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

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In re : Chapter No. 11
: :
BGI, INC., f/k/a Borders Group Inc., : Case No.: 11-10614 (MG)
: :
Debtor. : Substantively Consolidated
: :
-----X

**MOTION OF GIFT CARD CLAIMANTS FOR A
STAY OF INTERIM DISTRIBUTIONS PENDING APPEAL**

Jane Freij, Eric Beeman, and Robert Traktman (the “Gift Card Holders”), individually and on behalf of all members of the putative class of all purchasers and recipients of Gift Cards with an outstanding balance (the “Gift Card Claimants”), pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure, respectfully move the Court to enter an order staying any Interim Distribution of Funds by Curtis R. Smith (the “Liquidating Trustee”) and the BGI Creditors’ Liquidating Trust (the “Trust”) as successor to Borders Group Inc. and seven affiliates (the “Debtors”) under the Plan of Liquidation pending determination of the Gift Card Claimants appeal from the Court’s decisions of August 14, 2012 denying the Motions: 1) To Allow and Deem Timely Filed Gift Card Claims; and 2) For Entry of an Order Certifying the Class of All

Holders and Purchasers of Gift Cards (Docket Nos. 2814, 2815). In support of this motion, the Gift Card Claimants respectfully state as follows:

I. INTRODUCTION

1. Bankruptcy courts balance four factors when considering motions to stay orders in bankruptcy cases: 1) whether the movant will suffer irreparable injury absent a stay; 2) whether another party will suffer substantial injury if a stay is issued; 3) whether the movant has demonstrated a substantial likelihood of success on the merits; and 4) the public interests at stake.

2. The Gift Card Claimants face a significant risk of irreparable harm as a practical matter. An Interim Distribution¹ of a substantial portion of the funds held for payment of unsecured claims threatens to moot the Gift Card Claimants' appeals, because there is a finite pool of funds available for distribution to unsecured creditors pursuant to the Liquidating Plan.

3. A stay will not cause other interested parties to suffer substantial injury. The Liquidating Trustee has not completed his administration of the estate, including analyzing and prosecuting claims objections or other Chapter 5 causes of action. Therefore, it does not appear that the Liquidating Trustee should be seeking to make a substantial distribution at this time (i.e., the Trustee's requested distribution of \$75 million out of a \$106 million pool of funds). For example, the Trustee has recently identified over 200 preference avoidance actions to prosecute on behalf of the estate, for which he has recently requested an extension of various time periods for conducting investigations. The Liquidating Trustee has also requested two extensions of the claims objection period, which now runs until January 2013. All proceeds of the sale of Borders' assets are held in the Trust in interest-bearing accounts, and the actual amount of pro rata shares

¹ Capitalized terms not defined herein shall have the meaning ascribed to them under the Joint Plan of Liquidation (The "Plan"). (Docket No. 1897).

owed to each creditor is still undecided given the number of actions the Trustee still has to prosecute on behalf of the Liquidating Trust. Finally, the Liquidating Plan specifically contemplates that Interim Distributions can occur over a five-year timeline. At worst, a stay would result in a delayed distribution but even that is highly speculative as there is no impending distribution deadline.

4. A stay is in the public interest because it would protect the Gift Card Claimants' ability to meaningfully prosecute allowance of over \$100 million of claims on behalf of millions of Gift Card holders -- individual consumers who were denied any effective due process during the pendency of the bankruptcy cases.

5. The Gift Card Claimants believe they have a substantial likelihood of success on the merits, as the Court's rulings on issues of law are subject to *de novo* review and not a higher burden of proof as would be the case in an appeal over an issue of fact. The Gift Card Claimants present a legal argument based on a reasonable interpretation of Constitutional Due Process jurisprudence, and thus demonstrate a sufficient likelihood of success. There is scant settled precedent on the issue of sufficiency of claims bar date notice or due process with regard to large groups of small-value consumer creditors in the modern age, especially where the Debtor is in possession of extensive email contact lists for possible claimants, and the District Court certainly could — and should — conclude that the letter and spirit of the Bankruptcy Code, if not Constitutional Due Process, will be served by including the Gift Card Claimants in the distribution of funds to unsecured creditors.² Further, the standard of “substantial likelihood” is significantly lower than a requirement of a “probability,” and courts within this Judicial District

² In fact, Congress specifically legislated that such consumers be granted additional protections in the form of priority claim status for consumer deposits arising pre-petition in connection with personal, family, or household products or services. 11 U.S.C. § 507(a)(7).

have held that this factor can be met by a lesser showing when public interest and irreparable harm are implicated, as they most surely are in this case.

6. For all of the foregoing reasons, the Gift Card Claimants respectfully request the entry of the attached Order staying any Interim Distribution pending appeal.

II. JURISDICTIONAL STATEMENT

7. On August 14, 2012, the Honorable Judge Martin Glenn, United States Bankruptcy Court, Southern District of New York, entered the Order denying the Motion of Gift Card Claimants to file a late proof of claim and the Motion to treat the claim as a class proof of claim. (Docket Nos. 2806, 2814, 2815). This Court has jurisdiction over the Stay Motion pursuant to 28 U.S.C. §§ 157 and 1334 and pursuant to Federal Rule of Bankruptcy Procedure 8005 which provides that motions for a stay of an order “pending appeal must be ordinarily presented to the bankruptcy judge in the first instance.” Venue is proper under 28 U.S.C. §§ 1408 and 1409.

III. BACKGROUND

A. The Bankruptcy Petition, Plan of Liquidation, and Distribution of Proceeds

8. The Debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code on February 16, 2011. (Docket No. 1).

9. Toward a goal of reorganization, the Debtors filed a first day motion seeking authority to honor pre-petition Customer Programs, including Gift Cards (Docket No. 18) (the “Customer Program Motion”). That Motion states in pertinent part:

The Debtors issue Borders gift cards in a variety of denominations (collectively the “Gift Cards”). Gift Cards typically are issued in exchange for cash, and are redeemable by purchasers or recipients in exchange for the Debtors’ merchandise (with a limited number of restrictions). The Gift Cards are not subject to service fees or expiration dates. As of the Debtors’ fiscal year-end on January 29, 2011, the aggregate amount on Gift Cards outstanding was

approximately \$275,045,213. However, taking breakage into account (i.e., the amount of traditionally unredeemed Gift Cards), the Debtors estimate that only approximately \$113,141,505 of this amount will be redeemed.

(at ¶ 14). On February 16, 2011 the Bankruptcy Court granted the Debtors' Motion and authorized the continuation of the Customer Programs. (Docket No. 63). As of May 25, 2012, it is estimated that roughly 17.7 million gift cards have an outstanding balance, with an aggregate total redemption value of approximately \$210 million. (Matson Declaration, Docket No. 2701, at ¶ 12) ("Matson Dec.").

10. On March 30, 2011 the Debtors filed their combined schedules of assets and liabilities (Docket No. 491). Schedule E, unsecured priority creditors, utterly fails to mention gift card claims or to disclose the aggregate liability related to them.

11. On April 8, 2011, the Order Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof was entered. (Docket No. 580) ("Bar Date Order") establishing "Bar Date Notice"). The Bar Date Order never specifically addressed Gift Cards.

12. On June 30, 2011 the Debtors filed their motion to sell substantially all of their operating assets as a going concern to BB Brands, a wholly-owned subsidiary of Direct Brands LLC ("BB"), for the aggregate consideration of approximately \$450 Million. (Docket No. 1130). BB's bid provided for the express assumption of gift card claims, which would have necessarily obviated the need for Gift Card holders to file claims in the bankruptcy case.

13. The sale to BB aborted, and rather than consummate a sale to BB that included the assumption of Gift Card Claims, the Debtors elected to close its stores and liquidate its remaining inventory through a series of Going Out of Business/Store Closing Sales. (Docket No. 1377).

14. On October 3, 2011 the Debtors and the Official Committee of Unsecured Creditors (the “Committee”) filed a Joint Plan of Liquidation (the “Plan”) which provided for a pro-rata distribution to all allowed unsecured claims of the funds remaining from the sale of all of Borders assets after satisfaction of allowed secured claims. (Docket No. 1897). Under the Plan the funds for distribution to unsecured claims were transferred to the Liquidating Trust. The members of the Trust are the identical members of the Committee, and their counsel and financial adviser were counsel and financial adviser to the Committee. According to the Plan, Interim Distributions to general unsecured creditors are to begin by January 12, 2013. (Plan Art. IV.D.6(b)).

15. The Joint Plan of Liquidation, as amended, was confirmed by the bankruptcy court on 12/21/11. (Docket No. 2384). The Plan contemplates Interim Distributions for up to five years from the Effective Date. To date, unsecured creditors, other than taxing authorities and administrative claimants, have not been paid. However, in the week following the Gift Card Claimants’ Notice of Appeal being docketed, the Liquidating Trustee entered his first Motion for an Interim Distribution under the Plan to Unsecured Creditors. (Docket No. 2875).

16. The Liquidating Trustee filed a motion, and was granted, an extension of time to January 4, 2013 by which time to object to claims filed against the estate. (Docket No. 2753). In a motion filed on September 27, 2012 to establish procedures to govern adversary proceedings, the Liquidating Trustee estimates that he still has yet to prosecute over 200 preference avoidance actions. (Docket No. 2876).

B. Gift Card Claims

17. As part of the sale of its intellectual property rights, the Debtors filed a separate motion (Docket No. 1850) (the “CPO Motion”) seeking the appointment of a Consumer Privacy Ombudsman to protect the rights of the owners of *48 million email addresses* in Borders’

consumer marketing database. The CPO Motion disclosed that, in conjunction with individual email addresses, the database contains “first and last name (for approximately 20.4 million individuals), mailing address (for 11.6 million individuals), seven digit phone number (for approximately 41 million individuals) . . .” and more detailed information about Borders Rewards members, such as “the Borders Rewards membership number assigned to the consumer . . . and certain information about the purchasing history of that consumer . . . [including] the date and location of purchases and stock-keeping unit (“SKU”) numbers associated with the purchases” (at 6–7, ¶¶ 6–8).

18. As Borders openly acknowledged in the CPO Motion:

Of the approximately 48 million consumers whose information in one form or another appears in the Consumer Marketing Database, approximately 45 Million are or were members of the Borders rewards program.

(Docket No.1850, at 7, ¶ 8).

19. On April 8, 2011, the Bar Date Order established the Bar Date Notice that would be issued. No provisions in the Bar Date Order or Notice made any particular reference to Gift Cards, nor was any actual, personal notice specifically directed at Gift Card Claimants. Neither did the Bar Date Application, Docket No. 475, filed March 25, 2011, make any mention of Gift Cards or outstanding Gift Card liability. Publication notice, through at least a one notice in the *New York Times*, was approved for any potential creditor not listed as requiring personal notice. The Bar Date was set for June 1, 2011. Only one such notice was ever published.

20. The Order approving the Store Closing Sales, which was entered on July 21, 2011, almost two months after the passage of the Bar Date, expressly instructed the Agent in charge of holding the store closing sales to “accept Debtors’ gift cards and merchandise credits” and authorized the Debtors to “reimburse Agent for such amounts during the weekly sale

reconciliation.” (Docket No. 1377, 24, ¶ 27). Moreover, the Debtors continued to sell Gift Cards until “approximately the date of the going-out-of-business day started . . . on July 22nd,” nearly two months after the Bar Date had passed. (Matson Deposition, Docket No. 2752-2, at 14).

21. Borders’ CEO Mike Edwards sent a “blast email” to the entire Borders Rewards email list on July 21, 2011 announcing that the chain was liquidating and encouraging customers to use their Gift Cards at store closing sales. Although it was thus clearly practicable to notify Gift Card holders by using the Borders Rewards email list, no similar email was sent to any Borders customer *before* the Bar Date notifying them of their ability to preserve their property rights. (Madsen Dec., 8 ¶ 19).

22. On October 11, 2011 the Debtors moved to set a bar date for the filing of administrative expense claims. (Docket No. 1875). Although the Debtors continued without interruption to sell Gift Cards post-petition, and previously acknowledged that post-petition gift card sales created potential administrative priority claims (*see* Customer Program Motion, Docket No. 18), the Debtors again failed to send notice of the Administrative Claims Bar Date to Gift Card claimants directly.

23. Out of approximately 17.7 million current Gift Cards, it is undisputed that not a single Gift Card Claim was filed before the Claims Bar Date elapsed.

24. The Gift Card Holders became aware that their Gift Cards were no longer valid when all Borders stores completed their liquidation sales in the Winter of 2011. (Docket No. 2450, 3 ¶ 1). The Gift Card Holders subsequently retained counsel, and filed motions to allow late-filed claims and for certification as a class claim on January 9, 2012. However, hearings on these motions were adjourned several times by stipulation before ultimately taking place on August 9, 2012. (Docket Nos. 2529, 2643). The Gift Card Holders’ motions were denied in

orders of the Bankruptcy Court issued August 14, 2012, from which Gift Card Claimants appeal. (Docket No. 2806). The Gift Card Claimants now seek a stay of Interim Distributions, and object to the Trustee's Motion Approving an Interim Distribution during the pendency of that appeal.

IV. **GROUNDS FOR THE STAY**

25. Rule 8005 provides in pertinent part: “[T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of the appeal on such terms as will protect the rights of all parties in interest.” Fed. R. Bank. P. 8005. Thus, this Court has discretion to issue the stay requested by the instant motion.

26. There are four factors that should be applied when considering whether to grant a stay of a Bankruptcy Court order pending an appeal. *In re General Motors Corp.*, 409 B.R. 24 (Bankr. S.D.N.Y. 2009). These factors are:

- (1) whether the movant will suffer irreparable injury absent a stay;
- (2) whether a party will suffer substantial injury if a stay is issued;
- (3) whether the movant has demonstrated “a substantial possibility, although less than a likelihood, of success” on appeal; and
- (4) the public interests that may be affected.

Id. at 30 (quoting *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)(emphasis added)); *see also In re Adelphia Comm. Corp.*, 361 B.R. 337, 346 (S.D.N.Y. 2007) . “[T]he Second Circuit has consistently treated the inquiry of whether to grant a stay pending appeal as a balancing of factors that must be weighed.” *Adelphia*, 361 B.R. at 347; *see also Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (approving in non-bankruptcy context “a stay pending appeal where the likelihood of success is not high but the balance of hardships favors the

applicant” and noting that, in the alternative, “a stay may be granted where the probability of success is ‘high’ and ‘some injury’ has been shown.”).

27. If this Court does not issue a stay, a premature distribution will significantly diminish the assets available to pay priority Gift Card Claimants, and could moot their appeal. Under the test from *General Motors* and with the understanding gleaned from *Mohammed v. Reno*, this Court could grant the Gift Card Claimants a stay based solely on the gravity of harm to the putative class if a stay is not granted. However, each of the *General Motors* factors, either taken separately or considered as a whole, strongly favor entering a stay: (1) the Gift Card Claimants face a substantial risk of irreparable harm if a substantial amount of the available funds are distributed before the District Court rules on its appeal; (2) other unsecured creditors will suffer no discernible harm if this decision is delayed pending the ruling on appeal, as no date or amount has been fixed for specific distributions; (3) the Gift Card Claimants can in no way be said to assert frivolous claims; and (4) the public interest in protecting the rights of the proposed class of over 2 million Gift Card Claimants weighs in favor of deferring distribution until the appellate process is complete. The Gift Card Claimants will suffer substantial and irreparable harm absent a stay of Interim Distributions.

A. **Absent Issuance Of A Stay Order, The Gift Card Claimants Are In Certain Danger Of Losing Their Chance Of Meaningful Appellate Review Because Their Claim Could Be Barred On Equitable Mootness Grounds.**

28. The Second Circuit has cautioned that when considering a stay pending appeal, judges should be aware that the a post-confirmation distribution or transfer of assets from the estate can “substantially limit the scope of appeal.” *In re Gucci*, 105 F.3d 837, 840 (2d Cir. 1997); *see In re Charter Comm., Inc.*, Nos. 11–1710–bk, 11–1726–bk, 2012 WL 3764706, at *3 (2d Cir., Aug. 31, 2012)(“In this circuit, an appeal is presumed equitably moot where the debtor’s plan of reorganization has been substantially consummated.”). Courts are ordinarily

reticent to entertain an appeal that, if successful, would require retrieving distributed funds after third-parties' reliance interests have vested. *See, e.g., Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)* 10 F.3d 944, 952–53 (2d Cir. 1993)). Beyond the possibility of a judge declaring the appeal equitably moot, the Gift Card Claimants face the practical reality of seeking to file a claim against a Trust that has divested itself of most of its assets. “[W]here the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied.” *Adelphia*, 361 B.R. at 348 (emphasis in original); *see also In re Country Squire Assoc. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996) ; *In re DBSD N. Am., Inc.*, No. 90-13061 (REM), 2010 WL 1838630, at *1 (S.D.N.Y. May 7, 2010).

29. The availability of a stay pending appeal in the bankruptcy context is a critical remedy for a creditor whose otherwise valid claim may become barred by virtue of equitable mootness. The District Court for the Southern District of New York has thus noted that “the ability to appeal a lower court ruling is a substantial and important right,” and “[w]ithout a stay, it is extremely unlikely that Appellants will ever be able to have meaningful appellate review of the rulings of the Bankruptcy Court, a non-Article III court, and in any event, a lower court.” *In re Adelphia*, 361 B.R. 337, 342. Here, the failure to grant a stay would undeniably prevent the Gift Card Claimants from receiving “meaningful appellate review” as described by the *Adelphia* court, as the Liquidating Trustee appears intent on moving forward with distribution of payments which will moot movants’ pending appeal. The Trustee has already filed one motion to distribute proceeds to general unsecured creditors, and appears to be pursuing this goal with undue haste. In the event Gift Card Claimants are denied a stay pending appeal, they could suffer irreparable harm. Unless the District Court timely reverses the ruling of this court and directs that email notice be given to the millions of consumers who hold Gift Cards, persons with

valid claims who could be given notice easily and cheaply will be denied Constitutional Due Process. The Debtors failed to use an email database to notify Gift Card holders and purchasers of the Bar Date although they knew it was the most practical and efficient means of doing so, this despite using the very same database to encourage Gift Card holders to use the balance of their Cards during the Store Closing Sales. As a result, not one claimant out of 17.7 million outstanding cards filed a timely claim. This factor unquestionably weighs in favor of granting stay relief.

B. Neither Other Creditors Nor The Trustee Will Suffer Harm If A Stay Is Granted.

30. In contrast to the irreparable harm faced by the Gift Card Claimants, the creditors and Liquidating Trustee will not suffer any discernible harm if a stay is granted pending appeal. The Southern District of New York has found that harm, in the way of delay caused to other interested parties, is not given much weight in balancing test when the “possibility of further delays has been apparent” during the course of the bankruptcy case. *In re St. Johnsbury Trucking Co., Inc.*, 185 B.R. 687, 690 (S.D.N.Y. 1995) (also noting that “a stay pending appeal need not mean a lengthy delay”). More importantly, in *In re Advanced Min. Sys., Inc.*, the Southern District of New York, in granting a stay, relied on the fact that “[a]ny prejudice to the debtors and creditors if a stay is granted pales into insignificance in contrast to the prejudice the [movant] would suffer if it is not.” 173 B.R. 467, 469 (S.D.N.Y. 1994).

31. The Trust has only recently moved for an order authorizing interim distributions to unsecured creditors. Moreover, the Trust has not alleged, nor could it allege in good faith, that it has suffered serious harm from previous delays in these proceedings, and the expected delay caused by the appeal will not be long enough to cause any significant harm to any other parties. The Liquidating Trustee is about to engage in the business of recovering preferences as well as

prosecuting and defending various claims on behalf of the estate. In addition, the Trustee sought, and received, two extensions of the Trustee's Claims Objection Deadline, which is now January 4, 2013. (Docket Nos. 2588, 2816). The Trustee has asserted he still intends to prosecute more than 200 preference avoidance actions and has moved the Bankruptcy Court to allow extensions of various time periods to help ease the tide of litigation he faces. (Docket No. 2876). Under the Plan, Interim Distributions are allowed to take place over a five-year window of time from the Effective Date. In addition, the Plan provides that the "Liquidating Trustee shall not make any distributions of Trust Assets to the Trust Beneficiaries unless the Trustee retains and reserves in the Disputed Claims reserve such amounts as are reasonably necessary to satisfy . . . Disputed Claims if the Disputed Claims were determined to be Allowed Claims." Plan, VI.4.e. Clearly, under the reasoning on display in *St. Johnsbury Trucking Co.*, the possibility of further delays into at least early 2013 has been contemplated by the Liquidating Trustee in this case, and thus the resolution of the estate's affairs will not be further delayed or prejudiced by a stay concurrent with the timeline for the Trustee's Extended Claims Objection Deadline. The administration of the Liquidating Trust has been proceeding at a measured pace thus far, and there is no legitimate reason for hurrying toward the first Interim Distribution at this point, other than to moot the Gift Card Claimants' appeal.

32. In those cases in which non-moving parties would be harmed by a stay pending appeal, courts explicitly noted the need for a speedy resolution to the bankruptcy. In *General Motors* the court found that the non-moving parties would be harmed by a stay in the proceedings such that this factor weighed against a stay, but only after noting that "GM will lose its funding if approval of this transaction is not secured" within the coming week. 409 B.R. at 32. Likewise in *DBSD*, the court found that harm to the non-moving parties weighed against the

stay, reasoning “that the existence of a stay might lead to the unraveling of the entire restructuring.” 2010 WL 1838630, at *2. Unlike those cases, the instant case presents no danger of the Trust losing funding or any post-confirmation transaction unraveling if the Gift Card Claimants’ stay pending appeal is granted. In sum, there is little to no discernible risk to creditors from allowing this stay and, as in *Advanced Min. Sys.*, any potential harm to the other parties in this case “pales into insignificance” when compared to that suffered by the Gift Card Claimants if their claims are deemed moot. Thus, this factor of the analysis weighs in favor of granting the stay.

C. Gift Card Claimants Have, At A Minimum, Demonstrated A “Substantial Possibility Of Success On Appeal.”

33. The issues on appeal are purely legal, involving the application of due process and interpretation of notice obligations. The District Court will therefore review the issues presented on appeal *de novo*. Courts in this District have made clear that, in seeking a stay, “the movant need not always show a ‘probability of success’ on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.” *Adelphia*, 361 B.R. at 349 (quoting *Mohammed*, 309 F.3d at 100). Moreover, the Second Circuit held that the “*Hirschfeld* [decision] prescribes an intermediate level between possible and probable which is intended to eliminate *frivolous* appeals,” and noted that “*Hirschfeld* chose to eliminate the more onerous requirement of ‘likelihood of success on appeal.’” *Country Squire*, 203 B.R. at 184 (citing to *Hirschfeld*, 984 F.2d at 39)(emphasis added).

34. The central issues on appeal are whether the Gift Card Claimants were “unknown” creditors, and whether they received adequate constructive notice of the General Bar Date. The Gift Card Claimants will also appeal whether class certification is appropriate in this

case. No claim can seriously be made in good faith that the Gift Card Claimants are pursuing a frivolous appeal — the notice by publication employed in this case resulted in zero out of approximately 2 million outstanding claims being timely filed. Indeed, their appeal presents a substantial case on the merits and addresses serious legal questions in a field of law with limited precedent. In the absence of controlling precedent on these legal questions, the Gift Card Claimants have at least a “substantial possibility of success on appeal.”

35. “The necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other [stay] factors . . . [such that the] requisite showing of ‘substantial possibility’ of success is ‘inversely proportional to the amount of irreparable injury plaintiff [] will suffer absent the stay.’” *Adelphia*, 361 B.R. at 349 (quoting *Mohammed*, 309 F.3d at 100). As noted, without the protection of a stay order, the Gift Card Claimants are in danger of suffering an irreparable injury through a holding of equitable mootness, and face the practical reality of attempting to recover from a Trust that has divested itself of most of its assets. Under the teachings of the courts in this District, the burden on movants to show the requisite possibility of success in this case is lower than it would be otherwise. Taking in consideration the balance of factors at play, Gift Card Claimants have, at a minimum, a substantial possibility of success on the merits such that this factor weighs in favor of granting a stay pending appeal.

D. A Stay Pending Appeal So That Two Million Individual Consumer Claimants Have a Chance to Meaningfully Protect Their Property Interests Is In The Public Interest.

36. The public interest supports granting a stay because movant and other Gift Card Claimants are: a) great in number; b) assert claims for substantial amounts (in excess of \$100 million); and c) seek to address significant issues of law applicable to individual consumers which have not been the subject of judicial review and which may have implications for other similar cases. *See, e.g., In re Eastman Kodak Co.*, No. 12-10202 (ALG), Notice of Debtors’

Motion For Authority to Serve Bar Date Notices and Pleadings on Kodak gallery Customers by Electronic Mail, Docket No. 2108-1 (Bankr. S.D.N.Y. September 28, 2012) (requesting authorization for e-mail service of Bar Date Notices to large groups of potential consumer claimants). The District Court for the Southern District of New York has noted that “parties objecting to a settlement and distribution scheme have a right to appellate review and distribution of the challenged settlement award before its validity has been tested would deprive those parties of that right.” *Adelphia*, 361 B.R. at 349–350 (internal quotations omitted). Other cases have likewise recognized the importance to the public interest of preserving parties’ effective ability to appeal: in *General Motors*, the court stated that “there is undoubtedly a public interest in giving litigants the ability to appeal . . .,” 409 B.R. at 33; and in *St. Johnsbury* the court held that “[e]xtended discussion is not required to establish that there is a strong public interest in appellate review of the issues . . . and that the denial of a stay may preclude that review.” 185 B.R. at 691. Here again, the danger that an appellate court would find the Gift Card Claimants appeal equitably mooted confirms that the public interest weighs in favor of granting a stay pending appeal. Additionally, there is a public interest in allowing the Gift Card Claimants to pursue a meaningful appeal in light of the sheer number of potential claimants and dollar value of their claims, especially in an era of ever-increasing reliance on digital forms of communication. Finally, the Court granting a stay pending appeal would not be adverse to any known or material public interest. Thus, the public interest factor weighs heavily in favor of this Court granting a stay pending appeal.

E. The Court should not require the Gift Card Claimants to post a bond.

37. The Gift Card Claimants should not be forced to post a bond as a condition of granting the requested stay pending appellate review. Rule 8005 provides the Court with discretion regarding the posting of a bond, with due consideration to any loss that the non-

moving party may suffer during the pendency of the appeal. Fed. R. Bank. P. 8005. The Second Circuit has held that a court “may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor’s interest in ultimate recovery.” *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1155 (2d Cir. 1986), *rev’d on other grounds*, 978 F.2d 820 (2d Cir. 1992); *see also Port Chester Elec. Constr. Corp. v. HBE Corp.*, No. 86 Civ. 4617, 1991 WL 258737, at *1 (S.D.N.Y. Nov. 27, 1991) (*citing Texaco Inc.*, 784 F.2d at 1155). This Court may therefore grant a stay without requiring the posting of a bond if the appellee does not face a diminished position vis-à-vis the original judgment as a result of the delays of appeal.

38. “In determining whether a bond should be ordered, the court looks to whether the bond would be necessary to protect ‘against diminution in the value of property pending appeal’ and to ‘secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal.’ Moreover, the posting of a bond ‘guarantees the costs of delay incident to the appeal.’”

In re Adelpia, 361 B.R. at 367–68 (S.D.N.Y. 2007) (internal citations omitted). In *Adelpia*, the court heard substantial testimony that interest was accruing on aggregate debt of the reorganized entity at \$70 million per month, and that professional fees were costing in the range of \$10 million per month, and that the administration of the estate risked being prolonged at these high costs simply by virtue of the appeal. *Id.* at 352–53, 367–68. The concerns of diminution in the value of property and of protecting the appellee against loss are simply not at issue in this case. In a reorganization, wherein future cash flows and liquid cash are used by the reorganized debtor to secure financing, there may be great harm at risk from having the plan implementation held up due to an appeal. *See, e.g., In re Tribune*, ___ B.R. ___, Case No. 08-13141 KJC, 2012 WL 3637925, at *9–12 (Bankr. D. Del. 2012). This case is a far cry from the scenario of any large reorganization — here the debtor has liquidated its assets and ceased to exist, the proceeds are held in a Trust (presumably earning interest), and the Trustee is still in the

business of administering the estate by prosecuting preference actions and objecting to claims. Creditors have no expectation of receiving any given dollar amount yet, and the Plan contemplates allowing Interim Payments over a span of five years — creditors cannot be said to have an immediate, vested reliance interest in a specific nominal claim amount at risk during the pendency of the appeal. Further, the Claimants would agree to an expedited briefing schedule, so that an appellate decision could well be reached by the deadline for the first Interim Distribution under the Plan.

39. In this case, Gift Card Holders are representative claimants of a putative consumer class of widely-held but individually small-value claims. The named claimants themselves hold less than a thousand dollars in claims against the Trust. Requiring that these claimants post a substantial bond would have a chilling effect on allowing anyone to protect the due process rights of consumer claimants and would set dangerous precedent. At least one decision of the SDNY has relied recently on the inability of small-value consumer plaintiffs to pay a large bond in ruling that a much smaller bond, covering only the costs and not the attorneys' fees on the appeal, was appropriate under the circumstances. *Blessing v. Sirius SM Radio Inc.*, Case No. 09 CV 100035(HB), 2011 WL 5873383, at *2 (S.D.N.Y. 2011) (balancing the “appellant’s financial ability to post a bond” in a small-claim consumer appeal).

40. The putative class seeks recovery from a bankruptcy estate with assets numbering in the hundreds of millions of dollars under the supervision of a Federal court for the sole purpose of distributing those assets which are already held in Trust to satisfy allowed claims. A bond is unnecessary under the circumstances.

V. NOTICE

41. This Motion has been served upon the parties on the attached service list.

VI. NO PRIOR REQUEST

42. No previous request for the relief sought herein has been made to this Court or any other Court.

VII. RELIEF REQUESTED

43. By this Motion, and for the reasons previously set forth, the Gift Card Claimants request that the Court enter an order, substantially in the form attached hereto as Exhibit A, approving an immediate stay of an Interim Distribution pending the determination of their appeal of the denial of the motion for leave to file a late proof of claim and for class treatment, Doc. No. 2806, pursuant to Fed. R. of Bankr. P. 8005.

WHEREFORE, the Movants respectfully request that the Court grant a Stay.

Dated: New York, New York
October 11, 2012

Respectfully submitted,

By: /s/ Schuyler Carroll

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Via the Court's Electronic Filing System

All parties who receive notice through the Court's electronic filing system.

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

-----X		
In re	:	Chapter No. 11
	:	
BGI, INC., f/k/a Borders Group Inc.,	:	Case No.: 11-10614 (MG)
	:	
Debtor.	:	Substantively Consolidated
-----X		

ORDER SUSTAINING THE MOTION OF GIFT CARD CLAIMANTS FOR A STAY OF INTERIM DISTRIBUTIONS PENDING APPEAL

Upon the *Motion of Gift Card Claimants for a Stay of Interim Distributions Pending Appeal*, dated October 11, 2012, of Jane Freij, Eric Beeman, and Robert Traktman (the “Gift Card Holders”), individually and on behalf of all members of the putative class of persons owning a Gift Card with an outstanding balance (the “Gift Card Claimants”), requesting a stay, under Rule 8005, of any Interim Distribution of Funds by Curtis Smith (the “Liquidating Trustee”) under the Plan of Liquidation pending determination of the Gift Card Claimants’ appeal from the Court’s decisions of August 14, 2012 denying the Motions: 1) To Allow and Deem Timely Filed Gift Card Claims; and 2) For Entry of an Order Certifying the Class of All Holders and Purchasers of Gift Cards (Docket Nos. 2814, 2815); and the Court having jurisdiction to hear and consider this Motion under 28 U.S.C. §§ 157 and 1334 and Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York Any and All Proceedings Under Title 11; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Gift Card Claimants having provided notice of the Motion to the Notice Parties; and the Court having held a hearing to consider the requested relief; and upon record of the Hearing, and all proceedings before the Court, the Court finds and determines that the requested relief is in the best interests of the Movants, the Trust, the creditors, and all parties in

interest; the legal and factual bases set forth in the Motion establish just and sufficient cause to grant the relief requested therein; IT IS HEREBY ORDERED THAT:

1. The Motion for a Stay of Interim Distributions Pending Appeal is GRANTED in its entirety as set forth herein.

Dated: New York, New York
_____, 2012

UNITED STATES BANKRUPTCY JUDGE