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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

JENNIFER CONVERTIBLES, INC., et al.,

Debtors.

Chapter 11

Case No.: 10-13779 (ALG)

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**LAKE PARK 415 CROSSWAYS PARK DRIVE LLC'S AND
CLK-HP 415 CROSSWAYS PARK DRIVE LLC'S RESPONSE
IN OPPOSITION TO THE TRUST ADMINISTRATOR'S FIRST
(NON-SUBSTANTIVE) OMNIBUS OBJECTION TO CERTAIN CLAIMS**

Lake Park 415 Crossways Park Drive LLC and CLK-HP 415 Crossways Park Drive LLC (collectively "415 Crossways Park"), a creditor herein, by and through its attorneys, Hamburger, Maxson, Yaffe, Knauer & McNally, LLP, responds to Trust Administrator's first (non-substantive) omnibus objection to certain (A) duplicative claims; (B) wrong debtor claims; (C) amended and superseded claims; (D) late filed claims; (E) satisfied claims; and (F) equity claims, as follows:

1. This response is to oppose Trust Administrator's first (non-substantive) omnibus objection which asserts that 415 Crossways Park's unsecured claim (Claim No. 219) in the amount of \$128,712.61 is "satisfied," when in fact such a claim is an agreed "allowable" claim.

415 CROSSWAYS PARK HAS AN UNSECURED CLAIM IN THE AMOUNT OF \$128,712.61 THAT HAS NOT BEEN SATISFIED OR RELEASED DURING THE CASE.

2. On or about February 1, 2003, 415 Crossways Park's predecessor-in-interest and Jennifer Convertibles, Inc. entered into a written lease agreement ("Lease") in which 415 Crossways Park, as landlord, leased to Jennifer Convertibles, as tenant, approximately 16,640 rentable square feet of space in certain retail premises located at 417 Crossways Park Drive, Woodbury, New York ("Premises"). A copy of the Lease is annexed hereto as Exhibit "A."

3. Thereafter, on November 13, 2007, 415 Crossways Park and Jennifer Convertibles, Inc. entered into a First Amendment to Lease amending the Lease (hereinafter collectively called the "Lease"), which, *inter alia*, extended the term of the Lease to and including January 31, 2018, at a basic monthly rental, with yearly increases, payable in advance on the first day of each month, plus additional rent as provided under the Lease. A copy of the First Amendment to Lease is annexed hereto as Exhibit "B."

4. Starting from about November 1, 2009, Jennifer Convertibles, Inc. defaulted under the Lease by failing to pay rent and additional rent.

5. On July 18, 2010, Jennifer Convertibles, Inc. commenced with the Bankruptcy Court a voluntary case pursuant to Chapter 11 of Title 11 of the United States Code.

6. On or about July 28, 2010, 415 Crossways Park filed a notice of appearance and demand for service of papers (Docket No. 102).

7. As a result of Jennifer Convertibles, Inc.'s pending bankruptcy filing, the parties began re-negotiating their obligations under the Lease.

8. In the interim, on October 15, 2010, 415 Crossways Park filed Proof of Claim in the amount of \$128,712.61 (Claim No. 219).

9. In November, 2010, 415 Crossways Park and Jennifer Convertibles, Inc. entered into a lease modification agreement (the "Modification Agreement"), which was subject to court approval. A copy of the Modification Agreement is annexed hereto as Exhibit "C."

10. Paragraph 1 of the Modification Agreement provided that "Landlord and Tenant agreed to the allowance by Landlord of the general unsecured claim pursuant to Rule 3003 of the Federal Rules of Bankruptcy Procedure for the Arrears under the Lease through to and including July 17, 2010." The third "whereas clause" of the Modification Agreement defined "Arrears" as \$128,712.61 — the amount of the Proof of Claim.

11. The Modification Agreement also, *inter alia*, shortened the term of the Lease to and including July 31, 2011 (instead of January 31, 2018) and substantially

reduced the gross rent to \$6,500 per month (instead of \$19,860.54 per month as previously required). *See* Ex. “C,” ¶¶ 2-3.

12. Paragraph 6 of the Modification Agreement specifically conditioned its enforcement and validity upon this Court’s approval, stating:

The effectiveness of this Modification Agreement is upon execution, but is conditioned upon approval by the bankruptcy court to hereof. If this Modification Agreement is not approved by the bankruptcy court within sixty (60) days from execution, this Modification Agreement shall be considered non-void and of no consequence to either [sic] party.

See Ex. “C,” ¶ 6.

13. On December 23, 2010, Jennifer convertibles Inc. and its affiliated debtors, as debtors and debtors in possession (collectively, the “Debtors”), made a motion before this Court for authority to (i) enter into amended nonresidential real property leases pursuant to 11 U.S.C. §363 and (ii) to assume amended nonresidential real property leases pursuant to 11 U.S.C. §365, effective as of the effective date of a Chapter 11 Plan of Reorganization (“Lease Assumption Motion”) (Docket No. 403).

14. For confidentiality reasons, the Lease Assumption Motion did not attach the terms of each amended lease agreement, but did attached a “List of Amended Leases” as Exhibit “A.” 415 Crossways Park was identified as the *first* landlord on the schedule as “Woodbury Office Seven” under “Landlord Name,” having a “Store Location” at “417 Crossways Park Drive, Woodbury, NY.” For the Court’s convenience, a copy of the Lease Assumption Motion, with attachment, is annexed hereto as Exhibit “D.”

15. On January 25, 2011, the Lease Assumption Motion was heard before this Court (Hon. Allan L. Gropper), with attorneys James S. Carr and Jason R. Adams from Kelley Drye & Warren LLP representing the Official Committee of Unsecured Creditors (the "Committee") present, to consider the relief requested in the motion (Docket No. 404). Notably, the Committee made no objections to the motion.

16. On January 26, 2011, an Order was entered by this Court authorizing the Debtors to enter into the amended nonresidential real property leases and assume the amended leases, which would become effective on the "Effective Date" of the Debtors' Chapter 11 Plan of Reorganization (Docket No. 474).

17. On February 9, 2011, this Court entered an order confirming the Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and its affiliated debtors, dated January 24, 2011 (the "Plan") which became effective on February 22, 2011 (the "Effective Date") (Docket No. 503).

18. On February 22, 2011, the Effective Date of the Plan of Reorganization:

- a. the Modification Agreement became valid;
- b. the Committee was terminated and no longer existed post-Effective Date (*see* Plan, § 15.12);
- c. Kelley Drye & Warren LLP retained by the Committee in accordance with section 1103 of the Bankruptcy Code was

released and discharge from its respective fiduciary obligations
(*see id.*); and

- d. the Trust Administrator assumed, *inter alia*, the powers and rights of the Committee and the exclusive right to object to unsecured claims (*see* Plan, § 8.01).

19. On or about that same time, Kelley Drye & Warren LLP, the firm discharged by the Committee, was retained to represent the Trust Administrator.

20. Thus, as of February 22, 2011, 415 Crossways Park had an agreed allowed general unsecured claim for \$128,712.61. This amount has not been satisfied or released during the pendency of this proceeding.

**TRUST ADMINISTRATOR'S OBJECTS TO 415
CROSSWAYS PARK'S UNSECURED CLAIM OF
\$128,712.61.**

21. On October 14, 2011, 415 Crossways Park was served with the Notice of Trust Administrator's First Omnibus Objection to Certain Claims, dated October 11, 2011 (Docket No. 618).

22. 415 Crossways Park's claim, Claim No. 219, erroneously appears on "Exhibit E" to the Notice of Trust Administrator's First Omnibus Objection as "satisfied."

23. That same day, by e-mail, 415 Crossways Park's counsel, Lane T. Maxson, Esq.: (a) notified the attorneys for the Trust Administrator that the Modification Agreement executed with Jennifer Convertibles Inc. treats the outstanding rent debt of

\$128,712.61 as an existing unsecured claim; (b) provided a copy of the Modification Agreement; and (c) inquired into whether or not the Trust Administrator will be withdrawing its application as it relates to 415 Crossways Park's claim, or whether an opposition to the Trust Administrator's objection needs to be submitted.

24. Trust Administrator's counsel, Jason Adams, replied that "we will review and get back to you shortly."

25. By e-mail dated November 7, 2011, Mr. Adams informed Mr. Maxson that the Trust Administrator will not be withdrawing its objection as it relates to 415 Crossways Park's claim because the Modification Agreement was entered into without the Committee's knowledge of its terms. A copy of the e-mail thread between Mr. Adams and Mr. Maxson is annexed hereto as Exhibit "E."

26. The November 7, 2011 e-mail states, in relevant part, as follows:

We've gone back and reviewed the pleadings as well as the Lease Modification Agreement you attached to your original email. Unfortunately, the Committee was never provided a copy of the agreement and was never informed that the Debtors intended to grant an allowed general unsecured claim to your client. The motion to approve the lease modification agreements was filed after the proposed plan was filed and, therefore, the Debtors knew at the time the Trust would have the sole right to deal with unsecured claims. However, the motion did not disclose the allowance of your client's general unsecured claim in connection with a lease modification and assumption.

Ex. "E," p. 3.

27. Accordingly, this response also addresses the Trust Administrator's informal e-mail objection to 415 Crossways Park's unsecured claim.

TRUST ADMINISTRATOR HAS NO MERITORIOUS BASIS FOR OBJECTING TO 415 CROSSWAYS PARK UNSECURED CLAIM.

28. The explanation provided by the Trust Administrator's counsel does not serve as a meritorious basis for disallowing the claim.

A. Debtor's Had The Right To Manage Unsecured Claims When The Amendment Was Made.

29. First, the Lease Assumption Motion was filed on December 23, 2010 when the Debtors still had authority to manage unsecured claims.

30. Section 1107 of the Bankruptcy Code places the debtor-in-possession in the position of a fiduciary, with the rights and powers of a Chapter 11 trustee.

31. Pursuant to section 8.01 of the Plan, it was not until the Effective Date (i.e., February 22, 2011) that the Debtors were deemed to have assigned the Trust the exclusive right to object to the disputed general unsecured claims.

B. The Amendment Was Negotiated In Good Faith.

32. Second, 415 Crossways Park negotiated in good faith for an unsecured claim of \$128,712.61 (reflecting the outstanding rent and additional rent debt) in

consideration for reducing Jennifer Convertibles, Inc.'s future rental obligations, shortening the term of the Lease and maximizing the value of the Debtor's estate by reducing costs for the reorganized Debtor going forward. The parties worked diligently and engaged in substantial arms length negotiation to modify the terms of the Lease that would fairly benefit Jennifer Convertibles, Inc. These terms were memorialized in the Modification Agreement.

C. This Court Approved The Amendment Under Proper Procedures.

33. Third, Jennifer Convertibles, Inc. and 415 Crossways Park complied with all proper procedures to obtain the necessary authority from the Court to enter into the Modification Agreement.

34. An Order was issued by this Court specifically authorizing Jennifer Convertibles, Inc. to enter into and assume the Modification Agreement, effective as of the effective date of the Chapter 11 Plan of Reorganization.

D. The Committee Received Notice Of The Amendment And Did Not Object.

35. Fourth, the Committee received notice of the motion and was present at the hearing held before this Court on January 25, 2011 to address the merits and any objections to the Lease Assumption Motion. They had every opportunity at that point to object, question or raise any concerns regarding the Amended Leases.

E. The Committee Was Given A Copy Of The Amendment At The Hearing.

36. Fifth, the record demonstrates that the Committee knew or should have known the terms of the Modification Agreement. The Transcript of the hearing held on January 25, 2011 regarding the Lease Assumption Motion reflects that the Debtors did in fact furnish the Committee with the terms of all the Amended Leases. An excerpt of the January 25, 2011 Hearing Transcript is annexed hereto as Exhibit "F."

37. The Transcript states:

MS. NADRITCH: Good morning, Your Honor. The motion that I have before me is a motion to assume modified leases seeking authority to enter into the amended real property leases, as well as to assume the leases upon an effective date of a plan of reorganization.

The terms of the amended leases have not been shared with the Court due to confidentiality issues, *but they have been provided, both to counsel for the committee and counsel to Mengnu, and neither have had any objections.*

This motion is uncontested. While there was a limited objection initially filed by one of the landlords there was some confusion. And after subsequent discussions with that counsel they have withdrawn that objection.

Ex. "F," pp. 15-16 (emphasis added).

38. Thus, the Committee was either in possession of, or had access to, the Modification Agreement. Any purported oversight of its terms was the result of the Commission's or its counsel's neglect.

39. Attorney James S. Carr, then counsel for the Committee and current counsel for the Trust Administrator, fully approved at the hearing all the modified lease agreements submitted for authorization and assumption, recognizing the substantial financial advantage they will have for Jennifer Convertibles, Inc. He stated:

MR. CARR: Good morning, Your Honor. Jim Carr of Kelly Drye & Warren on behalf of the official committee of unsecured creditors.

Your Honor, we received from the debtors' financial advisors the financial effect of the modifications of the leases. And as indicated to Your Honor they are substantial. And in connection with the retail case, Your Honor, there's two ways to make the company more successful as it emerges from bankruptcy.

One is to increase revenue, or the other is to decrease the expenses. And Mr. Bordwin (ph.) Has done a tremendous job in connection with decreasing the expenses that all of these locations, and the committee fully supports this motion.

Ex. "F," pp. 18-19.

40. Accordingly, the Trust Administrator's contention that the Committee was unaware of the terms of the Modification Agreement because the motion only attached a schedule listing the leases is unavailing. There is also no basis for the Trust Administrator to have assumed that Jennifer Convertibles, Inc. either personally settled or negotiated waivers of any existing rent debt.

41. The record clearly demonstrates that the Committee "dropped the ball," by failing to review the terms of the lease agreements that were being modified and

assumed. Such neglect should not deprive 415 Crossways Park, an innocent unsecured creditor that negotiated with Jennifer Convertibles, Inc. in good faith, from being entitled to the benefits of its bargain.

F. The Challenge Is Time Barred.

42. Sixth, the Trust Administrator's challenge to 415 Crossways Park's unsecured claim is procedurally improper. The Trust Administrator is essentially seeking relief from an Order rendered by this Court which authorized the Debtors to enter into and assume the amended nonresidential real property leases, as it applies to the Modification Agreement. This cannot be done pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure by filing an objection to 415 Crossways Park's unsecured claim, but must be done on motion pursuant to Rule 60 of the Federal Rules of Civil Procedure.

43. Rule 60 (which applies to proceedings under the Bankruptcy Code) allows the Court to exercise its discretion to relieve a party from an order on the ground of, *inter alia*, mistake, inadvertence or excusable neglect. *See* Fed. R. Civ. P. 60(b). Here, the right to make such a motion is lost by the expiration of the one-year statute of limitations. A motion under Rule 60 for reason of mistake, inadvertence, surprise or excusable neglect must be made "no more than a year after the entry of the judgment or order or the date of the preceding." Fed. R. Civ. P. 60(c)(1). Since the Order granting the Lease Assumption Motion was entered on or about January 26, 2011, and the earliest date

a Rule 60 motion could be made by the Trust Administrator would be April 2012, the Trust Administrator is barred by the statute of limitations from seeking relief from such Order.

44. For these reasons, the Trust Administrator's Objection to 415 Crossways Park's unsecured claim (Claim No. 219) is facially insufficient as a matter of law, and cannot justify its position that this unsecured claim should be deemed "satisfied."

WHEREFORE, Lake Park 415 Crossways Park Drive LLC and CLK-HP 415 Crossways Park Drive LLC request an Order denying the Trust Administrator's Objection to Claim 219 and granting Lake Park 415 Crossways Park Drive LLC and CLK-HP 415 Crossways Park Drive LLC such additional and further relief as the Court deems appropriate.

Dated: Melville, New York
March 26, 2012

Yours, etc.,

**HAMBURGER, MAXSON, YAFFE,
KNAUER & McNALLY, LLP**

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