

Hearing Date: June 2, 2011, at 10:00 a.m. (prevailing Eastern Time)
Objection Deadline: May 26, 2011, at 4:00 p.m. (prevailing Eastern Time)

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*Attorneys for Debtors
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

BORDERS GROUP, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 11-10614 (MG)

(Jointly Administered)

**NOTICE OF HEARING ON DEBTORS' MOTION PURSUANT TO
11 U.S.C. § 365(a) AND RULES 6006 AND 9014 OF THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE TO REJECT MASTER
LICENSING AGREEMENT WITH SEATTLE'S BEST COFFEE, LLC**

PLEASE TAKE NOTICE that Borders Group, Inc. and its debtor subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), filed the attached *Debtors' Motion Pursuant to 11 U.S.C. § 365(a) and Rules 6006 and 9014 of the Federal Rules of Bankruptcy Procedure to Reject Master Licensing Agreement With Seattle's Best Coffee, LLC* (the "Motion").

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion shall be held on **June 2, 2011 at 10:00 a.m. (prevailing Eastern Time)**, or as soon thereafter as counsel may be

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.

heard, before the Honorable Martin Glenn, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, Courtroom 501, One Bowling Green, New York, New York 10004 (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion shall be made in writing, shall state with particularity the grounds therefor, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, and shall be filed with the Bankruptcy Court electronically in accordance with General Order M-399 (General Order M-399 and the User’s Manual for the Electronic Case Filing System can be found at www.nysb.uscourts.gov, the official website for the Bankruptcy Court) by registered users of the Bankruptcy Court’s case filing system, and by all other parties in interest, on a 3.5 inch disk or CD-ROM, preferably in Portable Document Format (PDF), WordPerfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and served in accordance with General Order M-399 or otherwise **so as to be actually received no later than May 26, 2011 at 4:00 p.m. (prevailing Eastern Time)** by:

(i) Kasowitz, Benson, Torres & Friedman LLP, attorneys for the Debtors, 1633 Broadway, New York, New York 10019 (Attn: David M. Friedman, Esq., Andrew K. Glenn, Esq., and Jeffrey R. Gleit, Esq.); (ii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, New York, New York 10004 (Attn: Tracy Davis, Esq. and Linda Riffkin, Esq.); (iii) Lowenstein Sandler PC, counsel for the official committee of unsecured creditors, 65 Livingston Avenue, Roseland, New Jersey 07068 (Attn: Bruce D. Buechler, Esq. and Paul Kizel, Esq.), and 1251 Avenue of the Americas, New York, New York 10020 (Attn: Bruce S. Nathan, Esq.); (iv) counsel for the DIP Agents: (a) Morgan, Lewis & Bockius LLP, 101 Park Avenue, New York, New York 10178-0060 (Attn: Wendy Walker, Esq.), and 225 Franklin Street, 16th

Floor, Boston, Massachusetts 02110-4104 (Attn: Sandra Vrejan, Esq.), counsel for the Working Capital Agent, and (b) Choate Hall & Stewart LLP, Two International Place, Boston, Massachusetts 02110 (Attn: Kevin Simard, Esq.), counsel for GA Capital LLC; (v) Kelley Drye & Warren LLP, attorneys for certain landlords, 101 Park Avenue, New York, New York 10178 (Attn: James S. Carr, Esq., Robert L. LeHane, Esq., and Benjamin D. Feder, Esq.); (vi) Bingham McCutchen LLP, attorneys for Bank of America, N.A., One Federal Street, Boston, Massachusetts 02110-1726 (Attn: Julia Frost-Davies, Esq. and Andrew Gallo, Esq.); and (vii) Davis Wright Tremaine LLP, attorneys for Seattle's Best Coffee, LLC, 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045 (Attn: Ragan L. Powers, Esq. and Hugh R. McCullough, Esq.).

PLEASE TAKE FURTHER NOTICE that the relief requested in the Motion may be granted without a hearing if no objection is timely filed and served as set forth above and in accordance with the order, dated February 16, 2011, implementing certain notice and case management procedures in these cases [Docket No. 64].

Dated: May 19, 2011
New York, New York

KASOWITZ, BENSON, TORRES
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**UNITED STATES BANKRUPTCY COURT
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In re

BORDERS GROUP, INC., et al.,¹

Debtors.

Chapter 11

Case No. 11-10614 (MG)

(Jointly Administered)

**DEBTORS' MOTION PURSUANT TO 11 U.S.C. § 365(a) AND RULES 6006
AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE TO REJECT
MASTER LICENSING AGREEMENT WITH SEATTLE'S BEST COFFEE, LLC**

TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

Borders Group, Inc. and its affiliated debtors, as debtors and debtors in possession (collectively, the "Debtors"), submit this motion to reject their Master Licensing Agreement with Seattle's Best Coffee, LLC (the "Motion"), and the declaration of Holly Felder Etlin in support thereof (the "Etlin Decl."), filed contemporaneously herewith, and respectfully represent as follows:

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.

BACKGROUND

1. On February 16, 2011 (the “Commencement Date”), each of the Debtors commenced a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ cases are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

JURISDICTION

2. The Court has subject matter jurisdiction to consider and determine this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

DEBTORS’ BUSINESS

A. Operations.

3. The Debtors are a leading operator of book, music and movie superstores and mall-based bookstores. On the Commencement Date, the Debtors operated 642 stores under the Borders, Waldenbooks, Borders Express and Borders Outlet names (as well as Borders-branded airport stores), of which 639 were located throughout the United States and three were in Puerto Rico. The Debtors have closed or are in the process of closing approximately 225 of their retail store locations pursuant to the Court’s February 18, 2011 *Order Approving Agency Agreement, Store Closing Sales and Related Relief* [Docket No. 91] and the Debtors’ March 25, 2011 *Notice of (A) Designation of Final Put Option Store List and (B) Filing of Agency Agreement for Store Closing Sales at Put Option Stores* [Docket No. 473]. Currently, the Debtors operate approximately 405 stores. In addition, the Debtors operate a proprietary e-commerce web site,

www.Borders.com, launched in May 2008, which includes both in-store and online e-commerce components.

4. The Debtors currently employ approximately 3,792 full-time employees and approximately 7,244 part-time employees, located throughout the United States and Puerto Rico. The Debtors' employees are not subject to any collective bargaining agreements.

B. Financials.

5. For the fiscal year ended January 29, 2011, the Debtors recorded net sales of approximately \$2.3 billion. As of December 25, 2010, the Debtors had incurred net year-to-date losses of approximately \$168.2 million. The Debtors' Schedules list \$1,649,799,850 of assets and \$2,626,757,691 of liabilities. See Debtors' Schedules [Docket Nos. 491, 493, 495, 497, 499, 501, 503, 505, each at 2].

6. Additional information regarding the Debtors' business, capital structure, and the circumstances leading to these chapter 11 cases is contained in the *Declaration of Scott Henry Pursuant to Local Bankruptcy Rule 1007-2 in Support of First Day Motions* [Docket No. 20].

THE LICENSING AGREEMENT

7. On or about August 11, 2004, Borders, Inc. ("Borders") and Seattle's Best Coffee, LLC ("SBC") entered into that certain Master Licensing Agreement (the "Licensing Agreement"), annexed as Exhibit B hereto,² which provides Borders with the rights to operate SBC stores ("SBC Stores") at Borders stores. SBC Stores feature coffee, tea, and espresso beverages, whole bean coffee, related hardware items, food, and other items. Etlin Decl. ¶ 5.

² Section 5.11.3 of the Licensing Agreement contains a confidentiality provision prohibiting Borders from disclosing the specific terms of the Licensing Agreement. To comply with the confidentiality restrictions in the Licensing Agreement, on May 18, 2011, the Debtors filed a motion to file the Licensing Agreement with the Court under seal [Docket No. 851] (the "Motion to Seal"), which the Court will be hearing in conjunction with this Motion on June 2, 2011.

8. The Licensing Agreement obligates Borders to pay certain fees, purchase certain goods and supplies directly from SBC and incur other expenses in connection with SBC Stores opened by Borders, including, but not limited to, royalties (the “SBC Related Costs”), which are excessive and which have contributed to the Licensing Agreement being unprofitable for the Debtors. Moreover, as a result of the Licensing Agreement, the Debtors are unable to reduce their supply costs for the cafés in their retail stores by purchasing comparable products from other sources. *Id.* ¶ 6. Accordingly, the Debtors intend to open and operate cafés in their retail stores on their own or through another provider.

RELIEF REQUESTED

9. The Debtors request that, pursuant to section 365(a) of the Bankruptcy Code and Bankruptcy Rules 6006 and 9014, the Court enter an order, substantially in the form of Exhibit A annexed hereto, approving the Debtors’ rejection of the Licensing Agreement, effective as of June 30, 2011. However, in connection therewith, the Debtors do not intend to terminate their café licenses with the various applicable municipalities, which licenses currently provide that the business is “Borders, Inc. d/b/a Seattle’s Best Coffee,” before such licenses otherwise expire. *Id.* ¶ 10.

ARGUMENT

10. As part of their operational restructuring, the Debtors have reviewed and analyzed the Licensing Agreement. Following this review, the Debtors determined that continued compliance with the terms of the Licensing Agreement would be highly burdensome to the Debtors and their estates. The royalties combined with the cost of products and supplies are well in excess of comparable products available from other suppliers, and the SBC Stores are not profitable as a result. Indeed, the Debtors project that they will lose at least \$10 million annually

on the Licensing Agreement over its remaining term.³ *Id.* ¶ 7. Thus, the Debtors have concluded, in their business judgment, that they can improve profitability by rejecting the Licensing Agreement and operating coffee cafés in certain of their retail stores on their own or through another provider. *Id.* ¶ 8.

11. Accordingly, the Debtors respectfully submit that rejecting the Licensing Agreement pursuant to section 365 of the Bankruptcy Code is in the best interest of the Debtors, the estates and all stakeholders.

BASIS FOR RELIEF

12. Section 365(a) of the Bankruptcy Code provides, in relevant part, that a debtor, “subject to the court’s approval, may assume or reject any executory contract . . . of the debtor.” 11 U.S.C. § 365(a). *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-22 (1984) (citing and applying section 365(a)); *Med. Malpractice Ins. Ass’n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 386 (2d Cir. 1997) (“Under 11 U.S.C. § 365(a), a trustee may assume or reject an executory contract of the debtor.”). The Second Circuit has explained that “[t]he purpose behind allowing the assumption or rejection is to permit the trustee to use valuable property of the estate and to renounce title to and abandon burdensome property. In short, the trustee is allowed to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject.” *Id.* (quoting *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993)) (ellipses and brackets omitted).

13. In determining whether to grant a debtor’s motion to reject an executory contract, courts employ the “business judgment” test. *See Bildisco & Bildisco*, 465 U.S. at 523

³ The Debtors believe that SBC, on the other hand, profits from this arrangement, but cannot be sure because SBC does not share this information with Borders.

(recognizing the “business judgment” standard used to approve rejection of executory contracts); *Nostas Assocs. v. Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 25 (2d Cir. 1996) (same); *In re MGM Studios, Inc.*, Case No. 10-15774 (SMB), 2010 Bankr. LEXIS 4550, at *23 (Bankr. S.D.N.Y. Dec. 6, 2010) (“The Debtors have exercised reasonable business judgment in determining whether to assume or reject their executory contracts (including licenses)”); *In re Delta Air Lines, Inc.*, 359 B.R. 468, 476 (Bankr. S.D.N.Y. 2006) (“the standard for deciding a motion to reject an executory contract under Section 365(a) is the business judgment rule”); *In re G Survivor Corp.*, 171 B.R. 755, 757-58 (Bankr. S.D.N.Y. 1994), *aff’d*, 187 B.R. 111 (S.D.N.Y. 1985) (approving debtor’s rejection of license where such rejection satisfied the “business judgment” test).

14. Courts generally refuse to second-guess a debtor’s business judgment concerning section 365(a). In fact, “[a] debtor’s decision to . . . reject an executory contract based on its business judgment will not be altered absent a showing of bad faith or an abuse of discretion.” *In re Teligent, Inc.*, 303 B.R. 728, 733 (Bankr. S.D.N.Y. 2004) (citing *G Survivor Corp.*, 171 B.R. at 757-58); *see also In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) (“The decision to . . . reject an executory contract is within the sound business judgment of the debtor-in-possession . . . and in reviewing such a decision the bankruptcy court merely ‘review[s] the . . . debtor’s decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate.’”) (quoting *Orion Pictures*, 4 F.3d at 1098); *Delta Air Lines*, 359 B.R. at 476 (“the standard for deciding a motion to reject an executory contract under Section 365(a) . . . basically means that if it makes economic sense for the debtor in the judgment of management, the motion to reject will be granted.”); *In re Balco Equities Ltd., Inc.*, 323 B.R. 85, 99 (Bankr. S.D.N.Y. 2005) (“In determining whether the debtor has employed reasonable

business discretion, the court for the most part must only determine that the rejection will likely benefit the estate.”) (citation omitted); *In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001) (“A debtor’s decision to reject an executory contract must be summarily affirmed unless it is the product of bad faith, or whim or caprice.”) (internal quotation and marks omitted); *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 951-52 (N.D. Ohio 1997) (“Whether an executory contract is ‘favorable’ or ‘unfavorable’ is left to the sound business judgment of the debtor Courts should generally defer to a debtor’s decision whether to reject an executory contract.”).

15. The Debtors have determined that the Licensing Agreement is very burdensome to the estates because the SBC Related Costs owed under the Licensing Agreement render the SBC Stores unprofitable to the Debtors. Rejecting the Licensing Agreement will save the estates at least \$10 million annually over the term of the Licensing Agreement. Etlin Decl. ¶¶ 6-7. Thus, the Debtors have concluded in their business judgment that they can improve profitability by rejecting the Licensing Agreement and operating cafés on their own or through another provider. *Id.* ¶ 8. Accordingly, the decision to reject the Licensing Agreement is a proper exercise of the Debtors’ business judgment.

16. The Debtors intend, within forty-five (45) days after the effective date of the rejection of the Licensing Agreement, to cease operating their cafés as SBC Stores and using any of SBC’s trademarks. Specifically, in furtherance thereof, Borders will (i) remove all menu boards with SBC branding and (ii) modify or remove any SBC-proprietary equipment (except for the coffee brewing and espresso machines, which shall be modified solely by removing the SBC-proprietary controller chips contained therein and replacing such controller chips with third party-supplied chips containing programming not proprietary to SBC). Each of the locations will

operate as Borders-branded locations unless the Debtors enter into an arrangement with a third-party café operator. The Debtors estimate that it will take no longer than forty-five (45) days for all of the SBC Stores to be de-branded as described herein. *Id.* ¶ 9.

17. In light of the foregoing, the Debtors respectfully request that the Court approve their rejection of the Licensing Agreement pursuant to section 365(a) of the Bankruptcy Code.

18. The Debtors have obtained state, municipal and other governmental permits and licenses (“Business Licenses”) to operate the SBC Stores. Because it would be extremely burdensome and costly to the Debtors’ estates to obtain new licenses, the Debtors do not intend to terminate, amend or renew their current Business Licenses if this Motion is granted, until such time as the respective renewal dates of such Business Licenses arise in the normal course. *Id.* ¶

10. Thus, the Debtors respectfully request that rejecting the Licensing Agreement not be construed, as a matter of bankruptcy law, to terminate, or require amendment or modification of, any of the Debtors’ Business Licenses to operate cafés.

NOTICE

19. No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion has been given in accordance with this Court’s order, dated February 16, 2011, implementing certain notice and case management procedures [Docket No. 64], and to SBC (collectively, the “Notice Parties”). The Debtors submit that no other or further notice need be provided.

20. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as it deems just and proper.

Dated: May 19, 2011
New York, New York

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

By: /s/ Andrew K. Glenn
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*Attorneys for Debtors
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EXHIBIT A

Proposed Order

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

In re

BORDERS GROUP, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 11-10614 (MG)

(Jointly Administered)

**ORDER GRANTING MOTION PURSUANT TO 11 U.S.C. § 365(a) AND RULES 6006
AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE TO REJECT
MASTER LICENSING AGREEMENT WITH SEATTLE'S BEST COFFEE, LLC**

Upon the Motion,² dated May 19, 2011, of Borders Group, Inc. and its debtor subsidiaries, as debtors and debtors in possession (collectively, the “Debtors”), for an order pursuant to section 365(a) of the Bankruptcy Code and Rules 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) approving the rejection of the Licensing Agreement, as more fully described in the Motion; and the Court having jurisdiction to consider the Motion and grant the requested relief in accordance with 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, dated July 10, 1984 (Ward, Acting C.J.); and consideration of the Motion being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Debtors having provided notice of the Motion and Hearing (as defined below) to the Notice Parties; and the Court having held a hearing to consider the requested relief (the “Hearing”); and upon the record

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² Capitalized terms used herein, and not otherwise defined, shall have the meanings ascribed to them in the Motion.

of the Hearing, and all of the proceedings before the Court, the Court finds and determines that the requested relief is in the best interests of the Debtors, their estates, creditors, and all parties in interest; the Debtors have provided due and proper notice of the Motion and Hearing and no further notice is necessary; the legal and factual bases set forth in the Motion establish just and sufficient cause to grant the relief requested herein; IT IS HEREBY ORDERED THAT:

1. The Motion is granted as provided herein.
2. Pursuant to section 365(a) of the Bankruptcy Code and Bankruptcy Rules 6006 and 9014, the Debtors' rejection of the Licensing Agreement is approved, effective as of June 30, 2011.
3. Rejecting the Licensing Agreement shall not be construed, as a matter of bankruptcy law, to terminate, or require amendment or modification of, any of the Debtors' Business Licenses to operate cafés.
4. The Debtors are authorized to take such actions as are necessary to implement and effectuate the terms of this Order.
5. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementations, interpretation and/or enforcement of this Order.

Dated: _____, 2011
New York, New York

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Licensing Agreement

Filed Under Seal

(Pending Court's decision on Motion to Seal)