agreement Rent was due on the first day of each month during the term of the Lease Agreement.

17.

Debtor never made payment of the April 2010 Rent totaling \$12,577.14.

18.

Debtor failed to pay any Rent for May or June 2010.

19.

As of July 18, 2010, the date on which the Debtor filed the Petition for Relief in the herein Bankruptcy case, Debtor had not yet paid any of the July 2010 Rent.

20.

On or about August 9, 2010 SCI received a \$12,957.86 payment from Debtor dated August 3, 2010. This payment was applied to administrative post-petition Rent for the period July 19, 2010 through August 31, 2010 totaling \$18,391.86, leaving a balance due for the period July 19, 2010 through August 31, 2010 of \$5,434.00. See Exhibit "E" attached hereto and made a part hereof by reference.

21.

Pursuant to the Lease Agreement, Debtor's monthly minimum fixed rent for September, October, November, and December 2010 was \$11,192.43 per month.

22.

Pursuant to the Lease Agreement, Debtor's monthly estimated CAM for September, October, November, and December 2010 was \$731.00 per month.

23.

Pursuant to the Lease Agreement, Debtor's monthly estimated Insurance for September, October, November, and December 2010 was \$90.00 per month.

24.

Pursuant to the Lease Agreement, Debtor's monthly estimated Taxes for September, October, November, and December 2010 was \$1,269.00 per month.

25.

On or about September 7, 2010 SCI received a \$6,047.00 payment from Debtor dated September 2, 2010. This payment was applied to administrative post-petition Rent balance of \$5,434.00 for the period July 19, 2010 through August 31, 2010. The remaining payment credit of \$613.00 was applied to the administrative post-petition Rent for September 1, 2010 through September 23, 2010 totaling \$10,183.25. See Exhibit "E" attached hereto and made a part hereof by reference.

26.

The current balance due for SCI's administrative post-petition Rent for September 1, 2010 through September 23, 2010 is \$9,570.25. See Exhibit "E" attached hereto and made a part hereof by reference.

27.

On August 31, 2010 this Court entered an "Order Approving Expedited Procedure For Rejection of Certain Unexpired Leases of Nonresidential Real Property" ("Order Rejecting

Leases”). By and through the Order Rejecting Leases, this Court authorized Debtor to reject the leases set forth in a Rejection Notice to be filed by Debtor.

28.

On September 1, 2010 Debtor filed the Rejection Notice, identifying the Lease Agreement between SCI and Debtor as being rejected effective September 14, 2010. However, in the Order Rejecting Leases, this Court ruled that the effective date of the rejection of a lease shall not occur until (i) the Debtors unequivocally relinquish control of the premises to the affected landlords in writing of the Debtors’ surrender of the premises or by turning over keys or “key codes” to the affected landlord.

29.

Debtor never provided SCI with any written notice that Debtor was unequivocally relinquishing control of the Premises. Debtor did however return the keys to the Premises to SCI on September 23, 2010. Accordingly, the effective date of the rejection of the Lease Agreement was September 23, 2010 and not September 14, 2010.

30.

Pursuant to the Lease Agreement, Debtor’s monthly minimum fixed rent for January, February, March, April, May, June, and July 2011 was \$11,192.43 per month.

31.

Pursuant to the Lease Agreement, Debtor’s monthly estimated CAM for January, February, March, April, May, June, and July 2011 was \$754.00 per month.

32.

Pursuant to the Lease Agreement, Debtor’s monthly estimated Insurance for January, February, March, April, May, June, and July 2011 was \$81.00 per month.

33.

Pursuant to the Lease Agreement, Debtor's monthly estimated Taxes for January, February, March, April, May, June, and July 2011 was \$1,269.00 per month.

34.

On October 25, 2010 SCI filed a Proof of Claim with itemizations attached thereto. This Proof of Claim was assigned Claim Number 295. Attached hereto and made a part hereof by reference as Exhibit "C-1", "C-2", and "C-3" is a true and correct copy of SCI's Proof of Claim and corresponding itemizations.

35.

By and through the attached Proof of Claim, SCI asserted an unsecured claim totaling \$211,121.82, *of which*, \$9,570.25 was claimed to be an administrative priority claim. Accordingly, the "net" unsecured claim asserted by SCI in the attached Proof of Claim was \$201,551.57.

36.

By and through the herein response, SCI now asserts an unsecured claim totaling \$195,941.14, plus an administrative claim of \$9,570.25, for a total amount of \$205,511.39. **See** Exhibits "D" and "E" attached hereto and made a part hereof by reference.

UNSECURED REJECTION DAMAGES CLAIM
IS WITHIN 11 U.S.C. 502(B)(6) CAP

Attached to the herein response to the Fourth Omnibus Objection as Exhibit "E" is a true and correct "Itemization of Unsecured Claim" reflecting \$195,941.14 as being the accurate amount of SCI's unsecured claim. This is less than the amount claimed in the Proof of Claim (Exhibits "C-1" through "C-3" attached hereto), but \$3,211.24 more than the \$192,729.90 proposed by the Trust Administrator in the Fourth Omnibus Motion. The claim amount of \$195,941.14 is not in excess of the statutory cap imposed.

SCI's claim for damages, related to Debtor's rejection of the Lease Agreement, is limited to the Rent reserved in the Lease Agreement for *the greater of* one year, *or* fifteen percent (15%) of the remaining term of the Lease Agreement not to exceed three (3) years. 11 U.S.C. 502(b)(6). On September 23, 2010, the effective date of rejection of the Lease Agreement, the remaining term of the Lease Agreement was less than one (1) year. Accordingly, the Rent reserved for the remainder of the lease term is *greater than* fifteen percent (15%) of the remaining lease term. This "future rent" or "rejection damages" total \$149,317.91. See Exhibit "D" attached hereto and made a part hereof by reference.

In addition to future rent reserved in the lease, 11 U.S.C. 502(b)(6) expressly includes any unpaid rent due at the time the bankruptcy case is filed or the lease is terminated, whichever is sooner, to be included as part of the claim. Accordingly, included as a component of SCI's unsecured claim is Rent that was due as of July 18, 2010, the date Debtor filed its Petition for Relief. The amount of Rent due from Debtor as of July 18, 2010 was \$46,623.23. See Exhibit "D" attached hereto and made a part hereof by reference.

The accurate and proper amount of SCI's claim, as a result of Debtor's September 23, 2010 rejection of the Lease Agreement is \$195,941.14. See Exhibit "D" attached hereto and made a part hereof by reference. This amount is computed strictly in compliance with 11 U.S.C. 502(b)(6) and should be allowed by this Court. As such, this Court should overrule the Trust Administrator's objection and allow SCI an unsecured claim, separate from its administrative claim, in the amount of \$195,941.14.

OVERSTATED LANDLORD CLAIMS

In the Fourth Omnibus Objection, the Trust Administrator has objected to SCI's Proof of Claim alleging that the amount is overstated in that it fails to disclose whether SCI was able to mitigate its damages by re-letting the Premises. However, under applicable state and bankruptcy

law, SCI has no obligation to mitigate its damages. As such, SCI's unsecured claim (\$195,941.14) and administrative claim (\$9,570.25) are not overstated and should be allowed in such amounts.

The Lease Agreement provides "[t]he laws of the state in which the Shopping Center is located shall govern the validity, performance and enforcement of this Lease". See Lease Agreement (Exhibit "A-9" attached hereto). The Premises being the subject of the Lease Agreement is located in Georgia. Under Georgia law, a landlord has no obligation to mitigate its damages. "The general rule is that the duty to mitigate damages set forth in OCGA § 13-6-5 does not apply to lease contracts." *Sirdah v. North Springs Associates, LLLP*, 304 Ga. App. 348, 350 696 S.E.2d 391, 394 (2010). "In Georgia, if a tenant abandons leased premises without authorization prior to the expiration of the term, the landlord is not required to mitigate damages by reletting the premises. Rather, he may allow the premises to remain vacant and hold the tenant responsible for accruing rent." *Allen v. Harkness Stone Co.*, 271 Ga. App. 397, 400 609 S.E.2d 647, 650 (2004).

In *In re Andover Togs, Inc.*, 231 B.R. 521 (Bankr. S.D.N.Y. 1999), the Court was faced with the issue of whether the landlord of property located in New York, had an obligation to mitigate its damages. The *Andover* court concluded that this issue was controlled by state law. In that case, the court found that under New York law, a landlord was not required to mitigate its damages. In addition, the *Andover* court rejected the debtor's argument that in the context of a bankruptcy a landlord should be required to mitigate its damages.

As in *Andover*, this Court should reject the Trustee Administrator's objection that SCI's claim is overstated because it fails to disclose whether SCI has mitigated its damages by reletting the Premises. Since SCI had no obligation to re-let the Premises under Georgia law, whether it has or has not re-let the Premises is irrelevant. As such, this Court should overrule the

Trust Administrator's objection and allow SCI an unsecured claim, separate from its administrative claim, in the amount of \$195,941.14.

ADMINISTRATIVE CLAIM

Finally, *in addition to* its \$195,941.14 unsecured claim, SCI reasserts its administrative claim for post-petition, pre-rejection Rent totaling \$9,570.25. **See** Exhibit "E" attached hereto and made a part hereof by reference.

CONCLUSION

WHEREFORE, SCI prays as follows:

- a) That this Court deny the Fourth Omnibus Objection as to SCI;
- b) That this Court allow SCI an unsecured claim in the amount of \$195,941.14;
- c) That this Court allow SCI an administrative claim in the amount of \$9,570.25;
and
- d) That this Court grant SCI such further and other relief as this Court deems just and proper.

MOSKOWITZ & MARTIN, LLP
One Lakeside Commons
990 Hammond Drive, Suite 990
Atlanta, Georgia 30328
(678) 775-3557
nmoskowitz@mmlawatl.com

/s/ Neil A. Moskowitz
NEIL A. MOSKOWITZ
Attorney for SCI Cobb Place Fund, LLC
Georgia Bar No: 526560

NAM/mm

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: :
: :
: CASE NO. 10-13779(ALG)
JENNIFER CONVERTIBLES, INC., :
: :
: CHAPTER 11
Debtor s. :

:

CERTIFICATE OF SERVICE

I, Neil A. Moskowitz, certify that I am over the age of 18 and that on February 22, 2012, I served a copy of the foregoing RESPONSE OF SCI COBB PLACE FUND, LLC TO TRUST ADMINISTRATOR'S FOURTH (SUBSTANTIVE) OMNIBUS OBJECTION TO CERTAIN (A) OVERSTATED CLAIMS; (B) NO LIABILITY CLAIMS; (C) MISCLASSIFIED CLAIMS; (D) REJECTION DAMAGES CLAIMS; (E) MISCLASSIFIED CLAIMS; AND (F) OVERSTATED CLAIMS on the following persons or entities at the stated addresses, by the indicated method:

VIA EMAIL: jcarr@kelleydrye.com; jadams@kelleydrye.com
AND FIRST CLASS MAIL
Kelley Drye & Warren LLP
Attn: James S. Carr, Esq. and Jason R. Adams, Esq.
101 Park Avenue
New York, NY 10178

VIA EMAIL: dwolnerman@olshanlaw.com; jnadritch@olshanlaw.com; mfox@olshanlaw.com
AND FIRST CLASS MAIL
OLSHAN GRUNDMAN FROME ROSENZWEIG & WOLOSKY, LLP
Jordanna L. Nadritch
Michael S. Fox
Park Avenue Tower
65 East 55th Street
New York, NY 10022

VIA EMAIL: nazar.khodorovsky@usdoj.gov

AND FIRST CLASS MAIL

Office of the United States Trustee

Attn: Nazar Khadarovsky

33 Whitehall Street, 21st Floor

New York, NY 10004

This 22nd day of February 2012.

MOSKOWITZ & MARTIN, LLP

One Lakeside Commons

990 Hammond Drive, Suite 990

Atlanta, Georgia 30328

(678) 775-3557

nmoskowitz@mmlawatl.com

/s/ Neil A. Moskowitz

NEIL A. MOSKOWITZ

Attorney for SCI Cobb Place Fund, LLC

Georgia Bar No: 526560

NAM/mm