

ASK FINANCIAL LLP

John T. Siegler, DC SBN 418558, NY Reg # 131395, MN SBN 0387634
Joseph L. Steinfeld, Jr., DC SBN 297101, MN SBN 0266292
Alex Govze, MN SBN 0388626
2600 Eagan Woods Drive, Suite 400
St. Paul, MN 55121
Telephone: (651) 406-9665 ext. 842 Fax: (651) 406-9676
e-mail: agovze@askfinancial.com

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Attorneys For Plaintiff, KDW Restructuring & Liquidation Services, LLC, Litigation Trustee

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

| | |
|---|---------------------------------|
| In re | Bk. No. 10-13779-ALG |
| Jennifer Convertibles, Inc., et al. ¹ , | Chapter 11 |
| Debtors. | Honorable Allan L. Gropper |
| KDW Restructuring & Liquidation Services, LLC, Litigation Trustee for the Jennifer Convertibles Litigation Trust, | Adv No. Refer to Summons |
| Plaintiff, | |
| vs. | |
| Primo International Inc., | |
| Defendant, | |

**COMPLAINT TO AVOID TRANSFERS
PURSUANT TO 11 U.S.C. §§ 547, 548 AND 502 AND TO RECOVER
PROPERTY TRANSFERRED PURSUANT TO 11 U.S.C. § 550**

KDW Restructuring & Liquidation Services, LLC, litigation trustee (the "Plaintiff" or "Litigation Trustee") by its undersigned attorneys, files this complaint (the "Complaint") to avoid and recover transfers against Primo International Inc. (the "Defendant"), and in support thereof alleges upon information and belief that:

NATURE OF THE CASE

1. Plaintiff seeks to avoid and recover from Defendant, or from any other person or entity for whose benefit the transfers were made, all preferential transfers of property that occurred during the ninety (90) day period prior to commencement of the Debtors' bankruptcy proceedings pursuant to 11 U.S.C. §§ 547

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (I) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

and 550. Subject to proof, Plaintiff also seeks to recover pursuant to 11 U.S.C. § 548 any transfers that may have been a fraudulent conveyance. To the extent that Defendant has filed a proof of claim or has a claim listed on the Debtors' schedules as undisputed, liquidated, and not contingent, or has otherwise requested payment from the Debtors or the Debtors' chapter 11 estates, (collectively, the "Claims"), this Complaint is not intended to be, nor should it be construed as, a waiver of Plaintiff's right to object to such Claims for any reason including, but not limited to, 11 U.S.C. § 502 (a) through (j) ("Section 502"), and such rights are expressly reserved. Notwithstanding this reservation of rights, certain relief pursuant to Section 502 may be sought by Plaintiff herein as further stated below.

JURISDICTION AND VENUE

2. This court has subject matter jurisdiction over this adversary proceeding, which arises under title 11, arises in, and relates to cases under title 11, in the United States Bankruptcy Court for the Southern District of New York, Manhattan Division (the "Court"), Case No. 10-13779, pursuant to 28 U.S.C. §§ 157 and 1334(b).

3. The statutory and legal predicates for the relief sought herein are sections 502, 547, 548 and 550 of the United States Code (the "Bankruptcy Code") and Rules 3007 and 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

4. This adversary proceeding is a "core" proceeding to be heard and determined by the Court pursuant to 28 U.S.C. § 157(b)(2).

5. Venue is proper in Southern the District of New York pursuant to 28 U.S.C. § 1408 and §1409.

PROCEDURAL BACKGROUND

6. On July 18, 2010 (the "Petition Date") the Debtors each commenced a case by filing a voluntary petition for relief in this Court under chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases").

7. On July 22, 2010, the Court entered an order authorizing the joint administration of the Chapter 11 Cases for procedural purposes pursuant to Bankruptcy Rule 1015(b) [Docket No. 51]. The Chapter 11 Cases were jointly administered as Case Number 10-13779 (ALG).

8. Pursuant to the Debtors' Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. And Its Affiliated Debtors dated December 21, 2010 [Docket No. 399] (the "Plan"), which was confirmed on February 8, 2011 pursuant to the Court's 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], and the Litigation Trust Agreement, Plaintiff is authorized to pursue, commence, prosecute, compromise, settle, dismiss, release, waive, withdraw, abandon, or resolve all Litigation Trust Avoidance Actions.

THE PARTIES

9. The Debtors were owners of the largest group of sofabed specialty retail stores in the United States, as well as seven furniture stores operated under the Ashley Furniture Homestore brand. The Debtors' principal offices is an entity whose legal structure is presently unknown. Jennifer Convertibles is the direct or indirect parent company of each of the Debtors.

10. Upon information and belief, at all relevant times, Defendant was in the business of providing goods and/or services, with its principal place of business located at 7000 Hochelaga, Montreal, Montreal, QB H1N 1Y7. Plaintiff is informed and believes and on that basis alleges that Defendant is a corporation.

FACTUAL BACKGROUND

11. Prior to the Petition Date, the Debtors sold furniture in two operating segments, which were titled the Jennifer and Ashley segments. The Jennifer segment operated in the sofabed and leather specialty retail stores, while the Ashley segment operated big box full line home furniture stores for the sale of home furniture.

12. The Debtors' cash management system was an integrated network of bank accounts organized to collect, concentrate, and transfer funds generated by the Debtors, as well as to disburse funds to satisfy the obligation of the Debtors. The Debtors maintained several bank accounts, including disbursement accounts 6301-485573-509 and 6301- 546895-509 maintained at JP Morgan Chase Bank (the "Disbursement Accounts"). The Debtors made payments to their vendors, tax jurisdictions, and customers from the Disbursement Accounts.

13. In the ordinary course of their businesses, the Debtors, as owners of the largest group of sofabed specialty retail stores in the United States, maintained business relationships with various entities, through which the Debtors regularly purchased, sold, received, or delivered good and services.

14. As owners of the largest group of sofabed specialty retail stores in the United States, the Debtors regularly purchased goods from various entities, including vendors, creditors, suppliers and distributors. The Debtors, as owners of the largest group of sofabed specialty retail stores in the United States, also regularly paid for services used to facilitate their business.

15. During the ninety (90) days before the Petition Date, that is between April 19, 2010 and July 18, 2010 (the "Preference Period"), the Debtors continued to operate their business affairs, including the transfer of property, either by checks, cashier checks, wire transfers, direct deposit or otherwise to certain entities.

16. During the course of their relationship, the Debtors and Defendant entered into agreements, which are evidenced by invoices, communications and other documents (collectively, the "Agreements"). The details of each of the Agreements paid for during the Preference Period are set forth on the Statement of Account, which is attached hereto and incorporated by reference as Exhibit "A". Such details include "Invoice Number," "Invoice Date," "Invoice Amount" and "Debtor(s) Incurring Antecedent Debt."

17. The Debtors and Defendant conducted business with one another up to and through the Petition Date pursuant to the Agreements.

18. As identified in the Agreements, the Debtors purchased goods and/or services from Defendant.

19. Plaintiff has completed an analysis of all readily available information of the Debtors and is seeking to avoid all of the transfers of an interest of the Debtors' property made by the Debtors to Defendant within the Preference Period.

20. Plaintiff has determined that the Debtors made transfers of an interest of the Debtors' property to or for the benefit of Defendant during the Preference Period through payments aggregating an amount not less than \$16,254.00 (the "Transfers"). The details of each of the Transfers are set forth on the Statement of Account, which is attached hereto and incorporated by reference as Exhibit "A". Such details include "Check Number," "Check Amount," "Check Clear Date" and "Debtor Transferor(s)."

21. During the course of this proceeding, Plaintiff may learn (through discovery or otherwise) of additional transfers made to Defendant during the Preference Period. It is Plaintiff's intention to avoid and

recover all transfers made by the Debtors of an interest of the Debtors in property and to or for the benefit of Defendant or any other transferee. Plaintiff reserves its right to amend this original Complaint to include: (i) further information regarding the Transfers, (ii) additional transfers, (iii) modifications of and/or revisions to Defendant's name, (iv) additional defendants, and/or (v) additional causes of action (*e.g.*, but not exclusively, 11 U.S.C. §§ 542, 544, 545, 548 and/or 549) (collectively, the "Amendments"), that may become known to Plaintiff at any time during this adversary proceeding, through formal discovery or otherwise, and for the Amendments to relate back to this original Complaint.

22. Plaintiff acknowledges that some of the Transfers might be subject to defenses under Bankruptcy Code section 547(c), for which Defendant bears the burden of proof under Section 547(g).

CLAIMS FOR RELIEF

COUNT I

(Avoidance of Preference Period Transfers - 11 U.S.C. § 547)

23. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein.

24. Each Transfer was made to Defendant by the Debtor(s) identified on Exhibit "A" under the column heading "Debtor Transferor(s)." Each Transfer was paid from the Disbursement Accounts described *supra*. See Exhibit "A."

25. During the Preference Period, Defendant was a creditor at the time of each Transfer by virtue of supplying goods and/or services identified in the Agreements to the Debtor(s) identified on Exhibit "A" under the column heading "Debtor(s) Incurring Antecedent Debt" for which the identified Debtor(s) were obligated to pay following delivery in accordance with the Agreements. See Exhibit "A."

26. Each Transfer was to or for the benefit of a creditor within the meaning of 11 U.S.C. § 547(b)(1) because each Transfer either reduced or fully satisfied a debt or debts then owed by the Debtor(s) identified on Exhibit "A" under the column heading "Debtor(s) Incurring Antecedent Debt" to Defendant. See Exhibit "A."

27. Each Transfer was made for, or on account of, an antecedent debt or debts owed by the Debtor(s) identified on Exhibit "A" under the column heading "Debtor(s) Incurring Antecedent Debt" to Defendant before such Transfers were made, as asserted by Defendant and memorialized in the Agreements, each of which constituted a "debt" or "claim" (as those terms are defined in the Bankruptcy Code) of

Defendant prior to being paid by the Debtor(s) identified on Exhibit "A" under the column heading "Debtor Transferor(s)." See Exhibit "A."

28. Each Transfer was made while the Debtors were insolvent. Plaintiff is entitled to the presumption of insolvency for each Transfer made during the Preference Period pursuant to 11 U.S.C. § 547(f). As reported in the Debtor's 10K for the fiscal year ending August 28, 2010, the Debtor's incurred a net loss of \$24,333,000, \$11,008,000 and \$3,329,000 in the fiscal years ending August 28, 2010, August 29, 2009 and August 30, 2008, respectively. Further, the Debtor's bankruptcy schedules filed in the above captioned bankruptcy case indicated the amount of the Debtors' liabilities exceeded their assets as of the Petition Date.

29. Each Transfer was made during the Preference Period. See Exhibit "A."

30. As a result of each Transfer, Defendant received more than Defendant would have received if: (i) the Debtors' cases were under chapter 7 of the Bankruptcy Code; (ii) the Transfers had not been made; and (iii) Defendant received payment of its debts under the provisions of the Bankruptcy Code. As evidenced by the Debtors' schedules filed in the underlying bankruptcy case as well as the proofs of claim that have been received to date, the Debtors' liabilities exceed their assets to the point that unsecured creditors will not receive a full payout of their claims from the Debtors' bankruptcy estates.

31. In accordance with the foregoing, each Transfer is avoidable pursuant to 11 U.S.C. § 547(b).

COUNT II

(To Avoid Fraudulent Conveyances Pursuant to 11 U.S.C. § 548(a)(1)(B))

32. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein.

33. Subject to proof, Plaintiff pleads in the alternative that to the extent one or more of the Transfers as identified on Exhibit "A" were not on account of an antecedent debt or a prepayment for goods and/or services subsequently received, the Debtors did not receive reasonably equivalent value in exchange for such transfer(s) (the "Potentially Fraudulent Transfers"); either because the services and/or goods were in fact less in value than the transfer(s) or because the paying Debtor was not the Debtor incurring the debt, and

A. The Debtors were insolvent on the date that the Transfers(s) and/or Post-Petition Transfer(s) was made or became insolvent as a result of the Transfer(s) and/or Post-Petition Transfer(s); or

- B. The Debtors were engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the Debtors who made or for whose benefit the Transfer(s) and/or Post-Petition Transfers were made was an unreasonably small capital; or
- C. The Debtors intended to incur, or believed that the Debtors would incur, debts that would be beyond Debtors' ability to pay as such debts matured.

34. In accordance with the foregoing, the Potentially Fraudulent Transfers are avoidable pursuant to 11 U.S.C. § 548(a)(1)(B).

COUNT III

(Recovery of Avoided Transfers - 11 U.S.C. § 550)

- 35. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein.
- 36. Plaintiff is entitled to avoid the Transfers pursuant to 11 U.S.C. § 547(b), and any Potentially Fraudulent Transfers pursuant to 11 U.S.C. § 548. The Transfers, and any Potentially Fraudulent Transfers are collectively referred to herein as "All Avoided Transfers."
- 37. Defendant was the initial transferee of the All Avoided Transfers or the immediate or mediate transferee of such initial transferee or the person for whose benefit All Avoided Transfers were made.
- 38. Pursuant to 11 U.S.C. § 550(a), Plaintiff is entitled to recover from Defendant All Avoided Transfers, plus interest thereon to the date of payment and the costs of this action.

COUNT IV

(Disallowance of all Claims - 11 U.S.C. § 502(d) and (j))

- 39. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein.
- 40. Defendant is an entity from which property is recoverable under 11 U.S.C. § 550.
- 41. Defendant is a transferee of All Avoided Transfers avoidable under 11 U.S.C. §§ 547 and/or 548.
- 42. Defendant has not paid the amount of the All Avoided Transfers, or turned over such property, for which Defendant is liable under 11 U.S.C. § 550.

43. Pursuant to 11 U.S.C. § 502(d), any and all Claims of Defendant and/or its assignee, against the Debtors' chapter 11 estates or Plaintiff must be disallowed until such time as Defendant pays to Plaintiff an amount equal to the aggregate amount of All Avoided Transfers, plus interest thereon and costs.

44. Pursuant to 11 U.S.C. § 502(j), any and all Claims of Defendant, and/or its assignee, against the Debtors' chapter 11 estates or Plaintiff previously allowed by the Debtors or Plaintiff, must be reconsidered and disallowed until such time as Defendant pays to Plaintiff an amount equal to the aggregate amount of all the All Avoided Transfers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court grant it the following relief against Defendant:

As to Counts I through IV, that the Court enter a judgment against Defendant:

- A. That All Avoided Transfers avoidable under 11 U.S.C. §§ 547 and/or 548 in the total aggregate amount of not less than \$16,254.00 be avoided;
- B. That All Avoided Transfers, to the extent that they are avoided pursuant to 11 U.S.C. §§ 547, and/or 548, be recovered by Plaintiff pursuant to 11 U.S.C. § 550;
- C. Disallowing, in accordance with 11 U.S.C. § 502 (d), any Claims held by Defendant and/or its assignee until Defendant satisfies the judgment;
- D. Disallowing, in accordance with 11 U.S.C. § 502 (j), any Claims held by Defendant and/or its assignee until Defendant satisfies the judgment;
- E. Awarding pre-judgment interest at the maximum legal rate running from the date of each All Avoided Transfers to the date of judgment herein;
- F. Awarding post judgment interest at the maximum legal rate running from the date of judgment herein until the date the judgment is paid in full, plus costs;
- G. Requiring Defendant to pay forthwith the judgment amount awarded in favor of Plaintiff;

H. Granting Plaintiff such other and further relief as the Court deems just and proper.

Dated: April 2, 2012

~~ASK~~ FINANCIAL LLP

Please Contact Attorney in **Bold**

By /s/ John T. Siegler
Joseph L. Steinfeld, Jr., Esq.
John T. Siegler, Esq.
Alex Govze, Esq.
2600 Eagan Woods Drive, Suite 400
St. Paul, MN 55121
Telephone: (651) 406-9665 ext. 842 **Fax:** (651) 406-9676
e-mail: agovze@askfinancial.com
Attorneys For Plaintiff, KDW Restructuring &
Liquidation Services, LLC, Litigation Trustee