**Hearing Date: July 14, 2011 at 10:00 a.m. (Prevailing Eastern Time)**
**Objection Deadline (for Committee): July 13, 2011 at 12:00 noon (Prevailing Eastern Time)**

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

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

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO BID PROCEDURES AND BREAK-UP FEE CONTAINED IN THE DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 105, 363 AND 365 OF THE BANKRUPTCY CODE AND RULES 2002, 6004, 6006 AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE (I) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS AND THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO, (II) APPROVING THE SALE PROCEDURES AND BREAK-UP FEE, AND (III) GRANTING RELATED RELIEF**

The Official Committee of Unsecured Creditors (the "Committee") of Borders Group, Inc., *et al.*, the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, submits this objection (the "Objection") to

[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.

the Bid Procedures (including a Break-Up Fee),[2] which the Debtors seek to implement pursuant to the *Debtors' Motion for an Order Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (I) Approving the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests and the Assumption and Assignment of Executory Contracts and Unexpired Leases Related Thereto, (II) Approving the Sale Procedures and Break-Up Fee, and (III) Granting Related Relief* (the "Motion") [Docket No. 1130]. In support of this Objection, the Committee respectfully represents as follows:

**PRELIMINARY STATEMENT**

1. The Committee does not object to, and in fact would welcome, the sale of substantially all of the Debtors' assets under the terms of an appropriate asset purchase agreement. The Committee, however, does not believe that the Stalking Horse Agreement, as currently structured, represents the highest and best bid or that the proposed Bid Procedures are designed to maximize the potential value of the Debtors' assets. The Committee would fully support the Bid Procedures and the Stalking Horse Bidder if the Stalking Horse Agreement was modified to, among other things, embody a firm commitment to provide for a going concern sale of the Debtors' assets. Unfortunately, it does not.

2. As currently structured, the Bid Procedures and Stalking Horse Agreement provide BB Brands, LLC ("BB Brands"), the Stalking Horse Bidder, with the option to purchase substantially all the Debtors' assets and then, over the course of the next several months, reject executory contracts and unexpired leases, liquidate the inventory of the entire chain of retail locations and retain valuable intellectual property (*i.e.*, the Borders name and related intellectual property rights) and other assets for less consideration than the Back-Up Bid combined with the Debtors' other assets such as intellectual property.

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[2] Capitalized terms used but not otherwise defined herein shall have the definitions ascribed to such terms in the Motion.

3. In short, the Stalking Horse Bid is not a definitive going concern offer worthy of stalking horse protections. It neither maximizes value for the benefit of unsecured creditors nor provides for the other benefits of a going concern – preservation of the business and the thousands of jobs that go along with that business. Instead, it expressly allows the Stalking Horse Bidder the option to elect to conduct a Full Chain Liquidation *after* the Sale Hearing is conducted and the Sale is approved.

4. This is unacceptable because a Full Chain Liquidation conducted by the Stalking Horse Bidder will not maximize the value of the Debtors' assets for the benefit of unsecured creditors. If the Debtors' situation is so unfortunate as to require a Full Chain Liquidation, the preferable course would be to have that Full Chain Liquidation of the Debtors' inventory through GOB sales under the terms of the Back-Up Bid, combined with one or more separate sales of the Debtors' remaining assets (including intellectual property and leases) conducted by representatives of the Debtors' estates.

5. As described in greater detail below, although the Debtors seek approval of the Stalking Horse Bidder, a comparison of the Stalking Horse Agreement to the Agency Agreement (which serves as the Back-Up Bid) reveals that the Back-Up Bid will provide greater certainty and value to the Debtors' estates than does the current Stalking Horse Bid.

6. Accordingly, the Committee submits that unless the Stalking Horse Bid is modified to provide for a real commitment to a going concern sale, the current Back-Up Bid in the form of the Agency Agreement should be designated the Stalking Horse Bid. To clarify, the Committee encourages BB Brands participation in the Sale process and Auction. The Committee is hopeful that BB Brands will submit a revised bid prior to the Bid Deadline and proceed in the Sale process without the need of a Break-Up Fee or other bid protection with a going concern sale proposal. Significantly, the Agency Agreement could be approved as the Stalking Horse Bid without the need for the Debtors to commit to any break-up fee or a very large initial overbid.

7. Furthermore, the Bid Procedures do not allow Bids for specific asset categories such as intellectual property and real estate leases. The Bid Procedures should allow parties to submit Bids for the intellectual property and other specific asset categories such as real estate leases to ensure that the Sale generates maximum value for the Debtors' assets subject to the Committee's rights embodied in the Second Amendment and Waiver to the DIP Credit Agreement.[3]

8. Moreover, the Motion seeks approval of a $6,450,000 Break-Up Fee even though, as noted earlier, the Stalking Horse Bidder has no obligation to continue to operate Borders as a going concern after the Closing.[4] Although styled as a going-concern Bid, the Stalking Horse Bidder can liquidate the business shortly after the Sale closes. The Debtors concede this by acknowledging that "there is no guarantee that the Stalking Horse Bidder will proceed with a going concern acquisition for the Debtors' business." Motion, p. 3. Additionally, the Debtors already have a Back-Up Bidder (a consortium of professional liquidators) on board seeking to conduct a Full Chain Liquidation, who has not requested a Break-Up Fee or any other bid protections. Thus, a Break-Up Fee is neither warranted nor appropriate under the circumstances of this case.

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[3] The order approving the Second Amendment and Waiver to the DIP Credit Agreement expressly provides that "[t]o the extent the Debtors are permitted, under the terms of the Second Amendment, to exclude their intellectual property assets and interests in leases in or from a Sale Transaction, the Debtors shall include those assets in a Sale Transaction only after consultation (the "Consultation") with the Committee and the Committee reserves its rights to object to the Debtors' inclusion of those assets in a Sale Transaction in the event the Debtors seek to include them after the Consultation." Second Amendment and Waiver to the DIP Credit Agreement Order, ¶ 6.

[4] As described more fully below, the Stalking Horse Bidder has a significant amount of time after the Closing to designate which executory contracts and unexpired leases to assume or reject, has no obligation to assume any minimum number of unexpired real estate leases, and no obligation to provide equity in the case of a complete liquidation.

9. Finally, although the Debtors generally state in the Motion (p. 21, ¶ 27) and Bid Procedures (p. 14, ¶ O) that they "intend to consult with the Committee . . . on an ongoing basis throughout the Sale and Auction process," the most critical decision in the sale process--selecting the winner of the Auction--does not include consultation with the Committee. Further, several other key decisions specifically include consultation with the Stalking Horse Bidder. Allowing the Debtors to make decisions in their unfettered discretion is unreasonable, and allowing the Stalking Horse Bidder (whose goal is to purchase the assets for as little as possible) to participate in the decision-making relating to the Bid and Sale process in an effort to maximize the sale price is unacceptable.

## JURISDICTION

10. The Court has jurisdiction to consider this Objection and the Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of these cases in this District is proper under 28 U.S.C. §§ 1408 and 1409.

## BACKGROUND

11. On February 16, 2011 (the "Petition Date"), each of the Debtors commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

12. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Debtors' bankruptcy cases.

13. On February 24, 2011, the Office of the United States Trustee appointed the Committee pursuant to 11 U.S.C. § 1102. *See* Docket No. 156.

14. As of January 29, 2011, 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 stores were located in the United States and 3 in Puerto Rico. See Motion, ¶ 4. All of the Debtors' stores are situated on leased premises.

15. On the Petition Date, the Debtors filed a motion seeking authority to, among other things, enter into an agreement with the Phase I Liquidating Agent to conduct store closing sales ("SCSs") at no fewer than 200 of the Debtors' stores, and up to an additional seventy-five (75) of the Debtors' stores if the landlords did not agree to substantial rent concessions. *See* Docket No. 7. On March 19, 2011, the Debtors designated 26 additional stores to be included in the SCSs. *See* Docket No. 421. As of the date hereof, the liquidation sales at all 226 locations have concluded and the Debtors and the Phase I Liquidating Agent have reconciled all amounts due under the two agency agreements. *See* Motion, ¶ 9.

16. In addition, on the Petition Date, the Debtors filed the DIP Motion. *See* Docket No. 27. Thereafter, on March 16, 2011, the Court entered the Final DIP Order granting the DIP Motion, authorizing the Debtors to obtain the DIP Loan pursuant to the DIP Credit Agreement. *See* Docket No. 404.

17. The DIP Credit Agreement contained certain deadlines requiring the solicitation of bid packages and store closures at various locations by mid-June 2011. On June 9, 2011, the Debtors filed the Phase II GOB Motion, in which the Debtors sought entry of an Order authorizing the Debtors to sell certain assets located at up to fifty-one (51) store locations at which landlords had not agreed to extend the Debtors' time to assume or reject such leases past September 14, 2011. *See* Docket No. 999. However, on June 17, 2011, the Debtors and DIP Lenders entered into the Second Amendment and Waiver to the DIP Credit Agreement, which extended various deadlines to allow the Debtors to pursue a potential sale of substantially all of their assets and withdraw the Phase II GOB Motion. *See* Docket No. 1077. The Court approved the Second Amendment and Waiver to the DIP Credit Agreement by order dated June 22, 2011 (the "Second Amendment and Waiver to the DIP Credit Agreement Order"). See Docket No. 1111.

18. As of July 6, 2011, the Debtors owed approximately $140,502,000 to the DIP Lenders under the revolving credit facility of the DIP Loan (including the revolver, FILO tranche and undrawn letters of credit). In addition, they owed approximately $37,397,000 to

the DIP Lenders under the term loan portion of the DIP Loan. As of the projected closing date of July 30, 2011, it is estimated that approximately $175,000,000 will be due on the revolver (including the revolver, FILO tranche and undrawn letters of credit) and $36,616,000 will be due on the term loan, for a total amount due of approximately $211,000,000. With regard to the inventory (primarily books) that secures the DIP Loan, it is anticipated that as of the projected closing date of July 30, 2011, the book value of such inventory will be approximately $417,500,000.

19. With respect to unsecured debt, it is estimated the such claims will exceed $700,000,000. Based on the claims register, in excess of $1 billion in unsecured claims have been filed.

## THE MOTION

20. On June 30, 2011, the Debtors filed the Motion seeking authority to sell substantially all of their assets (the "Sale") to BB Brands, LLC (the "Stalking Horse Bidder"), pursuant to the terms of an asset purchase agreement (the "Stalking Horse Agreement") by and between the Debtors and the Stalking Horse Bidder, or to a higher and better bidder at an auction to be held on July 19, 2011 (the "Auction").

21. The purchase price under the stalking horse bid (the "Stalking Horse Bid") is comprised primarily of $215 million in cash (subject to a working capital adjustment) and the purported assumption of approximately $220 million of liabilities (some of which would not be paid in a liquidation). It is anticipated that a substantial portion of the cash portion of the Stalking Horse Bid will be used to repay the outstanding portion of the DIP Loan upon closing.

22. Notwithstanding the proposed assumption of liabilities and other characteristics that make the Stalking Horse Bid appear to be in contemplation of a going-concern Sale, the Motion makes clear that "there is no guarantee that the Stalking Horse Bidder will proceed with a going concern acquisition for the Debtors' business." Motion, p. 3. Indeed, the Stalking Horse Bidder will have an extended amount of time to decide which, if any, of the Debtors' leases and contracts to assume or reject. Specifically, Article 1.4 of the Stalking Horse

Agreement provides the Stalking Horse Bidder with the right to assume or reject real property leases and executory contracts at any time prior to the applicable Designation Deadline, some of which Designation Deadlines extend to January 2012. *See* Stalking Horse Agreement, Article 13, p. 33. In fact, the Stalking Horse Bidder has no obligation to designate any leases of non-residential real property until July 22, 2011, which is the day *after* the hearing to approve the Sale.

23. As required by the Debtors' DIP Credit Agreement, the Motion also includes a back-up bid for a liquidation of substantially all of the Debtors' inventory and furniture, fixtures and equipment (the "Back-Up Bid") pursuant to the terms of an agency agreement (the "Agency Agreement") submitted by a group of liquidation firms that will be consummated if the Stalking Horse Bidder fails to close. The Agency Agreement provides for a guaranteed recovery to the estate of seventy-two (72%) percent (the "Guaranty Percentage") of the cost value of the merchandise included in the liquidation (ranging from $350-395 million of inventory at cost), plus fifty (50%) percent of the proceeds above the guaranteed amount and funding of expenses. *See* Agency Agreement, Section 3; Etlin Decl., ¶ 9. Thus, the Back-Up Bid will generate a minimum of $252 million and up to $284 million in cash (Id.) and, significantly, provides the Debtors with the opportunity to separately sell or collect all other assets, such as the Borders name and other intellectual property, real estate leases, cash, notes, receivables and refunds. Under the Back-Up Bid, the Back-Up Bidders are obligated to remit ninety (90%) percent of the Guaranty Percentage on the first business day following the entry of the Sale Order, with the balance due after the Final Inventory Report is reconciled.

24. To facilitate the consummation of the Sale, the Debtors seek entry of two orders: one order approving the Bid Procedures, including the Break-Up Fee, and the other approving the actual asset sale. This Objection relates only with the proposed Bid Procedures. Any objections to the proposed Sale will be set forth in a separate objection that may be filed prior to the relevant objection deadline.

## OBJECTION

25. The Committee's objections to the Bid Procedures are as follows:

- Transaction Structure. As currently structured, the Bid Procedures will allow the Stalking Horse Bidder to purchase substantially all the Debtors' assets, reject the Debtors' executory contracts and unexpired leases, liquidate the entire chain of retail locations and retain valuable intellectual property and other assets for less consideration than the Back-Up Bid. The Stalking Horse Bid is not a definitive going concern offer because it allows the Stalking Horse Bidder the option to conduct a Full Chain Liquidation *after* the Sale Hearing is completed and the Sale is approved. Such a proposal is not acceptable to the Committee. The Debtors should not be permitted to designate a Stalking Horse Bid which the Committee objects to when there already exists a better alternative bid that does not require a Break-Up Fee.

- Stalking Horse Bid. The Debtors have designated the Bid of BB Brands as the Stalking Horse Bid, but have not established that such bid is currently the highest and best offer for the Debtors' assets and therefore worthy of designation as the Stalking Horse Bid. The Committee believes that the Back-Up Bid provides greater value to the Debtors' estates than does BB Brands' Bid and, therefore, the Back-Up Bid should be the Stalking Horse Bid. BB Brands would, of course, have the right to bid at the Auction and the Committee hopes that BB would submit a bid that provides for a going concern business.

- Break-Up Fee. The Debtors seek Court approval of a $6,450,000 Break-Up Fee in conjunction with the Stalking Horse Bid. Motion, pp. 3, 13 and 21. The Break-Up Fee is objectionable because the Stalking Horse Bid is not a true going concern offer and there is already another bid (the Back-Up Bid) in place that does not require a Break-Up Fee. Further, while the Debtors assert that the Stalking Horse Bidder would not have submitted its offer without the Break-Up Fee, (Motion, p. 4), the Motion does not clearly establish under what circumstances the Stalking Horse Bidder becomes entitled to the Break-Up Fee. Finally, the Debtors have failed to justify the amount of the Break-Up Fee.

- Form of Bids. The Debtors propose to consider only Bids for a GC Sale, a Remainder Chain Liquidation and Full Chain Liquidation. Motion p. 18; Bid Procedures, p. 2. In order to maximize the potential value to be generated through the asset Sale, the Bid Procedures must allow bids for individual asset categories such as intellectual property and real property leases subject to the Committee's rights in the Second Amendment and Waiver to the DIP Credit Agreement.

- Consultation. Although the Debtors generally state that they intend to consult with the Committee and the DIP Agents on an ongoing basis throughout the Sale and Auction process, (Motion, p. 21; Bid Procedures, p. 14.), the Motion and Bid Procedures, indicate that the two most critical and crucial decisions in the Sale process--deciding whether to conduct an Auction, and

> selecting the winner of the Auction--do not require consultation with the Committee. Further, key decisions designed to ensure that the Debtors receive maximum value for the assets such as (i) changing the Bidding Interval, and (ii) deciding whether to separate the Auctions (Bid Procedures p. 11), will be made in consultation with the Stalking Horse Bidder, whose obvious objective is to pay as little for the assets as possible. Allowing the Stalking Horse Bidder a voice in such decisions is counter-productive and should not be authorized.

26. Section 363(b) of the Bankruptcy Code provides, in pertinent part, that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor-in-possession to justify the proposed transaction with sound business reasons in order to satisfy its fiduciary duty to its creditors and equity holders. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989); *In re Au Natural Restaurant, Inc.*, 63 B.R. 575 (Bankr. S.D.N.Y. 1986).

27. As this Court has recognized, the paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the debtor's estate. *See In re Metaldyne Corp.*, 409 B.R. 661, 667-68 (Bankr. S.D.N.Y. 2009) ("It is the overarching objective of sales in bankruptcy to maximize value to the estate.") (*citing In re Integrated Resources Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2nd. Cir. 1993) ("It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and the [Debtor's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.")).

28. The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the debtor's estate. *See In re Cormier*, 382 B.R. 377 (Bankr. W.D. Mich. 2008) (*quoting In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998)). As stated in *In re President Casinos, Inc.*, 314 B.R. 784, 786 (Bankr. E.D. Mo. 2004), "[s]tructured bid procedures should provide a vehicle to enhance the bid process and should not be a mechanism to chill prospective bidders' interests." To accomplish these goals, bankruptcy

courts are necessarily given discretion and latitude in conducting a sale of a debtor's assets. *In re Wintz Co.*, 219 F.3d 807, 812 (8th Cir. 2000) (stating that in structuring the sale of assets, "[bankruptcy courts] have ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets"). The Committee submits that the Bid Procedures proposed by the Debtors fail to meet the goals of the bidding process - fairness and maximization of value, and respectfully requests that the Court modify the Bid Procedures in order to meet these goals as set forth herein.

29. The Committee is fully cognizant of the importance of a timely sale of the Debtors' assets to the highest and best bidder--as a full or partial going concern or, if necessary, in an orderly liquidation. However, the Committee is compelled to bring to the Court's attention certain objectionable aspects of the proposed Bid Procedures that will prevent the Debtors from obtaining maximum value for the assets in any type of Sale.

30. <u>Transaction Structure</u>. The going concern aspect of the Stalking Horse Bid is illusory. As currently structured, the Bid Procedures and Stalking Horse Agreement allow the Stalking Horse Bidder to purchase substantially all the Debtors' assets, then reject all executory contracts and unexpired leases, liquidate all of the inventory of the entire chain of retail locations, terminate employees and walk away with valuable intellectual property (*i.e.*, the Borders name and related intellectual property rights) and other assets for little or no consideration. Moreover, the Stalking Horse Bidder would not be required to reveal whether it will continue to operate the retail locations or liquidate them until *after* the Sale is approved or to disclose the exact amount of the equity investment that would be infused into BB Brands, if any. The Stalking Horse Bidder must not be allowed the option to conduct a Full Chain Liquidation post-Sale. The Debtors estates can effectuate a much more efficient and profitable liquidation by selling the intellectual property and real estate leases separately and having the Back-Up Bidders liquidate the inventory and fixtures as contemplated in the Agency Agreement. A sale to BB Brands only makes sense in connection with a definitive going concern sale on terms acceptable to the Committee.

31. Although the Committee prefers a going concern sale and hopes that the Stalking Horse Bidder decides to commit to a going concern sale prior to the hearing to approve the Bid Procedures, the Back-Up Bid is more advantageous than the proposed Stalking Horse Bid under a liquidation scenario. As noted earlier, the liquidation of the inventory alone through the Agency Agreement would generate no less than between $252 million and $284 million from the guaranteed amount (Etlin Declaration at ¶ 9), an amount that is more than enough to repay the DIP Loan in full, and would allow the remaining assets including, but not limited to, intellectual property and leases to be liquidated in an orderly manner for the benefit of unsecured creditors. Therefore, there is no good reason to include the intellectual property rights, real property leases and other valuable assets in a Sale to the Stalking Horse Bidder unless the Stalking Horse Bidder proceeds with a true going concern Bid that assures the continuation of the Debtors' business, the assumption of a substantial number of the Debtors real estate leases and the continued employment of a large segment of the Debtors' work force.

32. Stalking Horse Bid. In order to maximize value for the Debtors' estates, the Stalking Horse Bid must be the Bid that sets the "highest and best" floor for comparison with other competing Bids at the Auction. Although the Debtors have designated the bid of BB Brands, LLC as the Stalking Horse Bid, the Committee believes, as outlined above, that the Back-Up Bid would provide a greater return to the Debtors' estates in the event that BB Brands LLC elects to proceed to a liquidation after the closing of the sale. Therefore, the current Back-Up Bid, rather than the bid of BB Brands should be designated as the Stalking Horse Bid. In sum, the Committee believes that the transaction contemplated by the Back-Up Bid, coupled with the Sale of the assets excluded from the Back-Up Bidder, will yield greater value for the Debtors' estates. Accordingly, the Back-Up Bid should be designated as the Stalking Horse Bid. Further, the Back-Up Bid does not require a Break-Up Fee and the initial overbid would, therefore, be lower.

33. Break-Up Fee. The Stalking Horse Bidder is not entitled to a Break-Up Fee because the Stalking Horse Bid does not create a "floor" for competing bids for a going concern

Sale. Further, the Bid Procedures do not make clear under what circumstances the Stalking Horse Bidder becomes entitled to the Break-Up Fee. Section 11.4 of the Stalking Horse Agreement would appear to permit payment of the Break-Up Fee in almost any circumstance. Additionally, the Debtors already have a Back-Up Bidder in place who has not requested any bid protections or Break-Up Fee. Finally, in a case where distributions to unsecured creditors is uncertain, a $6,450,000 Break-Up Fee is excessive in absolute dollars.

34. A court will grant bid protections including a break-up fee when a bidder provides a floor for bidding by expending resources to conduct due diligence and allowing its bid to be shopped around for a higher offer. *See Integrated Resources*, 147 B.R. at 659. In approving a breakup fee, the court in *In re Fortunoff Fine Jewelry and Silverware, LLC*, 2008 WL 618983 (Bankr. S.D.N.Y. 2008), held that the break-up fee was an actual and necessary expense of preserving the debtors' assets within the meaning of sections 503(b) and 507(a)(2) of the Bankruptcy Code. The break-up fee was a component of what induced the buyer to submit its bid, which served as a minimum floor bid and provided the debtors with the opportunity to sell their businesses *as a going concern*. *See Id.* at *1. The buyer provided a material benefit to the debtors and their creditors by increasing the likelihood of obtaining the best possible price for the assets. Thus the court approved the break-up fee as reasonable. *Id. See also Reliant Energy Channelview LP, et al.*, 594 F.3d 200 (3d. Cir 2010) (affirming the bankruptcy court's denial of a break-up as not necessary to preserving the value of the estate); *In re O'Brien Environmental Energy*, 181 F.3d 527 (3d. Cir. 1999) (same).

35. Here, the Bid Procedures are structured so that the Stalking Horse Bidder may purchase substantially all the assets, then subsequently reject every executory contract and unexpired lease, conduct a Full Chain Liquidation and walk away with valuable intellectual property such as the Borders trade name and other assets for little or no consideration. The Bid Procedures allow for, and the Debtors readily acknowledge that the Stalking Horse Agreement does not guarantee a going-concern Sale. This possibility exists despite the presence of a

material and firm Back-Up Bid submitted by a consortium of professional liquidators who have not demanded a Break-Up Fee or other bid protections as an inducement to submit their bid.

36. Further, it is unclear under the Bid Procedures whether the Stalking Horse Bidder would be entitled to the Break-Up Fee in the event of a Full Chain Liquidation by a party other than the Back-Up Bidder. The Motion states that the Stalking Horse Bidder is entitled to a Break-Up Fee if the Stalking Horse Agreement "is terminated for any reason other the mutual agreement or default of the Stalking Horse Bidder." Motion, ¶ 21. This would be unfair to the estates.

37. Finally, the Debtors assert that $6,450,000 is a reasonable Break-Up Fee simply because it is the equivalent to three (3%) percent of the cash portion of the Stalking Horse Bid. However, no mention is made of the actual costs the Stalking Horse Bidder has incurred in conducting its due diligence and preparing the Stalking Horse Bid. The Committee submits that such costs could not be anywhere near $6,450,000 and, therefore, to award a Break-Up Fee in this amount will create a potential large windfall for the Stalking Horse Bidder at the direct expense of the Debtors' cash-strapped estates.[5] Similarly, the Debtors overlook the real danger that the excessive Break-Up Fee will chill the bidding process by discouraging competing Bids that must be $6,450,000 higher because of it.

38. Accordingly, considering that (i) the Stalking Horse Bid (with its optional Full Chain Liquidation) is not a commitment to purchase the Debtors' assets as a going concern; (ii) the Break-up Fee is excessive under the circumstances; and (iii) the presence of the Back-Up Bidder who does not require a Break-Up Fee, the Court should deny the Debtors' request for approval of a Break-Up Fee.

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[5] A more equitable and reasonable approach (if appropriate, which it is not in these cases) would be to offer a bid protection of expense reimbursement capped at no more than $3.0 million based on actual, documented, reasonable expenses incurred, including legal fees. This would provide the same protection and incentive for the Stalking Horse Bidder, yet prevent the payment of a huge windfall.

39. Lot Bids. The Bid Procedures must allow Bids for specific categories of the Debtors' assets in order to maximize value. There is no doubt that a Full Chain Liquidation would generate funds sufficient to repay the DIP Loan in full. Therefore, including the Debtors' intellectual property rights and real estate leases in such a liquidation without the opportunity to market such assets separately will result in "money left on the table" that could be used to satisfy the Debtors' other obligations. In order to maximize the potential value of the Debtors' assets, the Bid Procedures must be modified to allow for individual category bids subject to the Committee's rights as set forth in the Second Amendment and Waiver to the DIP Credit Agreement.

40. Consultation Rights. The Committee must be consulted in regard to all evaluations and decisions that may affect the outcome of the Sale. Although the Debtors have paid the Committee "lip service" by inserting a general provision pledging to "consult with the Creditors' Committee…on an ongoing basis throughout the sale and auction process" (Bid Procedures, p. 14), specific references throughout the Bid Procedures and Motion indicate that all critical evaluations and decisions will be made in the Debtors' sole and absolute discretion or, in consultation with the Stalking Horse Bidder. To allow the Debtors sole and absolute discretion over such decisions is inequitable and unreasonable. To allow the arguably conflicted Stalking Horse Bidder--whose goal is to purchase the assets for as little as possible--to participate in the decision-making process that is supposed to maximize the sale price is not reasonable.[6]

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[6] The Debtors are in the process of revising the Bid Procedures and the Bid Procedures Order. To the extent the revised Bid Procedures and Bid Procedures Order resolve any of the objections contained herein, such objections will be withdrawn.

## RESERVATION OF RIGHTS

41. The Committee expressly reserves its rights to raise further and other objections to the Motion and Bid Procedures prior to or at the July 14, 2011 hearing (and at the Auction and Sale Hearing).[7]

## CONCLUSION

**WHEREFORE** The Committee respectfully requests that the Court (i) deny the Motion or, in the alternative, modify the relief sought as necessary to incorporate the concerns and objections of the Committee as set forth herein; and (ii) grant the Committee such other and further relief as the Court deems just and proper.

Dated: July 13, 2011

**LOWENSTEIN SANDLER PC**

By: <u>/s/ *Bruce Buechler*</u>
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[7] In particular, the terms of the Agency Agreement are in the process of being revised in response to issues raised by the DIP Lenders. The Committee reserves its right to raise objections to the final version of the Agency Agreement once the final version is provided to the Committee.