

Hearing Date: **May 23, 2012 @ 10:00 A.M. Eastern**
Objection Deadline: **May 16, 2012 @ 4:00 P.M. Eastern**

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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|---|---|
| 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, | |
| Plaintiff, | Adv. No. <u>Refer to Exhibit "A"</u> |
| vs. | |
| Defendants Listed on <u>Exhibit "A,"</u> | |
| Defendant. | |

**PLAINTIFF'S MOTION FOR AN ORDER ESTABLISHING STREAMLINED
PROCEDURES GOVERNING ADVERSARY PROCEEDINGS BROUGHT BY KDW
RESTRUCTURING & LIQUIDATION SERVICES, LLC, LITIGATION TRUSTEE FOR
THE JENNIFER CONVERTIBLES LITIGATION TRUST PURSUANT TO SECTIONS
502, 547, 548 AND 550 OF THE BANKRUPTCY CODE**

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).

Pursuant to sections 102(1) and 105(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 7016, 7026 and 9006 of the Federal Rules of Bankruptcy Procedures (the “Bankruptcy Rules”), KDW Restructuring & Liquidation Services, LLC, the duly appointed litigation trustee for the Jennifer Convertibles Litigation Trust, (the “Plaintiff” or “Trustee”), by and through its undersigned counsel, ASK Financial LLP, hereby moves this Court (the “Procedures Motion”) for entry of a procedures order (the “Proposed Procedures Order”), substantially in the form annexed hereto as **Exhibit “B,”** establishing streamlined procedures for all adversary proceedings brought by Plaintiff under sections 502, 547, 548 and 550 of the Bankruptcy Code, which are identified in Exhibit “A” annexed hereto (collectively, the “Avoidance Actions”)²: (a) eliminating the requirement of a Bankruptcy Rule 7026(f) scheduling conference and, in lieu thereof, setting procedures and timetables for service of Bankruptcy Rule 7026 disclosures and for conducting fact and expert written discovery and depositions³; (b) establishing procedures and timetables requiring the Avoidance Actions be referred to non-binding mediation; (c) requiring pre-motion conferences before any motion is filed in any of the Avoidance Actions; and (d) establishing omnibus hearings for the Avoidance Actions and general agendas for the same (collectively, the “Proposed Procedures”).

Plaintiff believes that, in setting forth structured procedures for the efficient resolution of the Avoidance Actions, the Proposed Procedures further the purpose of the applicable Bankruptcy Rules. Like the applicable Bankruptcy Rules, the Proposed Procedures are designed to promote the cost-effective, timely resolution of the Avoidance Actions and to further the goals of judicial economy and efficiency. In support of the Procedures Motion, Plaintiff respectfully

²This Procedures Motion and Proposed Procedures Order pertains only to the Avoidance Actions identified in Exhibit “A” annexed hereto.

³Plaintiff reserves the right to seek further or additional relief from the Court regarding discovery and any other matter in the Avoidance Actions.

represents as follows:

JURISDICTION

1. This Court has jurisdiction over this Procedures Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Procedures Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (F), (H) and (O).
2. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409(a).

BACKGROUND

3. 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").
4. 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).
5. 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.

RELIEF REQUESTED

6. Plaintiff respectfully requests that the Court implement the Proposed Procedures in

connection with the prosecution of the Avoidance Actions by entering the Proposed Procedures Order, substantially in the form annexed hereto as **Exhibit "B:"** (a) eliminating the requirement of a Bankruptcy Rule 7026(f) scheduling conference and, in lieu thereof, setting procedures and timetables for service of Bankruptcy Rule 7026 disclosures and for conducting fact and expert written discovery and depositions; (b) establishing procedures and timetables requiring the Avoidance Action be referred to non-binding mediation; (c) requiring pre-motion conferences before any motion is filed in any of the Avoidance Actions; and (d) establishing omnibus hearings for the Avoidance Actions and general agendas for the same.

BASIS FOR RELIEF REQUESTED

I. Proposed Procedures Generally

7. The Court has broad discretion to adopt and implement guidelines, such as the Proposed Procedures, which will aid in the administration of these proceedings. Specifically, Bankruptcy Rule 7016(a) authorizes courts to enter orders for the purpose of:

- expediting the disposition of the action;
- establishing early and continuing control so that the case will not be protracted because of lack of management;
- discouraging wasteful pretrial activities; and
- facilitating the settlement of the case.

Fed.R.Bankr.P. 7016(a).

8. In addition, Bankruptcy Rule 7016(b) affords courts significant flexibility in case management and scheduling. Specifically, Bankruptcy Rule 7016(b) authorizes courts to enter scheduling and other orders that limit the time to file motions and to complete discovery. In addition, Bankruptcy Rule 7016(b) expressly provides that such order may include modifications for the disclosures required under Federal Rule 26 (made applicable to the Avoidance Actions by Bankruptcy Rule 7026), dates for conferences and trials, and any other matters appropriate to the

circumstances of the case.

9. Section 105(a) of the Bankruptcy Code also grants bankruptcy courts broad authority and discretion to take such actions and implement such procedures as are necessary to enforce the provisions of the Bankruptcy Code. That section provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

10. The Proposed Procedures further the purpose of the applicable Bankruptcy Rules by establishing certain guidelines that Plaintiff believes are essential to the efficient and successful resolution of the Avoidance Actions. Plaintiff submits that implementation of the Proposed Procedures will further the cost-effective, timely resolution of the Avoidance Actions, for the benefit of creditors, the defendants in the Avoidance Actions, and all parties in interest. Plaintiff also submits that the Proposed Procedures will further the goals of judicial economy and the conservation of judicial resources. Absent the establishment of the Proposed Procedures to govern the prosecution of the Avoidance Actions, it will be extremely difficult and costly for Plaintiff to prosecute the Avoidance Actions in an efficient and timely manner and equally difficult for this Court to administer these matters. To the extent the Proposed Procedures deviate from otherwise applicable rules and orders, Plaintiff submits that such variations are warranted in to promote efficient use of estate assets and judicial resources.

11. Also, Plaintiff hopes and expects that the Proposed Procedures set forth in the Proposed Procedures Order will promote settlements and reduce defense costs because proceeding in such a manner may obviate the need for defendants to retain outside and/or local counsel during the settlement process. Often, not having to expend substantial resources for outside and/or local

counsel is a major consideration in a defendant's willingness to settle quickly. Defendants in the Avoidance Actions will also be able to present their defenses to Plaintiff for evaluation before engaging in costly litigation.

II. Pretrial Conferences, Discovery and Motion Practice

12. Given the number of Avoidance Actions, Plaintiff believes that the provisions of the Proposed Procedures Order governing scheduling conferences, pretrial conferences, initial disclosures, fact and expert discovery, and motion practice are imperative because said provisions establish a structured, efficient process for the resolution of the Avoidance Actions. The Proposed Procedures extend the agreed-upon time to serve Initial Disclosures, and set out deadlines for the parties to select a mediator in order to timely complete mediation by the agreed upon deadline.

13. Although Plaintiff's counsel is retained on a contingency fee bases, the Estate bears the full costs and expenses associated with litigation. Thus, by instituting the Proposed Procedures requested herein, Plaintiff will be able to minimize the administrative costs to the Estate including, among other things, the cost and expense of having counsel travel to and from the Court for countless pretrial and scheduling conferences.

14. Additionally, by limiting unbridled motion practice, the Proposed Procedures will result in more orderly and efficient litigation and discourage dilatory tactics on the part of defendants.

III. Referral of Avoidance Actions to Mandatory Non-Binding Mediation

15. Plaintiff seeks approval of the Proposed Procedures with respect to referring Avoidance Actions to mandatory non-binding mediation.

16. Referring unresolved adversary proceedings to mediation has proven highly successful in other bankruptcy cases in other districts where ASK Financial, LLP has represented Trustees in

the prosecution of preference and fraudulent transfer avoidance actions. Mandatory non-binding facilitative mediation orders similar to the provisions contained in the Proposed Procedures Order have been entered in other cases pending in the Southern District of New York such as In re TALT (f.k.a. Tower Automotive, Inc., *et al.*), Chapter 11 Case Nos. 05-10576 through 05-10601 (ALG) and In re Quebecor World (USA) Inc., *et al.*, Chapter 11 Case No. 08-10152-JMP. In TALT, the mediators were able to resolve nearly 96% of the remaining 159 adversary proceedings in less than 10 months. *See also* Delaware Bankruptcy Court General Order re Procedures in Adversary Proceedings, dated April 7, 2004, as amended April 11, 2005 (establishing mediation procedures for all adversary proceedings).

17. As the Proposed Procedures Order provides for non-binding mediation, it will not prejudice any party. In fact, Plaintiff submits that all parties will benefit from the mediation provisions in Proposed Procedures Order by providing the opportunity to resolve these matters without expensive and burdensome litigation and trial.

THE PROPOSED PROCEDURES

18. The Proposed Procedures are set forth in Exhibit "B" attached hereto.

NOTICE

19. Notice of this Procedures Motion has been provided to: (i.) all entities that are defendants in the Avoidance Actions as of the date hereof, which are identified in Exhibit "A" annexed hereto; (ii.) counsel for the Debtor; and (iii.) the United States Trustee. Plaintiff respectfully submits that such notice is adequate and that no other or further notice need be provided.

20. Within 10 days of entry of an order approving this Procedures Motion, Plaintiff shall serve such order on all entities that are parties to the Avoidance Actions as of the date thereof.

NO PRIOR REQUEST

21. No other or prior motion for the relief sought herein has been made to this Court or any other court.

WHEREFORE, Plaintiff believes the Proposed Procedures are integral to the ability to resolve the Avoidance Actions in a cost-effective, efficient manner that will further speedy distributions to creditors and, ultimately, Plaintiff's efforts towards an expeditious closing of the Debtor's Chapter 11 case. In light of the foregoing, Plaintiff submits that the Proposed Procedures are warranted and approval thereof is well within the authority granted to the Court under applicable Bankruptcy Rules and sections of the Bankruptcy Code.

Accordingly, Plaintiff respectfully requests that this Court enter the Proposed Procedures Order, attached hereto as Exhibit "B," (i.) approving the Proposed Procedures and (ii.) granting such other and further relief as the Court deems just and proper.

Dated: April 10, 2012

A·S·K FINANCIAL LLP

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