Hearing Date: April 14, 2011, at 3:00 p.m. (Prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	**Chapter 11**
BORDERS GROUP, INC., *et al.*,[1]	**Case No. 11-10614 (MG)**
Debtors.	**(Jointly Administered)**
	Related Docket Nos: 457, 561

REPLY TO THE U.S. TRUSTEE'S OBJECTION TO DEBTORS' MOTION PURSUANT TO SECTIONS 363(b), 365(a) AND 503(c) OF THE BANKRUPTCY CODE AND FED R. BANKR. P. 6006 AND 9014 FOR AN ORDER AUTHORIZING (I) IMPLEMENTATION OF (A) KEY EMPLOYEE INCENTIVE PLAN AND (B) KEY EMPLOYEE RETENTION PLAN, AND (II) ASSUMPTION OF CERTAIN EMPLOYMENT AGREEMENTS

TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

Borders Group, Inc. ("BGI") and its affiliated debtors, as debtors and debtors in possession (collectively, the "Debtors"), respectfully submit this reply (the "Reply") to the objection [Docket No. 561] (the "Objection") of the United States Trustee[2] to the Debtors'

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Borders Group, Inc. (4588); Borders International Services, Inc. (5075); Borders, Inc. (4285); Borders Direct, LLC (0084); Borders Properties, Inc. (7978); Borders Online, Inc. (8425); Borders Online, LLC (8996); and BGP (UK) Limited.

[2] The Debtors understand that the Official Committee of Unsecured Creditors (the "Committee") does not object to the KERP and certain payments to be made under the Employee Agreements. The Debtors and the Committee are in active negotiations with respect to the KEIP and other payments under the Employee

Motion Pursuant to Sections 363(b), 365(a) and 503(c) of the Bankruptcy Code and Fed. R. Bankr. P. 6006 and 9014 for an Order Authorizing (I) Implementation of (A) Key Employee Incentive Plan and (B) Key Employee Retention Plan, and (II) Assumption of Certain Employment Agreements (the "Motion"),[3] and respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Court should approve the KEIP, the KERP and assumption of the Employee Agreements to ensure that the Debtors will have the vital human resources to maximize the Debtors' ability to continue operating as a going concern.

2. The Motion outlined the Debtors' difficulties in retaining quality employees that began before the Commencement Date. Indeed, the U.S. Trustee acknowledges that "[t]here is no question that the [Executives] are critical to the continued operations of the Debtors, particularly since a number of managers have already left the Debtors." Objection at 10. Unfortunately, these difficulties have continued given the uncertainty of these cases and the uncertainty surrounding approval of the KEIP and KERP plans. As a result, the KEIP now only applies to fifteen Executives, and has a target cost of $4.4 million instead of $4.7 million (and a maximum cost of $6.6 million instead of $7.1 million), because two of the seventeen Executives – a Senior Vice President and a Vice President – have resigned from the Debtors since the Debtors filed the Motion just two and a half weeks ago. In the same period, twenty-two *additional* corporate employees have voluntarily left the Debtors for a total of *forty-seven* employees since the Commencement Date. The more employees the Debtors lose, the harder the Debtors' senior management and director-level employees must work to compensate for these

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Agreements. The Debtors will adjourn the hearing on the KEIP and the contested Employee Agreements if the Debtors do not have an agreement with the Committee by the hearing date.

[3] Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Motion.

losses. In addition, at great expense to these estates, the Debtors now run their E-Commerce department with independent contractors, and AlixPartners LLP ("Alix") has assumed the responsibilities of many departing employees. Thus, the Debtors must implement the KERP to retain the KERP Employees to avert any further risk to the Debtors, their estates and stakeholders.

3. The U.S. Trustee's Objection[4] does not properly recognize the substantial risks that the Debtors are seeking to mitigate through the KEIP and KERP plans, the relative difficulty and benefits of earning an Award Determination Event, and the critical importance of retaining the Debtors' KERP Employees. Contrary to the U.S. Trustee's arguments, the KEIP and KERP are reasonable and justified based upon comparable market data, legal precedent in this and other districts, and the facts and circumstances of these cases. The KEIP is incentive-based in nature, and the Debtors have provided ample information to parties in interest – and have set forth additional information in this Reply and in the supplemental declaration of John Dempsey (the "Supplemental Dempsey Declaration, or "Supplemental Dempsey Decl."), filed contemporaneously herewith. The KEIP and KERP both satisfy the *Dana II* factors, and are certainly not "premature" based on the speedy timeframe within which the Debtors anticipate emerging from Chapter 11.

4. For all of the reasons set forth herein, the Objection should be overruled and the Motion should be granted.

[4] The Objection does not appear to object to assumption of the Employee Agreements, and contains no argument against assumption. However, the point is unclear, because the Objection seemingly complains about the Employee Agreements. *See* Objection ¶ 7.

ARGUMENT

A. Section 503(c)(1) Does Not Apply to the KEIP.

5. As more fully set forth in the Motion, section 503(c)(1) of the Bankruptcy Code does not apply to the KEIP because the KEIP payments would not be made "for the purpose of inducing such person to remain with the debtor's business." 11 U.S.C. §§ 503(c)(1); Motion ¶¶ 44-48. Instead, they would incentivize performance to ensure that the Debtors quickly emerge from Chapter 11 to *maintain* their business as a going concern. Motion ¶¶ 44-48. This is no small task; almost every major retailer in Chapter 11 has liquidated in recent years. Etlin Decl. ¶ 17. Indeed, *Dana II*, cited by the U.S. Trustee, addresses exactly what the Debtors seek to accomplish through the KEIP, and admonishes that section 503(c) is "not intended to foreclose a chapter 11 debtor from reasonably compensating employees, including 'insiders,' *for their contribution to the debtors' reorganization*." *In re Dana Corp.*, 358 B.R. 567, 575 (Bankr. S.D.N.Y. 2006); *see also In re Global Home Prods., LLC*, 369 B.R. 778, 786 (Bankr. D. Del. 2007) (citing *Dana II*) (accord).

6. The U.S. Trustee asserts that, because the KEIP payments are dependent on the timing of an Award Determination Event rather than on some other type of financial benchmark, the KEIP is a retention program as a matter of law. *See* Objection at 2, ¶ 9, 11. This is simply wrong. Whether a payment is incentive- or retention-based depends upon the facts and circumstances of each case. "Debtors are not required to establish that they have any particular chance of successfully reorganizing in order for this Court to grant Debtors the authority to enter into the KERP. . . . Rather, *the decision on whether to approve a retention plan depends on the facts and circumstances of each case*." *In re EaglePicher Holdings, Inc.*, Case No. 05-12601, 2005 Bankr. LEXIS 2894, at *13-14 (Bankr. S.D. Ohio Aug. 26, 2005) (emphasis added). "Generally, *courts take a holistic view of and measure acceptability of compensation packages*

through the prism of several factors including: whether the amount of cost or expense is reasonable and in the best interest of the estate; whether the services to be provided are likely to enhance a successful reorganization or liquidation of the debtor; whether the debtor exercised appropriate business judgment in implementing any application for continuing, resuming, or retaining the executive." *Dana II*, 358 B.R. at 571(emphasis added).

7. As set forth more fully in the Motion, incentive programs tied to the consummation of beneficial transactions or other milestone events have been approved by courts in this and other districts. *See* Motion ¶ 40 (collecting citations). None of the authorities cited by the U.S. Trustee proves otherwise. The closest the U.S. Trustee comes is *Dana I*. However, *Dana I* had a critical distinguishing factor that the U.S. Trustee ignores: the bonuses there were payable "*regardless of the outcome of the[] cases*," and were tied to nothing at all "other than *staying with the company until the Effective Date*." *In re Dana Corp.*, 351 B.R. 96, 102 (Bankr. S.D.N.Y. 2006) (emphasis added). Here, on the contrary, the KEIP payments are payable only upon two very specific potential "outcome[s] in these cases" – consummation of a plan of reorganization or a going concern sale, each within a specified timeframe. If the "outcome of these cases" is any form of liquidation, there are no KEIP payments. Moreover, the payments are most definitely tied to something "other than staying with the company until the Effective Date." Even if the fifteen Executives stay with the Debtors through the Effective Date, if they cannot cause an Award Determination Event to occur within just seven months, they get nothing even if the Debtors continue operating as a going concern.

B. <u>The KERP Employees Are Not Insiders</u>.

8. Likewise, sections 503(c)(1) and (2) of the Bankruptcy Code do not apply to the KERP because the KERP Employees are not insiders. The U.S. Trustee argues that the Debtors failed to demonstrate that the KERP Employees are not insiders because the Motion did not

contain a list of the individuals' names, job descriptions, or reporting requirements. *See* Objection at 2, ¶ 11, 12.

9. The Debtors believe they provided sufficient information in the Motion as to the KERP Employees by explaining that all of the KERP Employees are "non-executive managers," and by providing an inclusive list of the Critical Employees' various job descriptions, *see* Motion n.5, n.6. Since the filing of the Motion, however, the Debtors have provided additional information to the U.S. Trustee about the participating employees' titles and reporting obligations.

10. The U.S. Trustee's statement that "[g]enerally speaking, 'director level' executives tend to be senior management of a company, or insiders, as defined in section 101(31) of the Bankruptcy Code," is without foundation. *See* Objection at 12. While it is true that *executives* tend to be insiders, "employees referred to as 'directors' or 'director-level' are not ordinarily executives, and tend to be included in KERPs." Supplemental Dempsey Decl. ¶ 18. Moreover, it is "common for companies to refer to their corporate-level, non-executive employees like the Critical Employees as "directors" or "director-level employees." *Id*. The Critical Employees' job descriptions and reporting requirements are as follows:[5]

Critical Employee's Position	**Reporting Requirement**
Director, Associate General Counsel/Secretary	Chief Financial Officer
Director, Digital Merchandising	Director, Online Merchandising
Director, Product Systems	Chief Information Officer (currently filled by Alix)
Director, Merchandise Planning and	SVP, Planning and Allocation (currently, Alix)

[5] The Debtors do not believe it is appropriate to list these non-insiders' names in this publicly filed document, which is not filed under seal. The Debtors provided the U.S. Trustee such information on a confidential basis on April 11, 2011.

Replenishment	
Director, Merchandising Trade Books	VP, Book Merchandising
Director, Purchasing and Building Services	EVP, Operations
Director, E-commerce Systems	VP, Digital
Director, Real Estate Attorney	Director, Associate General Counsel/Secretary
Director, Assistant Controller	VP, Chief Accounting Officer
Director, Merchandise Planning and Replenishment	SVP, Planning and Allocation (currently, Alix)
Director, Device Merchandising	VP, Digital
Director, Marketing Systems	Chief Information Officer (currently, Alix)
Director, Associate General Counsel	Director, Associate General Counsel/Secretary
Director, Merchandising Operations	SVP, Planning and Allocation (currently, Alix)
Director, AP/AR	VP, Chief Accounting Officer
Director, Creative	EVP, Chief Merchandising Officer
Director, LP and Internal Audit	EVP, Operations
Director, Tax	VP, Tax
Director, Store and Customer Service	EVP, Operations
Director, Payroll and Benefits	SVP, Human Resources
Director, Human Resources	SVP, Human Resources
Director, Operations	EVP, Operations
Director, Risk Management	SVP, Human Resources
Director, Visual Presentation and Marketing	EVP, Chief Merchandising Officer
Director, Merchandising, Bargain/Fiction	VP, Book Merchandising

11. Thus, each of the Critical Employees, rather than being an "insider," is instead subordinate to and required to report to an officer, or to another director-level employee that, in turn, reports to the officer. The one Critical Employee out of the twenty-five that serves as the Debtors' corporate secretary, an associate general counsel (not General Counsel), likewise is not an "insider" within the meaning of the Bankruptcy Code. The individual's role as "secretary" is purely ministerial (taking minutes at Board of Director meetings and maintaining corporate records) and is a role the individual acquired only to perform the administrative functions when the prior General Counsel resigned. The individual is a director-level employee and is neither an officer nor an executive of the Debtors. *See In re Foothills Texas, Inc.*, 408 B.R. 573, 574-75, 579 (Bankr. D. Del. 2009) (party may hold title of an officer in name only and may not meet the substantive definition of the same if he or she is not taking part in the management of the debtor; "there may be persons that fall within the enumerated categories [of section 101(31)] but do not meet the definition of the category").

12. Finally, the Debtors submit that they do not intend to select, and will not select, any insiders as Discretionary Employees. The Debtors recognize that each and every one of their employees, not just the Executives and the Critical Employees, is important to achieving the extremely ambitious goal of an Award Determination Event in the next seven months. Unfortunately, however, the Debtors cannot provide a bonus to all their employees because of their financial circumstances. The Discretionary Pool is designed to reconcile these two propositions by rewarding truly exemplary employees. Courts in this district have permitted debtors to reserve discretionary bonus pools for employees later determined to perform exceptionally. *See, e.g., In re BearingPoint, Inc.*, Ch. 11 Case No. 09-10691 (REG) (Bankr. S.D.N.Y. July 24, 2009) [Docket No. 1128] (approving, *inter alia*, discretionary amounts to

"employees deemed by the Debtors to make a special contribution to achieving Recoveries," subject to reasonable creditors committee consent of payments exceeding $500,000 to any individual); *In re Calpine Corp.*, Ch. 11 Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. May 15, 2006) [Docket No. 1580] (approving, *inter alia*, a discretionary pool of $500,000 per year for employees at director-level and below in accordance with CEO discretion).[6] As set forth in the Motion, the Discretionary Pool would total only $300,000, and payments to individual Discretionary Employees would not exceed $20,000 per individual. *See* Motion ¶¶ 16-17.

C. The KEIP and KERP Satisfy the *Dana II* Test.

13. As set forth in the Motion, the KEIP and KERP both satisfy the factors set forth by *Dana II* to determine whether a bonus plan satisfies section 503(c)(3) of the Bankruptcy Code. *See* Motion ¶¶ 51-62. The U.S. Trustee's interpretation of these factors is inconsistent with, and unsupported by legal precedent.

14. In accordance with *Dana II*, courts look to the following factors in determining whether incentive plans satisfy section 503(c)(3) of the Bankruptcy Code, which the U.S. Trustee correctly acknowledges are "less rigorous" (*see* Objection at 14):

- whether there is a reasonable relationship between the plan proposed and the results to be obtained, *i.e.*, whether the key employee will stay for as long as it takes for the debtor to reorganize or market its assets, or whether the plan is calculated to achieve the desired performance;
- whether the cost of the plan is reasonable within the context of the debtor's assets, liabilities, and earning potential;
- whether the scope of the plan is fair and reasonable, *i.e.*, whether it applies to all employees or discriminates unfairly;
- whether the plan is consistent with industry standards;

[6] Both of these cited orders have been provided to the Court in the binder submitted with Chambers copies of the Motion on March 25, 2011.

- whether the debtor engaged in due diligence related to the need for the plan, the employees that needed to be incentivized, and what types of plans are generally applicable in a particular industry; and
- whether the debtor received independent counsel in performing due diligence and in creating and authorizing the incentive compensation.

See Dana II, 358 B.R. at 576-77 (collected citations omitted); *see also Global Home Prods.*, 369 B.R. at 786 (applying *Dana II* factors).

15. The Relationship Between the KEIP, the KERP and the Results To Be Obtained. The U.S. Trustee's misinterpretation of this first factor is apparent from the plain text of the Objection itself. The U.S. Trustee states that under *Dana II*, "the benchmarks for the payment of bonuses must be 'difficult *targets* to reach,'" and then in the same breath complains that "the Debtors have not set forth any *financial metrics* which would induce a 'stretch' of performance[.]" *See* Objection at 14 (quoting *Dana II*, 358 B.R. at 583) (emphasis added; additional emphasis removed). The U.S. Trustee fails to explain why it thinks "difficult targets" are one and the same as "financial metrics." The unrebutted evidence is that confirming a going concern plan or consummating a going concern sale will be difficult and challenging in these cases. Etlin Decl. ¶ 17. The Executives will have to work intensively over a highly compressed timeframe to earn the KEIP awards. Indeed, contrary to the U.S. Trustee's Objection, the KEIP plan requires work "beyond . . . ordinary job duties." *See* Objection at 2, 12. Causing the company to survive Chapter 11 and emerge as a going concern is certainly not part of the Executives' regular day-to-day duties.

16. Moreover, it is unclear what the U.S. Trustee means when it complains that "[t]he Debtors have not provided the Court with the facts and analysis to determine whether a reasonable relationship exists between the proposed bonuses and the results to be obtained." *See*

Objection at 14. The Debtors set forth an abundance of facts and described Mercer's analysis in the Motion and supporting Dempsey Declaration, and the U.S. Trustee never requested additional information. At any rate, the Supplemental Dempsey Declaration contains additional facts and analyses showing this relationship. Supplemental Dempsey Decl. ¶¶ 4-15; *see generally* Supplemental Dempsey Decl., Exhibit 1.

17. Finally, just because the Executives would, of course, "staunchly exercise their pre-existing contractual and fiduciary duties" with or without the KEIP does not mean that the KEIP does not satisfy *Dana II*. *See* Objection at 12, 14. The U.S. Trustee's argument in this regard necessarily implies that *no* employees subject to contractual and fiduciary duties should ever receive a bonus, or that only those which would *not* exercise their duties in the absence of a bonus, should. This is not, and should not be, the law.

18. The Bonus Plans Are Reasonable. The point of the KEIP (as with any incentive bonus plan) is to incentivize the Executives to perform, by offering market-competitive compensation. As set forth in the Motion and supporting Dempsey and Etlin Declarations, based on analyses performed by Mercer, assuming target KEIP payouts, the Executives' total direct compensation would *still* only be at 73% of the market median (with total direct compensation for the five highest-level Executives at 62% of the market median, and total direct compensation for the other twelve Executives falling at 95% of the market median).[7] Assuming maximum KEIP payouts, the total direct compensation for participating Executives would be 91% of the market median. *See* Motion ¶ 21, Dempsey Decl. ¶ 26; Etlin Decl. ¶ 22. Likewise, the KERP Employees, like other of the Debtors' employees, have not had salary increases in almost four years and have not received Annual Performance Bonus Plan bonuses for 2010. *See* Motion ¶¶

[7] This analysis excludes the Deferred Compensation and Prepetition Deferred Compensation with respect to the Employees. These percentages also do not account for the departures of the two Executives no longer receiving KEIP payments.

7, 19. The KERP payments are commensurate with Annual Performance Bonus Plan payments. *Id.* ¶ 17. Thus, the KEIP and KERP are more than reasonable in light of the Debtors' appropriate goal of offering their most vital employees market-competitive compensation. Again, the U.S. Trustee fails to cite any law in support of its contention that the KEIP and KERP payments cannot be reasonable because they must be tied to other financial metrics relating to the business plan. *See* Objection at 15.

19. The KEIP and KERP Do Not Discriminate Unfairly. The KEIP applies to the Executives the Debtors have identified as having the most control over the Debtors and their reorganization process, and thus that are the most critical to the Debtors in achieving their objective to emerge from Chapter 11 on an expedited timeframe. As set forth in the Motion, KEIP payments increase and decrease in amount commensurate with the Executives' levels, and thus in proportion to the amounts of control the Executives have over the restructuring process. Motion ¶ 12, Dempsey Decl. ¶ 12; Etlin Decl. ¶ 11. Likewise, the Critical Employees are the Debtors' director-level, non-insider employees in charge of the day-to-day execution of all components of the Debtors' business, from merchandising to creative to digital to tax to legal to human resources, as set forth both in the Motion and herein. *See* Motion ¶ 15, n.6. *See In re Brooklyn Hosp. Ctr.*, 341 B.R. 405, 412 (Bankr. E.D.N.Y. 2006) (KERP approved where "board considered which employees to include based on (i) the importance of the employee's job functions to the debtors' overall restructuring efforts, (ii) the importance of the employee's individual performance of these functions, and (iii) the risk that the employee would seek alternate employment if he or she were not included in the KERP, balanced against the debtors' ability to replace the employee if he or she chose to leave.") (internal quotation and marks omitted); *see also In re Allied Holdings, Inc.*, 337 B.R. 716, 723 (Bankr. N.D. Ga. 2005) (factors

to consider include the employee's necessity to operations and reorganization, possession of unique skills and abilities, risk of leaving, performance of heavy work loads since the bankruptcy filing and the difficulty of replacing the employee). Moreover, the Discretionary Pool would ensure that funds are available for additional employees determined to be deserving, based on job performance throughout these cases, so that no exceptional employee goes unrewarded.

20. The KEIP and KERP Are Appropriate Within Industry Standards. As set forth above, in the Motion, in the Dempsey Declaration, and in the Supplemental Dempsey Declaration, Mercer conducted extensive market research to determine whether, if the KEIP is approved, the Executives' total direct compensation would fall within the range of market competitive levels. Even assuming maximum KEIP payouts, the Executives' total direct compensation would fall *below* the market median. To the extent there is any continuing doubt about this, the Supplemental Dempsey Declaration and exhibit thereto contain additional information regarding the specific comparable companies which were analyzed. Finally, as set forth above and in the Motion and Dempsey and Etlin Declarations, no KERP payments will be made to any insiders. *See* Objection at 15.

21. The Debtors Engaged in Substantial Due Diligence. Contrary to the Objection, the Motion did not just "state[] that Mercer assisted the Debtors in formulating their bonus plan." *See id.* 16. The Motion also stated that (i) the Compensation Committee of the Debtors' Board of Directors engaged Mercer to design the KEIP, (ii) the Debtors and their professional advisors carefully reviewed and considered incentive plans instituted by comparable companies, as well as incentive based programs implemented in other complex Chapter 11 cases, and (iii) the Debtors and their professionals performed considerable diligence on the amounts of their Executives' compensation, and analyzed market comparables. Motion ¶ 56. Additional

information pertaining to these detailed analyses is set forth in the Supplemental Dempsey Declaration. The KEIP was thus approved only after extensive and careful analyses. While the Board of Directors is not involved with compensation issues below the officer level, the Compensation Committee is also aware of the KERP, and Mercer has worked extensively with the Debtors' Executives to create the KERP and Discretionary Pool. *See generally* Dempsey Decl. ¶ 15. Moreover, contrary to the U.S. Trustee's position, the Debtors believe in their business judgment that it is absolutely critical that they incentivize and retain the Executives and the KERP Employees, because of, *inter alia*, these employees' talent and critical roles; concerns arising from the publicity of these bankruptcy filings, prepetition negotiations, and store closures; the suspension of the Annual Performance Bonus Plan, the years since corporate employees have received a raise; the short tenure of many Executives; and the recent exit of key employees, all as set forth in the Motion. *See* Motion ¶¶ 8-9, 18-22; 39, 41-42, 59-62; Etlin Decl. ¶¶ 17-25.

22. The U.S. Trustee cites two cases for the proposition that the Debtors' due diligence was insufficient. *See* Objection at 16. One such case was a contract action decided twelve years before *Dana II* and does not appear to have anything to do with a bonus plan. *See* Objection at 16; *Rexnord Holdings v. Bidermann*, 21 F.3d 522 (2d Cir. 1994). The other case, also decided before *Dana II*, suggests that a debtor's diligence must be "exhaustive." *See* Objection at 16; *Brooklyn Hosp. Ctr.*, 341 B.R. at 405. However, *Dana II* articulates the operative standards for due diligence, which the Debtors plainly have met. *See Dana II*, 358 B.R. at 577. Moreover, the KERP in *Brooklyn Hospital*, a post-petition proposal designed to retain key employees through the bankruptcy process that was tied to confirmation of a reorganization plan, was approved as a proper exercise of the board's business judgment. 341

B.R. at 412-14. The court there found due diligence sufficient where "[t]he board consulted with its counsel and financial advisors, formulated several proposals, reduced the amount to be paid pursuant to the KERP, and, after negotiations with the Committee, broadened the scope of employees included and added a mitigation clause to the severance payment provision." *Id.* at 413. The U.S. Trustee does not point out what else the Debtors should have done, and does not cite any authority in support of its argument that what the Debtors have done is not enough.

23. The Debtors Received Independent Counsel. The relevant *Dana II* factor simply inquires into whether "*the debtor* receive[d] independent counsel." *Dana II*, 358 B.R. at 577 (emphasis added); *cf. Global Home Prods.*, 369 B.R. at 786 (approving plans even though "the evidence indicate[d] that Debtors did not use independent counsel," where, *inter alia*, the plans were "approved by a compensation committee and board of directors."). There is no requirement that the participants receive independent counsel. *See* Objection at 16. As stated in the Motion, the Debtors actively sought input regarding the KEIP and KERP from their independent professionals Alix, in addition to Mercer's specific compensation-related expertise. *See* Motion ¶ 57.

D. The KEIP and KERP Are Not "Premature".

24. Finally, the U.S. Trustee's argument that the KEIP and KERP are "premature" fails as a matter of law and logic. *See* Objection at 1, 9. It is unclear how long the U.S. Trustee would propose the Debtors wait. Indeed, one-third of the time within which the Executives must cause an Award Determination Event to occur to receive maximum KEIP payments has already passed. To obtain maximum incentive effects during the pendency of the bankruptcy proceedings and to retain as many non-insider employees as possible, the Motion had to be filed at the early stages of these cases. There is no legal requirement that KEIP and KERP motions be filed only after a certain point in the bankruptcy proceedings, and the U.S. Trustee cites no

support for its argument. Indeed, there are cases in which incentive and retention plans were approved on similar timeframes. *See, e.g.*, *In re Nortel Networks Inc.*, Ch. 11 Case No. 09-10138 (KG) (Bankr. D. Del.) (filed for bankruptcy January 14, 2009; orders entered approving incentive and retention plans on March 5 and 20, 2009) [Docket Nos. 1, 436 and 511].

25. Retailers have to move on a faster track than other debtors to survive Chapter 11 and avoid liquidation. In the Debtors' cases, this has influenced the need to get the KEIP and KERP in place very quickly and has set a faster track to implementing the same. Supplemental Dempsey Decl. ¶ 16.

26. The losses the Debtors have suffered in senior management and director-level employees prove that the Motion was filed at the appropriate time. *Id.* ¶ 17. The KEIP and the KERP should be approved without further delay to stop further attrition and preserve the Debtors' estates.

WHEREFORE the Debtors respectfully request that the Court overrule the Objection, grant the Motion, and grant such other and further relief as it deems just and proper.

Dated: April 12, 2011
New York, New York

KASOWITZ, BENSON, TORRES
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