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

In re:

JENNIFER CONVERTIBLES, INC.,

Debtor.

Chapter 11

Case No. 10-13779 (ALG)

**THE DEBTOR'S OBJECTION TO THE APPLICATION OF OAKLAND SQUARE LLC  
IN SUPPORT OF STIPULATION AND AGREED ORDER**

Jennifer Convertibles, Inc. ("Jennifer Convertibles" or the "Debtor") hereby files this objection (the "Objection") to the Application (the "Application", docket no. 768) of Oakland Square LLC (the "Landlord") in Support of Stipulation and Agreed Order (the "Stipulation and Order", docket no. 690) filed by The Trust Administrator For The Jennifer Convertibles Litigation Trust ("the Litigation Trustee") and the Landlord. In support of this Objection, the Debtor respectfully states as follows:

**Objection**

1. The Debtor files this Objection to the Application because there is no basis under the terms of the lease or in law for awarding counsel for the Landlord almost \$20,000 in

attorney's fees on account of a lease that was rejected by the Debtor two months after it filed its chapter 11 petition.

2. As stated in the Debtor's objection to the Stipulation and Order, filed on March 6, 2012 (docket no. 698), the Debtor has no objection to the Landlord receiving an allowed general unsecured claim in the amount of \$56,855.84, on account of prepetition amounts due and owing. The Debtor also has no objection to the Landlord receiving an allowed administrative claim for \$8,801.79, for unpaid post-petition amounts due and owing for July, 2010. In fact, immediately after the April 3, 2012 hearing held with respect to the Stipulation and Order, the Debtor issued a check to the Landlord for \$8,801.79 in July stub rent.<sup>1</sup> However, to the extent the Landlord is seeking an allowed administrative claim for \$19,042.42 in post-petition attorney's fees and costs, the Debtor objects.

3. In the first instance, contrary to counsel for the Landlord's assertions, the lease between the Landlord and the Debtor does not provide for payment of the Landlord's counsel's fees and expenses incurred in or in connection with the Debtor's chapter 11 case. Section 12.01 of the lease provides as follows: "In the event that either Landlord or Tenant *prevails in a lawsuit* against the other party, the losing party agrees to reimburse the prevailing party for reasonable costs, including attorney's fees" (emphasis added). The reconciliation of the Landlord's claim is not an instance where there is a prevailing party, and thus there is no basis in the lease agreement to award counsel for the Landlord its fees and expenses.

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<sup>1</sup> The Debtor issued a check for the full \$8,801.79, even though the Debtor's books and records reflect that the Landlord is owed a significantly lower amount owed on account of July, 2010 stub rent. Counsel for the Landlord informed the Debtor's counsel that the Landlord did not receive the check that was sent on April 4, 2012, and the Debtor reissued the check to the Landlord on April 19, 2012.

4. Even, *assuming arguendo*, that the lease between the Landlord and the Debtor could provide for payment of attorney's fees, there still would be no basis for this Court to award counsel for the Landlord their fees and expenses.

5. The invoices attached to the Application by counsel for the Landlord do not reflect any efforts by the Landlord's counsel to contact counsel for the Debtor to negotiate a deal or resolve the outstanding administrative rent issue, other than a handful of telephone calls and email/letter communications in August and September, 2010. The last communication with counsel for the Debtor occurred on September 16, 2010. Even so, counsel for the Landlord managed to accrue over \$12,000.00 in legal fees since rejection of the lease on September 28, 2010. How can this be?

6. As "support" for their exorbitant fee request, the invoices provided by counsel for the Landlord demonstrate that, with the exception of drafting the Application and negotiating the Stipulation and Order, no substantive work has been performed in this case since the Landlord's lease was rejected by the Debtor in September, 2010. Even including this pre-September, 2010 time, approximately 40% (roughly \$7,600.00) of the invoices are described as "Pleadings/docket review/analysis" and/or conducting interoffice conferences and communications. There is no justification offered to demonstrate that the Debtor should be liable for the Landlord's docket review and communications with each other.

7. In addition, the Landlord is seeking \$5,147.66 in additional fees and expenses incurred since the filing of the Stipulation and Order in February 2012, and seeks reimbursement from the Debtor of same. Again, there is no legal basis or justification for these amounts. These additional amounts were expended by counsel for the Landlord solely in an attempt to recoup its own fees and expenses. Counsel for the Landlord has failed to demonstrate a benefit to the

Landlord or the Debtor or its estate. The Debtor cannot possibly be liable for payment of over \$5,000 in time spent by counsel for the Landlord to collect its own fees.

8. Moreover, despite the Landlord's assertions, the Debtor at no time "recognized" the Landlord's claim for attorney's fees. While the Debtor wrote to the Landlord inquiring about the basis for the administrative claim since the Debtor believed it was current on all rental obligations other than stub rent, the Debtor did not receive a response from the Landlord, and certainly never received the requested back-up. It is impossible to classify this interaction as a "recognition" by the Debtor that it owed the Landlord over \$13,000 in legal fees and expenses on account of a rejected lease.

9. The cases cited by counsel for the Landlord are distinguishable and inapplicable to the current facts. For example, in *Urban Retail Props. v. Loews Cineplex Entm't Corp. (In re Loews Cineplex Entm't Corp.)*, No. 01-8946, 2002 WL 535479, at \*1 (S.D.N.Y. Apr. 9, 2002), the Debtors had not yet assumed or rejected the Lease at issue. The landlord in *Urban Retail* was seeking \$1 million in reimbursement for "Landlord's Work", as provided for in the lease, and counsel for the landlord filed a motion to compel payment, appeal paperwork, and other substantive pleadings during the course of the Debtors' cases. Here, the Landlord's lease was rejected two months after the bankruptcy filing, no pleadings were filed by counsel for the Landlord, other than the Application and the Landlord's proof of claim, and, as discussed above, the Landlord's lease does not provide for payment of attorneys' fees and expenses in these circumstances.

10. Bankruptcy Code § 365(g)(1) provides that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease — if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11,

12, or 13 of this title, immediately before the date of the filing of the petition.” 11 U.S.C. § 365(g)(1). Thus, it is arguable that because the Debtor rejected the Landlord’s lease, the rejection constitutes a breach immediately before the Petition Date, and, assuming the lease provided for the payment of attorneys’ fees, the Debtor could only possibly be liable for prepetition attorneys’ fees incurred pursuant to the terms of the lease.<sup>2</sup> However, counsel for the Landlord has not asserted that it is owed any prepetition fees and expenses, and the lease does not provide for payment of the fees.

11. Furthermore, post-petition attorneys’ fees and expenses must be incurred as a benefit to the Debtor’s estate, and counsel for the Landlord is unable to show that any of its fees, particularly those incurred trying to collect on their fees, provided any type of benefit to the Debtor’s estate. *See, e.g., In re Ames Dep’t Stores, Inc.*, 306 B.R. 43, 48 (S.D.N.Y. 2004) (“As claim for 365(d)(3) payment here was made after rejection (and not when the debtor was continuing in occupancy), Ames’s liability under section 365(d)(3) is limited to the pro-rata accrual for its occupancy obligations in the post-petition, pre-rejection period. Ames is not now liable for obligations relating to the time after the debtor-tenant’s rejection—though if timely request had been made by the landlord for payment in full of section 365(d)(3) obligations while the debtor-tenant was still in occupancy, this Court would have required payment by the debtor in full, subject to disgorgement in the event of subsequent rejection and any resulting overpayment to the landlord.”). *In re Pudgie’s Dev. of NY, Inc.*, 202 B.R. 832 (Bankr. S.D.N.Y. 1996) is also instructive. In *Pudgie’s*, the bankruptcy court held that attorney fees incurred by a lessor in seeking payment of rent did not constitute rent, and any contractual obligation to pay counsel fees should be treated as part of the landlord’s claim for damages. This was so even

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<sup>2</sup> Such fees would be allowed as an unsecured rejection damages claim.

though the lease at issue provided that “counsel fees incurred to enforce the lease are to be considered part of the rent.” *Id.* at 836-37. Specifically, the court held as follows:

While the statutory obligation [in section 365(d)(3)] of “timely” performance is unambiguous with respect to rent, the obligation with respect to counsel fees is not. The language employed in section 365(d)(3) suggests a Congressional purpose to grant landlords a preferred position with respect to those obligations arising under the lease in a contractually determined time frame. Thus, the statute refers in the first sentence to “all the obligations ... arising *from* and after the order for relief ... *until* such lease is assumed or rejected” . . . The legislative history provides further support for this interpretation, stating that the “timely performance requirement” of section 365(d)(3) “will insure that the debtor-tenants will pay their rent, common area, and other charges on time” (citation in text at footnote 2, above). I conclude from this that the obligation to pay attorneys' fees is not one of the obligations within the scope of section 365(d)(3). Accordingly, any contractual obligation to pay counsel fees should be treated as part of the landlord's claim for damages.

*Id.* at 837.

12. The Debtor conceded that it owed the Landlord \$8,801.79 in unpaid stub rent, which has since been paid, and the Debtor does not object to providing the Landlord with a general unsecured claim for prepetition rental obligations. There are no other outstanding amounts owed by the Debtor to the Landlord. It is incredulous for the Landlord’s counsel to assert a claim for \$19,042.42 in legal fees and expenses, more than twice the amount of the Landlord’s \$8,801.79 administrative claim, for a lease that was rejected two months after the bankruptcy filing and does not provide for payment of the Landlord’s attorneys fees. The Debtor does not believe any amounts are owed to counsel for the Landlord on account of its legal fees and expenses, and requests that this Court deny the relief requested in the Application.

**Notice**

13. Notice of this Objection has been provided to: (i) the Office of the United States Trustee for the Southern District of New York; (ii) counsel to the Landlord; (iii) the Litigation Trustee; and (iv) any other party who has filed a notice of appearance in this case. The Debtor submits that such notice is sufficient under the circumstances.

WHEREFORE, the Debtor respectfully requests that this Court deny the relief requested in the Application and grant such further relief as the Court deems necessary at this time.

Dated: New York, New York  
April 24, 2012

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