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Hearing Date: To be determined
Objection Deadline: June 16, 2014 at 4:00 p.m.

Counsel To The Trust Administrator For
The Jennifer Convertibles Litigation Trust

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

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| _____ |) | |
| In re: |) | |
| |) | Chapter 11 |
| JENNIFER CONVERTIBLES, INC. |) | |
| |) | Case No. 10-13779 (ALG) |
| Reorganized Debtor. ¹ |) | |
| _____ |) | |

**OBJECTION OF THE TRUST ADMINISTRATOR FOR
THE JENNIFER CONVERTIBLES LITIGATION TRUST
TO THE REORGANIZED DEBTORS' MOTION FOR FINAL
DECREE CLOSING CASE OF THE REORGANIZED DEBTORS**

The Trust Administrator for the Jennifer Convertibles Litigation Trust (the “Trust”) hereby objects (the “Objection”) to the motion (the “Motion”) of Jennifer Convertibles, Inc. and its affiliated reorganized debtors (collectively, the “Reorganized Debtors”) for entry of an order granting a final decree in, and closing, the above-captioned case, and requiring the Trust to pay no less than half of any outstanding and unpaid post-confirmation quarterly fees owed to

¹ On July 7, 2011, the Court entered an order leaving open the above-captioned case and closing the cases of the following eleven affiliated debtors whose bankruptcy cases were previously jointly administered: (i) Jennifer Convertibles Boylston MA, Inc.; (ii) Jennifer Chicago Ltd.; (iii) Elegant Living Management, Ltd.; (iv) Hartsdale Convertibles, Inc.; (v) Jennifer Management III Corp.; (vi) Jennifer Purchasing Corp.; (vii) Jennifer Management II Corp.; (viii) Jennifer Management V Ltd.; (ix) Jennifer Convertibles Natick, Inc.; (x) Nicole Convertibles, Inc.; and (xi) Washington Heights Convertibles, Inc. [Docket Entry No. 601.]

the United States Trustee (the “U.S. Trustee Fees”). In support of the Objection, the Trust respectfully states as follows:

PRELIMINARY STATEMENT

1. The request for a final decree should be denied because the Reorganized Debtors have failed to fulfill their monetary obligations to general unsecured creditors under the Plan (as defined below).² The Plan, which was confirmed in February 2011, was the result of substantial negotiations, ultimately culminating in a settlement whereby holders of over \$16 million of unsecured claims agreed to a fractional recovery on their claims. To aid the Debtors’ reorganization efforts, unsecured creditors further agreed to deferred payouts from the Reorganized Debtors, evidenced by two secured promissory notes: (i) a \$1.4 million Tranche A Note due February 22, 2012 (the “Tranche A Note”); and (ii) a \$950,000 Tranche C Note due February 22, 2014 (the “Tranche C Note”). As a result, unsecured creditors agreed to wait three years before receiving all of the bargained-for consideration under the Plan.

2. Notably absent from the Motion is the fact that the Reorganized Debtors have defaulted on the Tranche C Note. Prior to the February 22, 2014 maturity date of the Tranche C Note, the Reorganized Debtors requested an extension of the maturity date from the Trust, further delaying the bargained-for distributions to unsecured creditors. Ultimately, the Trust agreed to a brief forbearance until June 2, 2014. Such patience, however, has not been rewarded. One day after filing the Motion, the Reorganized Debtors informed the Trust they would not be able to pay the Tranche C Note. The Reorganized Debtors are now in default and, as a result, the Trust is not in a position to make final distributions to unsecured creditors.

² Prior to the filing of this Objection, the Reorganized Debtors informed the Trust that the request for the Trust to pay certain U.S. Trustee fees would be withdrawn.

3. Since the Effective Date (as defined below), the lead Debtor's case has remained open to, among other things, ensure the Reorganized Debtors fulfilled their obligations. The Reorganized Debtors are in default and have breached their financial commitments under the Plan, leaving the Trust no option but to seek to enforce its remedies. That Motion must, therefore, be denied.

BACKGROUND

A. The Plan And Post-Effective Date Administration Of The Cases

4. On February 9, 2011, the Court entered an order (the "Confirmation Order")³ confirming the *Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and its Affiliated Debtors*, dated December 21, 2010 (as amended, the "Plan").⁴ The Plan became effective on February 22, 2011 (the "Effective Date"). On the Effective Date, the Trust was established pursuant to the Plan, the Confirmation Order and the *Litigation Trust Agreement and Declaration of Trust* dated February 22, 2011 (the "Trust Agreement").

5. The Plan embodied a global settlement between the Debtors and their unsecured creditors, whereby unsecured creditors agreed to accept a partial payout over time. The Plan required the Reorganized Debtors to make two payments totaling \$2.35 million to the Trust for the benefit of general unsecured creditors. The Reorganized Debtors' obligations to make these payments were documented through the following notes issued by the Reorganized Debtors:

³ Docket Entry No. 491.

⁴ Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan.

- (a) a one-year \$1.4 million senior secured Tranche A Note maturing on February 22, 2012, bearing an interest rate of 3% per annum;⁵ and
- (b) a \$950,000 three-year senior secured Tranche C Note maturing on February 22, 2014 (the “Tranche C Note Maturity Date”), bearing an interest rate of 5% per annum.⁶

The Reorganized Debtors’ obligations under the Tranche A Note and Tranche C Note are secured by a first priority security interest in the Reorganized Debtors’ inventory. A copy of the underlying Security Agreement, dated as of February 22, 2011, is attached hereto as Exhibit B.

6. The Plan requires the Reorganized Debtors to pay U.S. Trustee Fees pursuant to 28 U.S.C. § 1930, as and when due, until entry of a final decree closing all cases.⁷ To date, only the chapter 11 case of the lead Debtor, Jennifer Convertibles, Inc., remains open.⁸

7. Post-confirmation, the Plan provides for a broad retention of this Court’s jurisdiction to, among other things, resolve disputes regarding interpretation and implementation of, and enforcement of parties’ rights under, the Plan and all related agreements.⁹

⁵ The Reorganized Debtors timely paid the Tranche A Note on February 22, 2012.

⁶ A copy of the Tranche C Note is attached hereto as Exhibit A.

⁷ See Plan §§ 2.01, 6.08, and 15.13.

⁸ See *supra* n. 1.

⁹ See Plan § 13.01, providing that this Court shall retain jurisdiction to, among other things:

(v) Ensure that all payments due under the Plan and performance of the provisions of the Plan are accomplished as provided herein and resolve any issues relating to Distributions to Holders of Allowed Claims pursuant to the provisions of the Plan;

(vi) Following the Effective Date and consistent with section 1142 of the Bankruptcy Code, construe, take any action and issue such orders as may be necessary for the enforcement, implementation, execution and consummation of the Plan and all contracts, instruments, releases and other agreements or documents created in connection with the Plan and the Confirmation Order, for the maintenance of the integrity of the Plan and protection of the Estates following consummation in accordance with sections 524 and 1141 of the Bankruptcy Code; [and]

(xiv) Hear and determine disputes arising in connection with the interpretation, implementation or enforcement of the Plan, and issues presented or arising under the Plan, including but not limited to disputes among Holders or with the Reorganized Debtor and arising under agreements, documents or instruments executed in connection with or governed by the Plan[.]

8. Since the Effective Date, the Trust has actively prosecuted claims objections and pursued preference actions as well as various other actions authorized by the Plan, all of which have been concluded. Coupled with the proceeds of the Tranche A Note, these activities enabled the Trust to make an initial distribution of 6% to general unsecured creditors in August 2012. The only remaining tasks for the Trust are to collect the proceeds of the Tranche C Note and make a final distribution to unsecured creditors.

B. The Trust's Forbearance And The Reorganized Debtors' Default

9. Prior to the Tranche C Note Maturity Date, the Reorganized Debtors requested an extension of time to make the final payment contemplated by the Plan. Following numerous discussions between the parties, the Trust and the Reorganized Debtors entered into a Forbearance Agreement dated February 21, 2014 (the "Forbearance Agreement") to provide for a forbearance until June 2, 2014 (the "Forbearance Deadline").¹⁰

10. In addition, the Trust agreed that if the Reorganized Debtors paid the unpaid principal balance of the Tranche C Note on or before the Forbearance Deadline, the Trust would: (i) waive accrued but unpaid interest from and after August 23, 2013; and (ii) return the Trust's equity interest in the Reorganized Debtors.¹¹ As partial consideration for these concessions by the Trust, each of the Reorganized Debtors provided the Trust with a full release from any and all claims.¹²

¹⁰ See Forbearance Agreement at § 2, a copy of which is attached hereto as Exhibit C.

¹¹ *Id.* at § 4(a).

¹² *Id.* at § 6.

11. During the three-month forbearance period, the Trust began making preparations for its final distribution to be made following the Reorganized Debtors' anticipated June 2 payment of principal under the Tranche C Note. Without any advance notice to, or discussion with, the Trust, the Reorganized Debtors filed the Motion on May 28, 2014, seeking to close the case and compel the Trust to pay at least half of any outstanding and unpaid post-confirmation U.S. Trustee Fees.

12. The following day, the Reorganized Debtors informed the Trust it would not pay the Tranche C Note by the Forbearance Deadline. The Trust did not receive payment of the \$950,000 principal balance of the Tranche C Note on June 2, 2014.¹³ As a result, on June 5, 2014, the Trust provided the Reorganized Debtors with written notice of default (the "Default Notice").¹⁴

13. As of the date of this Objection, the Reorganized Debtors have not paid the principal balance of the Tranche C Note. The Trust intends to promptly commence an adversary proceeding against the Reorganized Debtors for judgment on the Tranche C Note and to enforce its remedies thereunder and under the Security Agreement.

OBJECTION

A. The Lead Case Cannot Be Closed With The Tranche C Note In Default

14. At its core, the Plan is a settlement between the Debtors and their unsecured creditors, compromising the Debtors' admitted liabilities and governing the timing, amount and manner of distributions. The Court retains jurisdiction under the Plan to ensure that the fundamental terms and commitments of the Plan are honored. The unsecured creditors have

¹³ The Trust did receive a payment of approximately \$37,000 purportedly representing unpaid interest. Nothing in this Objection is intended to be a concession regarding the propriety of such payment.

¹⁴ A copy of the Default Notice is attached hereto as Exhibit D.

an unquestionable right, therefore, to seek this Court's assistance to compel the Reorganized Debtors to honor their obligations under the Plan.

15. The Reorganized Debtors have breached a material commitment to general unsecured creditors through the Tranche C Note default. This means that final distributions in this case, representing a substantial portion of creditors' ultimate recoveries, have been delayed indefinitely. There simply can be no final decree issued while the Tranche C Note is in default. In fact, the Trust intends to enforce the terms of the Tranche C Note and related agreements and is preparing an adversary complaint to be filed with the Court. The primary reason for this Court's retention of post-confirmation jurisdiction has come to pass, and the Motion should be denied.

16. The authorities cited by the Reorganized Debtors do not support granting a final decree in this case. None of those cases involved a situation in which a material default under key Plan documents had occurred and was ongoing. General unsecured creditors have not received the proceeds of the Tranche C Note, as required by section 4.02(b)(3)(A) of the Plan. Those proceeds are, in the words of the Advisory Committee's Note to Bankruptcy Rule 3022, "property proposed by the [P]lan to be transferred" that have not been transferred, a critical factor that mandates keeping this case open.

B. The Trust Is Not Responsible For Payment Of U.S. Trustee Fees

17. The Reorganized Debtors have no basis upon which to seek payment of any portion of outstanding U.S. Trustee Fees by the Trust. Not only are these fees a debtor's responsibility under federal law,¹⁵ the Plan is explicit that the Reorganized Debtors are obligated

¹⁵ See 28 U.S.C. § 1930(a)(6).

to pay all U.S. Trustee Fees post-confirmation.¹⁶ Additionally, by the Forbearance Agreement, the Reorganized Debtors granted the Trust a full release that precludes any attempt to shift such costs to the Trust.

18. Prior to the filing of this Objection, the Reorganized Debtors informed the Trust that this request would be withdrawn and so reflected in a revised order. As of the date of this Objection, the Reorganized Debtors have not provided the Trust with such a revised form of order. Accordingly, the Trust reserves all rights to supplement this Objection, if necessary, to further address the issue of U.S. Trustee Fees.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Trust respectfully requests that the Court deny the Motion and grant such other relief as this Court deems just and proper.

Dated: New York, New York
June 16, 2014

KELLEY DRYE & WARREN LLP

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Counsel to the Trust Administrator for the
Jennifer Convertibles Litigation Trust

¹⁶ See Plan §§ 2.01, 6.08, and 15.13.

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

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| JENNIFER CONVERTIBLES, INC. |) | Chapter 11 |
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| Reorganized Debtor. |) | Case No. 10-13779 (ALG) |
| |) | |

CERTIFICATE OF SERVICE

I, Timothy B. Martin, of full age, declare under penalty of perjury that:

1. I am employed by the law firm of Kelley Drye & Warren LLP, and I am over 18 years of age.

2. On June 16, 2014, true and correct copies of the *Objection Of The Trust Administrator For The Jennifer Convertibles Litigation Trust To The Reorganized Debtors' Motion For Final Decree Closing Case Of The Reorganized Debtors* were served or caused to be served on all of those parties receiving electronic notification via the Court's electronic filing system and via courier upon the parties set forth on the attached service list.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Dated: June 16, 2014

/s/ Timothy B. Martin
Timothy B Martin

Service List

The Honorable Allan L. Gropper
United States Bankruptcy Court –
One Bowling Green
New York, NY 10004-1408

Office of the United States Trustee
201 Varick Street, Suite 1006
New York, NY 10014
Attn: Nazar Khodorovsky, Esq.

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Park Avenue Tower, 65 East 55th Street
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