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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 11-10614-mg

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In the Matter of:

BORDERS GROUP, INC. et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

September 8, 2011
11:05 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

1 [1399] Hearing Re: First Lease Sale of Motion for Order
2 Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code
3 and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of
4 Bankruptcy Procedure (I) Approving the Bidding and Auction
5 Procedures for the Sale of Unexpired Nonresidential Real
6 Property Leases, (II) Setting Lease Sale Hearing Dates and
7 (III) Authorizing and Approving (A) Sale of Certain Unexpired
8 Nonresidential Real Property Leases Free and Clear of All
9 Interests, and (B) Assumption and Assignment of Certain
10 Unexpired Nonresidential Real Property Leases

11
12 [1698] Motion to Authorize/Notice of Hearing on Debtors Motion
13 Pursuant to Sections 363(b) and 503(c) of the Bankruptcy Code
14 for Order Authorizing Certain Severances Payments

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25 Transcribed by: Ellen S. Kolman

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P R O C E E D I N G S

THE COURT: Please be seated. All right. We're here in Borders Group, Inc., number 11-10614. Mr. Glenn?

MR. GLENN: Good morning, Your Honor, Andrew Glenn, Kasowitz, Benson, Torres & Friedman on behalf of the debtors and debtors-in-possession.

Your Honor, at this point, I can go through the agenda one by one. The Kin mortgage and the Mortgage Corporation of America motions have been adjourned by consent until October 18th.

The next item on the agenda for which we're proceeding today is docket number 1399, first round lease auction sale hearing. For that, I'm going to turn the podium over to my colleague, Dan Fliman.

THE COURT: Thank you.

MR. FLIMAN: Good morning, Your Honor. For the record, Dan Fliman, Kasowitz, Benson, Torres & Friedman on behalf of the debtors. Before the Court, Your Honor, is debtors' motion for authority to sell certain interests in unexpired real property leases. Your Honor entered an order on August 11th approving bid procedures in order to solicit interest in those leases. The bid procedures created a platform of two rounds of bidding. The first round consisted of leases with shorter assumption and rejection deadlines. The second round is being bid upon right now. With respect to the

1 first round, there were about 150 leases, and the debtors
2 received bids with respect to eight of those leases. Seven of
3 those eight leases, the only bids received were from landlords
4 in order to terminate those leases. The last lease, there were
5 two bids received; one was from the landlord and one was from a
6 third party bidder. With respect to that last lease, and
7 that's the Snellville location, the debtors proceeding with the
8 assistance of DGM, their advisors, to conduct an auction. That
9 auction commenced on August 31st and both the landlord, Equity
10 One, and the third party bidder participated. Following that
11 auction, the auction was recommenced on September 6 and as a
12 result of that Equity One emerged as the successful bidder.
13 Their bid is for 150,000 dollars for termination of the lease
14 plus waiver of pre-petition claims.

15 The debtors have been working with the committee in
16 order to document the eight termination agreements with respect
17 to these eight leases. Last night, Your Honor, we filed
18 notices of filing the contained proposed orders for each of
19 those eight deals as well as eight termination agreements.
20 Now, four of those termination agreements have been finalized,
21 have been signed, have been approved by the committee and were
22 annexed to the proposed orders that we filed last night.

23 With respect to the remaining four, we're still
24 discussing with landlords and landlord's counsel trying to
25 finalize the terms and we anticipate getting those done today

1 or tomorrow and submitting them to the Court.

2 Now, just to address the economics of the deals before
3 the Court, on the seven locations for which the only bid
4 received was from the landlord, each of those are a deal for
5 10,000 dollars of consideration in order to terminate the lease
6 and that would be paid either in cash or with respect to, I
7 believe, one location there is an allowed administrative
8 expense claim that will be credited against the 10,000 dollars
9 pursuant to the bidding procedures that Your Honor approved.

10 And as I said with respect to the last location, the
11 cash consideration will be 150,000 dollars paid by the landlord
12 in addition to release of pre-petition claims.

13 So, Your Honor, unless you have any questions
14 regarding this matter, what we would suggest is that the four
15 orders for which finalized termination agreements have been
16 executed, and I can identify them for Your Honor, that that be
17 entered. And with respect to the four remaining orders where
18 we're finalizing termination agreements that Your Honor permit
19 the debtors and the committee time to finalize those agreements
20 with the landlords and once finalized we will submit them to
21 the Court and unless the Court at that point has any direction
22 or any questions we would ask that those be submitted as well.

23 THE COURT: All right. Let me see whether anybody
24 else wishes to be heard with respect to the first round lease
25 auction sales. Mr. Buechler.

1 MR. BUECHLER: Your Honor, Bruce Buechler for
2 Lowenstein Sandler on behalf of the creditors' committee. We
3 have no opposition to the procedures laid out by Mr. Fliman.
4 Just two points with regard to the four locations to which
5 there has not been an agreement on the form of lease assignment
6 agreement. To the extent that we cannot reach an agreement by,
7 I think with regard to all four of these leases, the time for
8 the debtors' estate to assume and assign them where they would
9 be deemed rejected by operation of Section 365 of the
10 Bankruptcy Code of September 14th, if the landlords don't -- we
11 buck up to that date next week -- agree to voluntary extend
12 that for a week or two for the parties to work it out, if
13 necessary, we may have to come back before Your Honor to extend
14 that period. We hope that doesn't come to that. We believe
15 that is consistent with what was discussed with Your Honor at
16 the prior hearing where we discussed possibly having issues
17 with regard to assumption and assignment in there if there were
18 issues with cure costs or adequate assurance of future
19 performance but we may have an issue on some of the issues
20 raised on the assignment agreements where the landlords have
21 come back with terms that were not part of their bids. And
22 from the committee's perspective for two of them, a substantial
23 deviation from the proposed form of assignment that was
24 attached to the motion submitted by the debtors that brings us
25 here today. So, we hope to be able to work through those.

1 We have the caveat with regard to the other four. We
2 have no objection to the entry of the orders and the proposed
3 lease termination agreements and the committee was an active
4 participant in connection with the auction for the one store
5 that had the competing bids which was store number 208
6 Snelville, Georgia and believe that that auction was conducted
7 fairly and openly even though we did conclude the sale last
8 week and then recontinued the sale this week when the landlord
9 came back and decided to increase its bid to match the bid of
10 the competing nonlandlord bidder. And when they matched it,
11 the landlord opted not to go any higher, the committee
12 concurred with the debtors' business judgment that the
13 landlord's offer, Equity One in that case, was the highest and
14 best bid for the sale of the lease for store 208. Thank you.

15 THE COURT: Thank you, Mr. Buechler. Anybody else
16 wish to be heard?

17 MR. SAYDAH: Good morning, Your Honor. Gilbert Saydah
18 of Kelley Drye counsel for the landlords for store number 190,
19 Elk Grove, California; the landlord is Donohue Schriber, and
20 the landlord for store number 208 which is in Snellville,
21 Georgia which was the location where the auction was closed and
22 then subsequently reopened and Equity One, my client, was
23 selected as the highest and best bidder.

24 Your Honor, those two locations are two of the four
25 where we have not yet reached agreement with respect to the

1 form of the order or the lease termination agreements although
2 I think the parties are relatively close and we are working
3 diligently to get it done and get the order and the LTA
4 submitted just as soon as we can.

5 THE COURT: Thank you, Mr. Saydah.

6 MR. SAYDAH: Thank you, Your Honor.

7 THE COURT: Anybody else wish to be heard?

8 (No response.)

9 THE COURT: Okay. Mr. Fliman, why don't you give me
10 the numbers, the store numbers, where the orders have been
11 finalized?

12 MR. FLIMAN: So, I -- Your Honor, if it might be
13 easier, I can also reference the docket number for which we
14 filed it last night.

15 THE COURT: That's fine.

16 MR. FLIMAN: But they are for -- docket number 1724
17 which is store 294, docket number 1725 for store number 452,
18 docket number 1726 for store 249, and docket number 1727 for
19 store 163.

20 THE COURT: All right. So, with respect to stores
21 294, 452, 249 and 163 for which orders have been submitted, the
22 lease terminations are approved by the Court.

23 MR. FLIMAN: Thank you.

24 THE COURT: And with respect to the -- just give me
25 the numbers of the four that remain.

1 MR. FLIMAN: Sure. The store numbers, Your Honor?

2 THE COURT: Well, give me both the docket entry and
3 the -- well, I don't have the order so give me the store
4 numbers.

5 MR. FLIMAN: Sure. The store numbers are 19, 599, 190
6 and 208.

7 THE COURT: Okay. So, with respect to those four
8 stores, we are still working on the documentation. Assuming
9 that you're able to reach an agreement in form satisfactory to
10 the committee, the debtor, and the landlord submit those to the
11 Court as soon as possible. And so that the deadline for
12 assumption or rejection is -- what day next week is it?

13 MR. FLIMAN: It's the 14th, Your Honor.

14 THE COURT: The 14th is what? I don't have my
15 calendar open here.

16 MR. BUECHLER: Your Honor, that's Wednesday.

17 THE COURT: Wednesday. Okay. All right. I'm here
18 Monday, Tuesday, Wednesday so if this issue comes up that you
19 can't either finalize the documentation or get an agreement
20 from the landlords to extend the time, contact my clerk and
21 we'll schedule a telephone hearing to see if we can resolve the
22 issue then. Okay.

23 If you're able to finalize the agreements, submit them
24 to the Court. If I don't have any issue about them, we'll just
25 enter them. If there's any issue about it we'll schedule a

1 hearing about it but we'll proceed in that fashion.

2 MR. FLIMAN: Okay.

3 THE COURT: Okay.

4 MR. FLIMAN: Thank you, Judge.

5 THE COURT: I would just hope that -- well, let's
6 leave it at that. As I say, if you need to have an expedited
7 hearing because of the deadline to assume or reject, just call
8 chambers and we'll arrange a prompt hearing. Okay?

9 MR. FLIMAN: Thank you, Judge.

10 I guess as a housekeeping item, just one other item.
11 There were some cure objections that were filed with respect to
12 the leases for round one. None of them are being assumed and
13 assigned so those are mooted out.

14 THE COURT: Right. All those cure -- I understood
15 that that all the cure issues because these are all about
16 termination of the leases, the cure issues fall out of.

17 MR. FLIMAN: Thank you, Your Honor.

18 THE COURT: Thank you very much, Mr. Fliman. Mr.
19 Glenn?

20 MR. GLENN: That brings us, Your Honor, to the
21 severance motion which is docket number 1698.

22 Your Honor, we filed a motion pursuant to Section
23 363(b) and 503(c) authorizing us to make severance payments to
24 two groups of employees. First, the top four senior
25 management, Mike Edwards, Scott Henry, Jim Frering and Rosalind

1 Thompson along with additional employees at the vice president
2 level. This, I believe is ten other employees again pursuant
3 to Section 503(c) of the Bankruptcy Code.

4 Very briefly, by way of background, Your Honor, we
5 have severance plans that govern employees below the director
6 level. The general policy is one week of severance for every
7 one year of tenure with the company up to a maximum of twelve
8 weeks.

9 THE COURT: And that policy has been in place for how
10 long?

11 MR. GLENN: Several years. Several years.

12 Second, we have at the director and vice president
13 level individual severance agreements and general company
14 policy with respect to employees of those levels.

15 At the senior management level, each of the employees
16 is subject to an individual employment agreement. Your Honor,
17 at the -- towards the beginning of the case, we -- well, first
18 of all, on the first day of the case we had Your Honor enter an
19 employee wage order, traditional in these cases, authorizing us
20 to make payments other than to insiders and then we came back
21 to Your Honor to implement the KEIP and the KERP programs that
22 also authorized us to make incentive payments in certain
23 circumstances. Unfortunately, none of those circumstances came
24 to fruition so we are back in court today to not implement a
25 new severance program but instead to honor the programs that

1 were generally in existence before the Chapter 11 case.

2 Section 503(c) of the Bankruptcy Code requires that to
3 make the payments to insiders the program has to be "generally
4 applicable" words that effect to all employees. I believe we
5 submitted the declaration of Ms. Holly Etlin who is in court
6 today which indicates that substantially all employees of the
7 company are subject to severance agreements of one form or
8 another. We cited the form Health case which was the only
9 authority we could find on point other than Colliers which
10 suggest that the programs don't have to be identical at every
11 single level and we think that makes a tremendous amount of
12 sense and we think that that prong of 503(c) has been
13 satisfied.

14 Ms. Etlin in conjunction with the creditors' committee
15 financial advisors computed a mean amount of in excess of
16 125,000 dollars. The creditors' committee believe that amount
17 was too high. There was some negotiation. And ultimately, the
18 parties agree that 125,000 dollars should be the appropriate
19 amount. Again, we believe it could have well been higher than
20 that.

21 So, where we are today, just so the record is clear,
22 we have started making payments to the vice president level
23 employees on the belief that they're not getting a lump sum.
24 They're going to get paid something and it's going to be a
25 substantial amount. We didn't believe it was fair to those

1 employees to hold back the payments given it was salary
2 continuation and that all parties had agreed ultimately on the
3 amount and that no payments would be made anywhere near the cap
4 amount before we came to court today.

5 Mr. Schwartzberg in his office has reviewed the
6 calculations and is in agreement on those calculations. No
7 party has rejected and for all the reasons in our papers we
8 believe that the motion should be granted. We're talking 1.75
9 million dollars in the aggregate for the top four employees.
10 They will receive the 125,000 dollar payments. That
11 constitutes between two months to two and a half months salary,
12 I believe. So, we're not talking Golden Parachute type
13 payments that have been rejected in other cases. And I should
14 note for the record that those cases pre-date the enactment of
15 Section 503(c) of the Bankruptcy Code in any event. So, unless
16 Your Honor has any questions, we would ask for the motion to be
17 granted and to allow us to make those payments.

18 THE COURT: All right. Anyone else wish to be heard?
19 Mr. Buechler?

20 MR. BUECHLER: Your Honor, the -- prior to the filing
21 of this motion, the committee was actively involved in the
22 negotiation of the contours and terms of the motion and the
23 agreement on reaching 125,000 dollar cap. There was much
24 discussion between the debtors and the committee over how you
25 calculated what might be an appropriate and fair number given

1 the case as well as, as I said a moment ago, how you actually
2 calculate the cap under 503(c) of the Bankruptcy Code. At the
3 end of the day, the committee supports the motion seeking the
4 relief sought for the vice presidents and the four insiders.
5 The numbers of people resigned as opposed to actually -- or
6 terminated could be slightly less. And, therefore, we do
7 support the entry of an order granting the severance for these
8 level of employees along with the concomitant releases that
9 they would have to sign pursuant to the company's policies in
10 exchange for receiving the severance payments.

11 THE COURT: Thank you, Mr. Buechler. Does anybody
12 else wish to be heard?

13 (No response)

14 THE COURT: All right. Court has reviewed the motion
15 and specifically the declaration of Holly Etlin. The issues
16 before the Court are, first, whether the proposed payments
17 are -- involve an appropriate exercise of business judgment of
18 the debtor and the Court concludes based on the evidence before
19 that the payment's due. Then, the operative provision of the
20 Bankruptcy Code is Section 503(c) and here, 503(c)(2) which
21 sets forth the limitations or requirements for a Court to be
22 able to approve severance payments. The evidence here
23 establishes that the debtor had an existing severance policy.

24 Under 503(c)(2), the severance payment to an insider
25 which would be the officer level, the senior officer level

1 people, is only appropriate if the payment is part of a program
2 that is generally applicable to all full-time employees and the
3 amount of the payment is not greater than ten times of the
4 amount of the mean severance pay given to nonmanagement
5 employees during the calendar year in which the payment is
6 made. The Court is satisfied that the formula test in
7 503(c)(2)(B) is satisfied with respect to the payments that are
8 proposed to be made here.

9 In particular, with the negotiations that took place
10 with the committee capping the payments is 125,000 dollars, the
11 Court is satisfied that this -- these proposed payments involve
12 an appropriate exercise of business judgment and are consistent
13 with the limitations contained in Section 503(c) of the
14 Bankruptcy Code. Consequently, the debtors' motion to approve
15 the payments, the severance payments, as provided in motion is
16 granted.

17 MR. GLENN: Thank you, Your Honor.

18 Other than that, Section 2 of the agenda letter lists
19 a bunch of claim matters and lift stay motions. All of those
20 have been adjourned to the October 18th hearing. So, unless
21 Your Honor has any questions, I think that concludes the
22 hearing for today.

23 THE COURT: Okay. Does anybody else have any issue
24 they want to raise for today?

25 (No response)

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THE COURT: All right. We're adjourned. Thank you
very much.

(Whereupon these proceedings were concluded at 11:24 AM)

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I N D E X

RULINGS

	Page	Line
Lease terminations for store numbers 294,452,	10	22
249 and 163 approved		
Motion to approve severance payments granted	17	15

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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Ellen S. Kolman

Digitally signed by Ellen S. Kolman
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Date: September 9, 2011