

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:

**BORDERS GROUP, INC., *et al.*,¹
Debtors.**

Chapter 11

Case No. 11-10614 (MG)

(Jointly Administered)

**REPORT OF MICHAEL ST. PATRICK BAXTER
CONSUMER PRIVACY OMBUDSMAN**

Michael St. Patrick Baxter
Yaron Dori
Dennis B. Auerbach
Elizabeth H. Canter
Joshua D. McKarcher
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Telephone: (202) 662-5164
Facsimile: (202) 778-5164
e-mail: mbaxter@cov.com

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 BOP (UK) Limited.

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Michael St. Patrick Baxter, the consumer privacy ombudsman in these cases (“**Ombudsman**”), files this report (“**Report**”), pursuant to Bankruptcy Code section 332(b), to assist the Court in its consideration of the facts, circumstances, and conditions of the proposed sale of personally identifiable information (“**PII**”)² of consumers of Borders Group, Inc., and its debtor subsidiaries (collectively, “**Debtor**”) to Barnes & Noble, Inc. (“**Buyer**”).

Based upon the following analysis and subject to the qualifications therein, the Ombudsman concludes and recommends as follows:

(a) Debtor may transfer to Buyer PII (other than information about certain audio-visual materials described in paragraph (c) below) that was collected after May 27, 2008, pursuant to Debtor’s May 27, 2008 Privacy Policy, provided that (i) Buyer adheres to all material terms in Debtor’s May 27, 2008 Privacy Policy (or terms that are at least as protective of consumer privacy); (ii) Buyer honors the opt-out requests of any consumer that previously opted out of receiving marketing messages from Debtor; (iii) Buyer safeguards

² See 11 U.S.C. § 101(41A), quoted *infra* at note 6.

all conveyed PII in a manner consistent with industry standard data security protections and applicable information security laws; and (iv) Buyer destroys PII for which it determines it has no reasonable business need.

(b) Debtor may transfer to Buyer PII (other than information about certain audio-visual materials described in paragraph (c) below) collected on or before May 27, 2008, provided that (i) Debtor obtains the affirmative consent of affected consumers; or (ii) Buyer agrees to treat PII collected by Debtor on or before May 27, 2008, consistently with the terms of Debtor's privacy policy in effect at the time of such collection, and agrees to obtain affirmative consent for any material change to such policy that relates to PII collected under it.

(c) Debtor cannot transfer to Buyer any consumer's purchase history information that includes the title, genre and other details about specific audiovisual materials (e.g., videocassettes, DVDs), regardless of when it was collected, unless Debtor obtains the written consent of the affected consumer.

(d) Debtor may transfer to Buyer the Aggregate Clickstream Data (as defined in paragraph 31 below).

BACKGROUND

1. On August 12, 2011, the United States Trustee for Region 2 appointed Michael St. Patrick Baxter as the consumer privacy ombudsman in these cases to review Debtor's proposed sale of PII to Buyer ("**Sale**"). The Ombudsman prepared this Report, pursuant to sections 332 and 363(b)(1) of the Bankruptcy Code, to assist the Court in its consideration of the facts, circumstances, and conditions of the Sale and, in particular, the sale of certain data collected by Debtor via its websites and other retail channels.

2. To facilitate the preparation of the Report, the Ombudsman provided written questions to Debtor and participated in several discussions with Debtor's representatives. The Ombudsman also conducted interviews of two representatives of Debtor: Matthew A. Chosid (Associate General Counsel, Borders Group, Inc.) and Daniel Angus (Vice President, Customer Loyalty, Borders Group, Inc.).

3. The Ombudsman invited representatives of the Federal Trade Commission, the Office of the New York Attorney General, and the National Association of Attorneys General to participate in the interviews of Messrs. Chosid and Angus.³

4. The following documents were relied upon by the Ombudsman in the preparation of the Report: (a) Debtor's Privacy Policies, dated May 27, 2008, April 12, 2007, and February 21, 2006, and the last policy in effect before February 21, 2006⁴ (attached hereto as **Exhibit A**); (b) Borders Rewards Terms and Conditions, dated October 1, 2010, September 1, 2010, August 26, 2010, July 23, 2010, September 10, 2009, November 3, 2008, May 27, 2008, April 12, 2007, and February 21, 2006 (attached hereto as **Exhibit B**); (c) other representations on Debtor's website, including Borders Websites and Computer Kiosk Terms of Use and "Consumer Service Email Opt-out" page (attached hereto as **Exhibit C**); and (d) the form of Asset Purchase Agreement provided by Debtor ("**Purchase Agreement**") (attached hereto as **Exhibit D**), specifically section 7.5 of that agreement:

³ The following representatives of the invited governmental agencies attended the interview in person or by telephone: Karen Jagielski (Federal Trade Commission), Michael P. Mora (Federal Trade Commission), Christopher N. Olsen (Federal Trade Commission), Karen Cordry (National Association of Attorneys General), and Clark P. Russell (Office of the New York Attorney General).

⁴ The exact effective date of this policy cannot be determined, so it has been marked "Pre-February 21, 2006 Privacy Policy" in Exhibit A.

Privacy. On or prior to the Closing Date, the Buyer agrees to adopt a written policy with respect to protection of the confidentiality of personally identifiable information regarding the customers and employees of the Seller Group and other Persons not affiliated with the Seller Group substantially similar in all material respects to those included in the written privacy policies of the Seller Group in effect as of the date of this Agreement. From and after the Closing Date, the Buyer shall comply with such policy, or such successor policies adopted by Buyer from time to time, and Applicable Law with respect to the protection of such personally identifiable information. Prior to making any material change to these privacy policies with respect to the personally identifiable information or the use or disclosure thereof different from that specified in the Buyer policies then in effect, the Buyer agrees (a) to notify the Persons whose personally identifiable information is included in the Assets by mail or email and afford such persons the opportunity to opt-out of the changes to the privacy policy or the new uses of their information; (b) to employ appropriate information security controls and procedures (technical, operational, and managerial) to protect their information; and (c) to abide by all Applicable Laws.

5. The Ombudsman also reviewed various internal documents that Debtor made available to the Ombudsman pertaining to its marketing and advertising programs, including the Borders Rewards and Borders Rewards Plus programs, and various documents pertaining to Debtor's information technology program.

6. As a condition of providing the Ombudsman with access to certain information, Debtor required that the Ombudsman enter into a written confidentiality agreement, which he did.

7. Finally, as discussed below in paragraphs 90–96 below, the Ombudsman received and considered letters concerning the Sale from the Federal Trade Commission (“**FTC**”) (attached hereto as **Exhibit E**) and 24 states' Attorneys General (attached hereto as **Exhibit F**).

SCOPE OF THE REPORT

8. Section 332(b) of the Bankruptcy Code requires that the Ombudsman “provide to the court information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of personally identifiable information under section 363(b)(1)(B).” This information may include the following:

- (a) Debtor’s privacy policy;
- (b) the potential losses or gains of privacy to consumers if the sale is approved by the Court;
- (c) the potential costs or benefits to consumers if the sale is approved by the Court; and
- (d) the potential alternatives that would mitigate potential privacy losses or potential costs to consumers.⁵

This Report reflects the Ombudsman’s consideration of these issues.

9. Section 363(b)(1)(B)(ii) of the Bankruptcy Code suggests that the Ombudsman should additionally consider whether a proposed sale of PII⁶ would violate

⁵ See 11 U.S.C. § 332(b).

⁶ Pursuant to 11 U.S.C. § 101(41A),

[t]he term “personally identifiable information” means—

(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—

- (i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;
- (ii) the geographical address of a physical place of residence of such individual;
- (iii) an electronic address (including an e-mail address) of such individual;

(continued...)

applicable nonbankruptcy law. Accordingly, the Ombudsman has included an analysis of whether the Sale would violate certain potentially applicable nonbankruptcy law, including the Federal Trade Commission Act (“**FTC Act**”), state laws similar to the FTC Act, and the Video Privacy Protection Act of 1998 (“**VPPA**”).

10. For purposes of this analysis, the Ombudsman may use the term “consumer data” to refer to data collected by Debtor. Such term may include data that is outside the scope of PII. The Ombudsman may also refer to “personal information” to the extent that Debtor’s policies made representations regarding “personal information,” and this term may be more or less inclusive than PII, depending upon the context in which it was used by Debtor.

(iv) a telephone number dedicated to contacting such individual at such physical place of residence;

(v) a social security account number issued to such individual; or

(vi) the account number of a credit card issued to such individual; or

(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)—

(i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or

(ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

AFFECTED CONSUMER DATA⁷

I. Background

11. Debtor owned and operated nearly 500 book, music, and movie superstores under the Borders name and more than 100 mall-based and other small-format bookstores, including stores operated under the Waldenbooks, Borders Express, and Borders Outlet names.⁸ As of January 29, 2011, Debtor's physical stores were located throughout the United States in 48 states plus the District of Columbia and Puerto Rico.⁹

12. Since May 2008, Debtor also operated a proprietary e-commerce platform, through which it sells products online through its websites (namely, www.borders.com), mobile applications, and in-store kiosks that connect to the Internet.¹⁰

13. Through its physical stores and e-commerce business, Debtor sells an assortment of products, including books, music and movies, gifts and stationery, food and beverages, eReaders and other digital devices, games, toys, calendars, posters, reading accessories, and furniture.¹¹ At least 40 percent of Debtor's product sales are attributable to purchases of non-media products, i.e., products other than books, music and movies.

⁷ The facts in the Report are stated upon the Ombudsman's information and belief, based upon his interviews with, and information provided by, Debtor's representatives. The Ombudsman shared drafts of the fact section of the Report with Debtor in an attempt to ensure the accuracy of the statement of facts in the Report. The Ombudsman also shared his preliminary legal conclusions with Debtor prior to the auction, and shared an initial draft of this report with Debtor, Buyer, the FTC, and representatives of the State Attorneys General and received comments from those entities.

⁸ Borders Group Inc., Annual Report, at 3, 8 (Form 10-K) (Apr. 29, 2011).

⁹ *Id.*

¹⁰ *Id.* at 6.

¹¹ *Id.* at 8.

II. Consumer Data Collected by Debtor

A. The Debtor's Consumer Marketing Database

14. Debtor collected certain consumer data at both its physical stores and through its e-commerce platform to target Debtor's marketing and promotional e-mails to consumers and otherwise facilitate its marketing efforts. Most of this consumer data appears to be PII under the Bankruptcy Code. The database containing this data is stored on servers maintained by, and accessed through software offered by, Debtor's service provider, Epsilon Data Management LLC ("**Epsilon**"). Subsets of the data stored on Epsilon's systems also are stored on servers controlled by Debtor and other service providers of Debtor. (Collectively, the Ombudsman refers to these databases as the "**Consumer Marketing Database.**") The Sale includes the Consumer Marketing Database.

15. Debtor has represented to the Ombudsman that the Consumer Marketing Database contains PII collected from consumers through its physical stores since May 2005. The Ombudsman further understands that PII in the Consumer Marketing Database has been collected by Debtor through its e-commerce platform since May 2008, other than for a subset of e-mail addresses received from Amazon.com. Debtor has represented to the Ombudsman that, prior to May 2008, Debtor's e-commerce business was operated by Amazon.com and that PII collected from consumers by Amazon.com generally was not provided to Debtor or incorporated into its Consumer Marketing Database except for a limited subset of e-mail information, as discussed below at paragraph 42.¹²

¹² As discussed below, Debtor has represented that the Consumer Marketing Database includes the email addresses of certain of Amazon.com consumers that "opted in" to having their e-mail information conveyed to Debtor at the time Debtor began operating its e-commerce platform. The Ombudsman asked for copies of the screen shots or other documentation of the opt-in provided by Amazon.com, as well as the applicable (continued...)

(i) Retail Store and E-Commerce Consumers

16. The Consumer Marketing Database contains the PII of approximately 48 million consumers. For each consumer, the Consumer Marketing Database contains some or all of the following data elements, with variability with respect to how much PII the consumer provided to Debtor and whether certain data elements remain valid: first and last name (for approximately 20.4 million individuals), e-mail address (for approximately 48 million individuals), mailing address (for approximately 11.6 million individuals), seven digit phone number (for approximately 41 million individuals), and month and day of birth (but not year)¹³ (for approximately 7.9 million individuals).

17. For those consumers that are or have been members of Debtor's loyalty program, Borders Rewards (discussed below), the Consumer Marketing Database also may contain the Borders Rewards membership number assigned to the consumer by Debtor, and certain information about the purchasing history of that consumer. Such purchase history information may include, for example, the date and location of purchases, the stock-keeping unit ("SKU") numbers associated with purchases, and information about the amount paid and the tender for payment used, e.g., cash or credit card.

18. Through the use of SKU numbers, Debtor collects and stores in the Consumer Marketing Database information about each unique product or item purchased by

Amazon.com privacy policy and any other privacy representations made by Amazon.com to the affected consumers. Debtor has not been able to provide those materials at the time of this Report, but Debtor has represented that it understands that the only information in the Consumer Marketing Database that was collected pursuant to an Amazon.com privacy policy was transferred to Debtor's Consumer Marketing Database pursuant to the affirmative consent of affected consumers.

¹³ Debtor recently informed the Ombudsman that it discovered that it had unknowingly collected birth year for some consumers. Debtor has represented to the Ombudsman that all birth-year data is in the process of being purged and will not be conveyed in the Sale.

a Borders Rewards member, including the title and genre of a purchased book, DVD, compact disc, or other product; the year of publication or distribution of the product; certain qualities of the product, such as whether a purchased book was hardcover or paperback; and other details about the unique product or item sold.

19. Debtor has represented to the Ombudsman that it is reasonably certain it can identify the date on which each data element described in paragraphs 16–18 was collected by Debtor and added to the Consumer Marketing Database.

(ii) Members of the Borders Rewards Program

20. Of the approximately 48 million consumers whose PII appears in the Consumer Marketing Database, approximately 45 million are or were members of the Borders Rewards loyalty program.¹⁴ Members of the program earn credit (“**Borders Bucks**”) toward future purchases from Debtor. Debtor operated the program from February 2006 until new enrollments were suspended on August 10, 2011. Consumers could enroll in the program at any of Debtor’s physical stores or through Debtor’s e-commerce platform, either from an in-store kiosk or other computer. Membership was free, with no enrollment costs or annual fees.

21. Although the terms and conditions applicable to program membership changed several times since February 2006, the terms and conditions have always contained a provision regarding marketing and consumer privacy that remained substantially the same: “By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks,

¹⁴ See generally Exhibit B (Borders Rewards Terms and Conditions).

and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.bordersrewards.com.”¹⁵

22. The terms and conditions required members to be at least 16 years of age (and, effective September 10, 2009, at least 18 years of age).¹⁶ Debtor has represented to the Ombudsman that (a) its standard business practice was to provide a brochure containing the program’s terms and conditions to consumers who enrolled in the program at one of Debtor’s physical stores, and (b) consumers who enrolled through Debtor’s e-commerce platform were able to access the terms and conditions electronically.

23. Over time, there were approximately 19.2 million Borders Rewards members (a) who opted out of receiving emails regarding their membership in the program, (b) terminated their membership in the program, or (c) whose e-mail addresses became invalid. Debtor has represented to the Ombudsman that it retained each member’s PII (including any purchase history information) in the Consumer Marketing Database in case the member later opted in to receiving program-related email, rejoined the program, or updated his or her e-mail address. However, a separate service provider, Experian CheetahMail, ensures that members who opted out or terminated their membership do not receive marketing communications.

(iii) Non-Members of the Borders Rewards Program

24. Of the approximately 48 million consumers whose PII appears in the Consumer Marketing Database, approximately 2.7 million opted in to receive marketing and promotional messages without becoming members of the Borders Rewards program.

¹⁵ See *id.* ¶ 6 (Feb. 21, 2006 version).

¹⁶ See *id.* ¶ 2(a) (Feb. 21, 2006 version); *id.* ¶ 2(a) (Sept. 10, 2009 version).

Debtor's websites invited consumers to sign up to receive marketing e-mails and promotions from Debtor, usually while completing a transaction on Debtor's website. These consumers provided an e-mail address and, in some cases, additional PII to Debtor, subject to Debtor's online privacy policy.¹⁷

25. Periodically, consumers who previously elected to receive marketing messages from Debtor opted out of receiving future messages. Debtor did not remove PII about such consumers from the Consumer Marketing Database. Experian CheetahMail maintains a list of the e-mail addresses of those who opted out and is responsible for ensuring Debtor's marketing messages are not sent to such consumers.

B. Payment Information and Other Quick Checkout Information

26. Debtor collected payment information, including credit card and debit card numbers and expiration dates, at its physical stores and through its e-commerce platform. Debtor has represented to the Ombudsman that it used such data only to process payments and did not retain that information, except where consumers opted to use Debtor's "Quick Checkout Feature" or joined Borders Rewards Plus, a paid version of the Borders Rewards program that entitled members to additional discounts and free shipping online.

27. Debtor's Quick Checkout Feature offered consumers the ability to store and automatically repopulate certain data elements required to complete a transaction on Debtor's e-commerce platform: first and last name, billing address, shipping address, e-mail address, and payment information. Debtor has represented to the Ombudsman that it

¹⁷ The Ombudsman has requested copies of sample screenshots or other documents used, but Debtor has not been able to provide him these documents before the filing of this Report. Debtor has represented, however, that its privacy policy was posted and accessible on the e-commerce platform through which consumers provided their PII to Debtor.

collected all such PII pursuant to its online privacy policy.¹⁸ Debtor retained the PII associated with the Quick Checkout Feature on a server controlled by Debtor. All PII collected by Debtor as part of its Quick Checkout Feature, except for the payment information, is included in the Sale.

28. Debtor collected and retained Borders Rewards Plus members' payment information to process their annual membership fees. This credit card information was stored on a server located in Ann Arbor, Michigan. Debtor has represented to the Ombudsman that the data stored on this server was segregated from the Consumer Marketing Database, consistent with Payment Cards Industry standards. Debtor also has represented to the Ombudsman that this payment information will not be conveyed in the Sale, and that Debtor plans to purge all payment information on or about September 27, 2011.

C. Borders Rewards Program Passwords

29. Debtor collected and stored password information for Borders Rewards and Borders Rewards Plus members to authenticate access to a customized website, BordersRewards.com. Any such password information was stored on a server maintained by Debtor's service provider, Brierley & Partners, located in Plano, Texas. This PII is included in the Sale.

D. User-Generated Content

30. Debtor hosted user-generated content, such as product ratings and reviews, which appeared on Debtor's websites. Debtor collected each participating

¹⁸ As discussed below in paragraph 42, Debtor's online privacy policy has changed three times since May 2005. The most recent version, dated May 27, 2008, has been in effect throughout the period in which the Quick Checkout Feature has been available.

consumer's user-generated content and e-mail address. Debtor has represented to the Ombudsman that each consumer who submitted such content to Debtor did so pursuant to Debtor's online terms and conditions and its online privacy policy. Such terms and conditions provide as follows:

For any content that you submit, you grant Borders a perpetual, irrevocable, royalty-free, transferable right and license to use, copy, modify, delete in its entirety, adapt, publish, translate, create derivative works from and/or sell and/or distribute such content and/or incorporate such content into any form, medium or technology throughout the world without compensation to you. . . . None of the content that you submit shall be subject to any obligation of confidence on the part of Borders, its agents, subsidiaries, affiliates, partners or third party service providers and their respective directors, officers and employees.¹⁹

Debtor has represented to the Ombudsman that it intends to convey in the Sale consumers' user-generated content, but not the e-mail addresses ascribed to specific user-generated content.

E. Aggregate Clickstream Data

31. In addition to the data in its Consumer Marketing Database, Debtor intends to convey to Buyer certain data that it collected through the use and analysis of cookies, web beacons, and other similar types of technology ("**Aggregate Clickstream Data**"). Aggregate Clickstream Data reflects user behavior, e.g., which web pages users click through from Debtor's home page. Such data aides website operators in determining which links, images, and pages are the most popular, i.e., how many users click on and how

¹⁹ See Exhibit C (Borders Websites and Computer Kiosk Terms of Use). Debtor has not furnished to the Ombudsman prior versions of its online terms and conditions other than the October 28, 2010 version that is available on Debtor's website. However, Debtor has represented that all information collected online from consumers was subject to Debtor's online privacy policy.

long users visit them. Debtor has represented to the Ombudsman that it did not collect Aggregate Clickstream Data at a consumer-specific level, and that data cannot be associated with particular e-mail addresses, IP addresses, or other unique identifiers that pertain to a particular consumer. It is the Ombudsman's understanding that the Aggregate Clickstream Data contains only macro-level analytics information about general user behavior on Debtor's websites.

F. Other Consumer Data Not Included in the Sale

32. Debtor also may have collected PII incidental to its gift card program, fraud detection and prevention activities, and general business operations. To the extent it collected PII in connection with any of these activities, Debtor has represented to the Ombudsman that such PII will not be included in the Sale and that Debtor will purge such PII on or about September 27, 2011.

33. Debtor has represented to the Ombudsman that it no longer has any physical retail operations that it operates outside the United States.²⁰ Debtor continues to have franchisees in the UAE and Malaysia. Debtor has represented to the Ombudsman that, although it previously may have licensed the "Borders" name to, or operated, certain e-commerce websites in Australia, New Zealand, and Singapore, it does not have any PII or other consumer data that was collected through these overseas e-commerce or physical operations. Accordingly, the Sale will not include such data.

²⁰ On September 21, 2007, Debtor sold its U.K. and Ireland bookstore operations, and, on June 10, 2008, Debtor sold bookstores that it had owned and operated in Australia, New Zealand, and Singapore. *See* Borders Group Inc., Annual Report, at 1 (Form 10-K) (Apr. 1, 2010).

III. Consumer Data Collected By or Through Service Providers and Partners

A. Next Jump, Inc.

34. In 2007, Debtor entered an agreement with a service provider, Next Jump, Inc. (“**Next Jump**”), to develop and operate a program called Borders Rewards Perks. Members of the Borders Rewards program were invited to join the paid Borders Rewards Perks program so they could receive discounts from unaffiliated third parties as negotiated by Next Jump. Approximately 3.4 million Borders Rewards members joined the program. The Consumer Marketing Database, in certain circumstances, reflects whether a Borders Rewards member joined the Borders Rewards Perks program, but it does not contain data that members provided to unaffiliated third parties related to the program.

35. While administering the Borders Rewards Perks program, Next Jump collected data regarding members’ behavior and preferences. For example, some members expressed preferences to Next Jump regarding categories of third-party retailers from which they were interested in receiving promotional offers.²¹ While Debtor asserts that it owns any such data pursuant to its agreement with Next Jump, Debtor has represented to the Ombudsman that it has not collected such data and has not stored it in its Consumer Marketing Database. The Ombudsman understands that such data is not included in the Sale.

B. Kobo, Inc.

36. In 2009, Debtor entered into an agreement with Kobo, Inc. (“**Kobo**”) pursuant to which, among other things, Debtor provided its customers with the ability to

²¹ See Declaration of Jeffrey R. Gleit, Adv. Proc. No. 11-02567, Doc. No. 3, Ex. A (Aug. 31, 2011) (agreement titled “Borders Rewards Perks Program,” contemplating that Next Jump would collect data about “expressed merchant and category spend preferences” on behalf of Debtor).

purchase and download literary works over the Internet. The Ombudsman understands that pursuant to this agreement Debtor collected customer data on its website and added such data to the Consumer Marketing Database. In 2011, Debtor entered into a new agreement with Kobo whereby customers interacted directly with Kobo. Debtor has represented to the Ombudsman that any PII about Kobo users that Debtor collected since the new agreement with Kobo went into effect in June 2011 is not Debtor's property and was used by Debtor pursuant to a license from Kobo. Debtor has represented to the Ombudsman that such data does not appear in the Consumer Marketing Database and will not be conveyed in the Sale. The Ombudsman understands that data entered into the Consumer Marketing Database before the June 2011 agreement, however, remains the Debtor's property and are included in the Sale.

C. Debtor's Marketing of Third-Party Websites and Services

37. Over the duration of its business operations, Debtor entered into agreements with other unaffiliated third parties whereby Debtor sent marketing messages to consumers on behalf of such third parties. To the extent that a consumer interacted with such third parties, any PII collected by that third party was collected pursuant to the third-party's privacy policy, not Debtor's. Debtor has represented to the Ombudsman that PII collected by such third parties was never shared with Debtor, does not appear in the Consumer Marketing Database, and thus is not included in the Sale.

DEBTOR'S APPLICABLE PRIVACY POLICIES

38. Section 363(b)(1) of the Bankruptcy Code directs the Court to consider whether the Sale is consistent with Debtor's privacy policy in effect on the date of the commencement of the case or violates applicable nonbankruptcy law. The issue of whether the Sale violates applicable nonbankruptcy law requires the consideration of the

terms of Debtor's privacy policy and any other privacy representations made by Debtor to consumers.²² Therefore, the Ombudsman has also considered Debtor's privacy policies in effect prior to the commencement of the case.

39. All of the PII at issue in the Sale was collected after May 2005. The Ombudsman, therefore, did not consider Debtor's privacy policies in effect prior to May 2005, because they are not relevant to the present analysis. However, separate analyses must be made of PII collected on or before May 27, 2008, and PII collected after that date.

I. May 27, 2008 Privacy Policy

40. Debtor has represented to the Ombudsman that Debtor's privacy policy changed three times from May 2005 to May 2008.²³ The most recent version of Debtor's privacy policy went into effect on May 27, 2008 ("**May 27, 2008 Privacy Policy**"), and it has been posted on Debtor's websites since that time. The May 27, 2008 Privacy Policy purports to apply to Debtor's privacy practices to all in-store and online transactions and to subscriptions to Debtor's email programs or Borders Rewards:

This privacy policy applies when you make a purchase at any Borders, Borders Outlet, Borders Express, Waldenbooks, or Brentano's store; when you visit the "Websites" (including but not limited to www.borders.com, www.bordersmedia.com, and www.bordersrewardspersks.com); when you access and use any Borders Website on any in-store computer kiosk (the "Kiosks"); when you add items to an online shopping cart; when you subscribe to any of our email programs or mobile content delivery programs; when you sign up for Borders Rewards and Borders Rewards Perks; or when you email content from the kiosk or any Borders Websites.²⁴

²² See 11 U.S.C. § 363(b)(1); *id.* § 332(b)(1).

²³ See generally Exhibit A.

²⁴ See Exhibit A (May 27, 2008 version).

41. The May 27, 2008 Privacy Policy contains the following provision regarding the sharing of “personal information”²⁵ with third parties in connection with the sale of the company or its businesses:

Circumstances may arise where for strategic or other business reasons Borders decides to sell, buy, merge or otherwise reorganize its own or other businesses. Such a transaction may involve the disclosure of personal and other information to prospective or actual purchasers, or receiving it from sellers. It is Borders’ practice to seek appropriate protection for information in these types of transactions. In the event that Borders or all of its assets are acquired in such a transaction, customer information would be one of the transferred assets.²⁶

Except for a few other provisions not relevant to the Sale, the May 27, 2008 Privacy Policy provides that Debtor will not share “personal information” with third parties without consumer consent.²⁷

II. Pre-May 27, 2008 Privacy Policies

42. Prior to May 27, 2008, Debtor had at least three privacy policies in effect, including a privacy policy that went into effect April 12, 2007, a policy that went into effect February 21, 2006, and the policy that governed prior to February 21, 2006 (collectively, the “**Pre-May 27, 2008 Privacy Policies**”). From August 2001 to May 2008, Borders did not operate its own e-commerce platform. Rather, Amazon.com operated the Borders.com website. The Ombudsman understands that any consumer data (including PII)

²⁵ The May 27, 2008 Privacy Policy does not define “personal information” but states that, for purposes of the policy, “personal information” includes “purchase history, phone number(s), email and residential addresses, and credit card data.” *Id.*

²⁶ *Id.*

²⁷ *Id.* While the privacy policy allows for the possibility that consumer information might be shared with third parties for marketing purposes pursuant to express consumer consent, Debtor has represented that it did not have such a program in place. Debtor further has represented that it is not aware of any consumers whose information is stored in the Consumer Marketing Database who have opted out of having their data disclosed to third parties for marketing purposes.

collected through the operation of Borders.com prior to May 2008 was collected pursuant to the Amazon.com privacy policy and was not shared with Debtor, except for a small number of email addresses that Amazon.com transferred to Debtor in 2008 with the affirmative consent (“opt in”) of the affected consumers.²⁸ The Pre-May 27, 2008 Privacy Policies expressly applied to purchases at any of Debtor’s physical stores; when a consumer visited the Debtor’s websites;²⁹ and when a consumer subscribed to any of Debtor’s email programs or Borders Rewards.

43. Although there are small variations among the Pre-May 27, 2008 Privacy Policies, none of the policies contains a provision that is similar to the provision in the May 27, 2008 Privacy Policy concerning the treatment of “personal information” and other information in a sale or reorganization. Instead, as relevant to the Sale, the Pre-May 27, 2008 Privacy Policies require Debtor to obtain consumers’ express consent to disclosure to third parties of their “email address or other personal information.”³⁰

44. The Ombudsman understands that, when Debtor modified its privacy policy on May 27, 2008, it updated the version of the policy posted on its websites, and the updated version contained a notation that the policy was “Last Modified May 27, 2008.”³¹ Debtor did not otherwise notify consumers of the changes to its policy. Nor did Debtor

²⁸ See *supra* note 12.

²⁹ These included www.borders.com, www.bordersstores.com, www.bordersrewards.com, and www.waldenbooksstores.com.

³⁰ See Exhibit A (Apr. 12, 2007 version); *id.* (Feb. 21, 2006 version); *id.* (pre-Feb. 21, 2006 version). These policies also permit third-party disclosure “based on a legal obligation . . . determined to be legally necessary in the reasonable opinion of our counsel.” See, e.g., *id.* (Feb. 21, 2006 version).

³¹ Because Debtor has not provided the time of the update, the Ombudsman has assumed that the amendment was made effective at 11:59 p.m. on May 27, 2008.

notify consumers that such changes would apply retroactively or seek their consent to apply such changes retroactively.

III. Evaluation of Sale Under Applicable Privacy Policies

45. The Ombudsman is required to consider whether the Sale is consistent with Debtor's privacy policy in effect at the commencement of the case. Debtor's May 27, 2008 Privacy Policy differed materially from Debtor's Pre-May 27, 2008 Privacy Policies because the May 27, 2008 Privacy Policy addressed the transfer of consumer data in a sale but the earlier privacy policies did not. Moreover, Debtor did not notify affected consumers or seek their consent to make this material change. As a result, the Ombudsman believes that more than one privacy policy was in effect at the commencement of the case. Specifically, the May 27, 2008 Privacy Policy was in effect for consumer data collected after May 27, 2008, and the Pre-May 27, 2008 Privacy Policies were in effect for data collected on or before May 27, 2008.

46. Under the May 27, 2008 Privacy Policy (quoted in full above at paragraph 41), consumers were on notice that their PII could be transferred to a third party as part of a sale of Debtor's businesses.³² Debtor promised that, in such a transaction, it would "seek appropriate protection for [the] information."³³

47. The Sale is not a "transaction" in which "all" of Debtor's assets are being sold. The Sale is of less than all Debtor's assets, albeit substantially all of Debtor's intellectual property assets, including PII. The transfer of PII is consistent with the May 27,

³² See Exhibit A (May 27, 2008 version).

³³ See *id.*

2008 Privacy Policy if such a partial sale was reasonably encompassed by that privacy policy.³⁴

48. The Ombudsman believes that it is not clear from the plain language whether the “sale” provision in the May 27, 2008 Privacy Policy applies solely to Debtor’s sale of all of its assets, or includes a sale of less than all of its assets. The resolution of the ambiguity in the plain language must be guided by applicable nonbankruptcy law, as discussed in paragraph 60 below.

49. The Pre-May 27, 2008 Privacy Policies did not contain a “sale” provision. The Sale to Buyer includes PII collected on or before May 27, 2008, which PII was collected under, and is governed by, the Pre-May 27, 2008 Privacy Policies. These policies required Debtor to obtain consumers’ consent to disclosure to third parties of their PII. As a result, the Sale is not consistent with the Pre-May 27, 2008 Privacy Policies and is permitted only if there is no showing that the Sale would violate applicable nonbankruptcy law, as discussed more fully below.

COMPLIANCE WITH APPLICABLE NONBANKRUPTCY LAW

50. Section 363(b)(1) of the Bankruptcy Code contemplates that Debtor may sell PII, even if the sale is inconsistent with the applicable privacy policy, if, after the appointment of a consumer privacy ombudsman, the Court (a) considers “the facts, circumstances, and conditions of such sale,” and (b) finds that no showing was made that the sale “would violate applicable nonbankruptcy law.”³⁵

³⁴ The Ombudsman believes that it is not material that the sale occurs in a bankruptcy liquidation because the word “sell” is not modified by any words of limitation in the May 27, 2008 Privacy Policy. *See supra* ¶ 41.

³⁵ *See* 11 U.S.C. § 363(b)(1).

51. The Ombudsman has determined that the following applicable nonbankruptcy laws are relevant to the Sale: (a) Section 5 of the FTC Act³⁶ and analogous state consumer protection laws (which this Report will consider together); and (b) the VPPA, which applies to the disclosure of information about purchases of audiovisual materials, including DVDs.³⁷

I. Federal Trade Commission Act and State Mini-FTC Acts

A. Relevant Legal Standards

52. Section 5 of the FTC Act directs the FTC to prevent persons and corporations from using “unfair or deceptive acts or practices in or affecting commerce.”³⁸ All 50 states have their own, similar consumer protection statutes — often referred to as “mini-FTC Acts” — that prohibit unfair and deceptive commercial practices.³⁹ While there is some variation among the state laws, a significant number of state consumer protection laws are modeled after the FTC Act,⁴⁰ and most, if not all, of these state laws prohibit

³⁶ 15 U.S.C. § 45(a).

³⁷ 18 U.S.C. § 2710.

³⁸ 15 U.S.C. § 45(a)(1).

³⁹ See, e.g., Alabama, Ala. Code § 8-19-1 *et seq.*; Arizona, Ariz. Rev. Stat. Ann. § 44-1521 *et seq.*; California, Cal. Bus. & Prof. Code § 17200 *et seq.*; Connecticut, Conn. Gen. Stat. § 42-110a *et seq.*; Delaware, Del. Code Ann. tit. 6, § 2511 *et seq.*; Florida, Fla. Stat. § 501.201 *et seq.*; Hawaii, Haw. Rev. Stat. § 480-2; Illinois, 815 Ill. Comp. Stat. Ann. §§ 505/1 *et seq.*; Iowa, Iowa Code § 714.16; Kentucky, Ky. Rev. Stat. Ann. §§ 367.110-367.300; Maryland, Md. Code Ann., Com. Law § 13-101 *et seq.*; Massachusetts, Mass Gen. Laws ch. 93A; Michigan, Mich. Comp. Laws § 445.911 *et seq.*; Minnesota, Minn. Stat. § 325D.44-.48; Mississippi, Miss. Code Ann. §§ 75-24-1; Montana, Mont. Code Ann. § 30-14-133 *et seq.*; Nevada, Nev. Rev. Stat. §§ 207.170-177; New York, N.Y. Gen. Bus. Law § 349 *et seq.*; Ohio, Ohio Rev. Code Ann. §§ 1345.01-1345.99; Oregon, Or. Rev. Stat. §§ 646.605 *et seq.*; South Dakota, S.D. Codified Laws § 37-24-1 *et seq.*; Utah, Utah Code Ann. § 13-11-1 *et seq.*

⁴⁰ Indeed, a number of states expressly provide that their consumer protection acts will be construed consistently with the interpretations of the FTC Act issued by the FTC and federal courts, including Alabama, Ala. Code § 8-19-6, Alaska, Alaska Stat. § 45.50.545, Arizona, (continued...)

deceptive representations to consumers.⁴¹ Therefore, the analysis under these state consumer protection laws is substantially the same as under the FTC Act.

53. To constitute an unfair act or practice, conduct must (a) cause substantial consumer injury, (b) not be outweighed by countervailing benefits to consumers or competition, and (c) be an injury that consumers could not reasonably have avoided.⁴²

54. Whether an act or practice is deceptive depends upon whether it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment.⁴³ To be deceptive, conduct (a) must be conveyed through either express or implied claims, (b) must be likely to mislead

Ariz. Rev. Stat. Ann. § 44-1522, Connecticut, Conn. Gen. Stat. § 42-110b(b), (c), Florida, Fla. Stat. § 501.204, Georgia, Ga. Code Ann. § 10-1-391, Hawaii, Haw. Rev. Stat. § 480-2(b), Idaho, Idaho Code Ann. § 48-604(1), (2), Illinois, 815 Ill. Comp. Stat. 505/2, Maine, Me. Rev. Stat. tit. 5, § 207(1), Maryland, Md. Code Ann., Com. Law § 13-105, Massachusetts, Mass Gen. Laws ch. 93A, § 2(b), (c), Montana, Mont. Code Ann. § 30-14-104(1), (2), New Hampshire, N.H. Rev. Stat. Ann. § 358-A:13, New Mexico, N.M. Stat. Ann. § 57-12-4, Ohio, Ohio Rev. Code Ann. § 1345.02(C), Rhode Island, R.I. Gen. Laws § 6-12.1-3, South Carolina, S.C. Code Ann. § 39-5-20(b), Tennessee, Tenn. Code Ann. § 47-18-115, Texas, Tex. Bus. & Com. Code Ann. § 17.46(c)(1), Vermont, Vt. Stat. Ann. tit. 9 § 2453(b),(c), Washington, Wash. Rev. Code § 19.86. 920, and West Virginia, W. Va. Code § 46A-6-103.

⁴¹ See, e.g., *supra* note 39.

⁴² See 15 U.S.C. § 45(n) (“The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”); see also *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-137 (2d Cir. 1984); Howard Beales, III, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003), <http://www.ftc.gov/speeches/beales/unfair0603.shtm> (“To qualify as substantial, an injury must be real, and it must be large compared to any offsetting benefits.”).

⁴³ FTC, *Policy Statement on Deception* (Oct. 14, 1983), <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> [hereinafter *FTC Policy Statement on Deception*].

reasonable consumers, and (c) must be material.⁴⁴ A representation is material if a “reasonably prudent person” would “usually” rely on it, or it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”⁴⁵ FTC policy presumes that express claims are material.⁴⁶

55. The FTC interprets Section 5 of the FTC Act to prohibit an entity from collecting, using, or disclosing PII in a manner contrary to promises made to consumers in a formal privacy policy.⁴⁷ This includes promises not to share customer information with third parties.⁴⁸ The FTC enforces these promises against companies in

⁴⁴ See *FTC v. Freedom Commc’ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC Policy Statement on Deception*, *supra* note 43.

⁴⁵ *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007) (internal quotation marks omitted).

⁴⁶ *FTC Policy Statement on Deception*, *supra* note 43.

⁴⁷ See, e.g., *FTC v. Sandra Rennert*, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000), <http://www.ftc.gov/os/caselist/9923245/9923245.shtm> (consent order settling charges alleging that defendants misrepresented the security and encryption used to protect consumers’ information and used the information in a manner contrary to their stated purpose); *FTC v. ReverseAuction.com Inc.*, No. 00-0032 (D.D.C. Jan. 6, 2000), <http://www.ftc.gov/os/2000/01/reverseconsent.htm> (consent order settling charges that an online auction site allegedly obtained consumers’ personal identifying information from a competitor site and then sent deceptive, unsolicited email messages to those consumers seeking their business); *In re Liberty Fin. Cos.*, 128 F.T.C. 240 (1999) (consent order alleging that site falsely represented that personal information collected from children, including information about family finances, would be maintained anonymously); *In re GeoCities, Inc.*, 127 F.T.C. 94 (1999) (consent order settling charges that website had misrepresented the purposes for which it was collecting personally identifiable information).

⁴⁸ See, e.g., *In re Gateway Learning Corp.* (Sept. 10, 2004), <http://www.ftc.gov/os/caselist/0423047/0423047.shtm> (finding violation for disclosure of consumer data to third-party marketers despite contrary representations in applicable privacy policy); *In the Matter of Nat’l Research Center for College & University Admissions, Inc.* (Oct. 22, 2002), <http://www.ftc.gov/os/caselist/0223005/index.shtm> (finding violation of section 5(a) for sharing student information with third parties’ marketing purposes where entity represented that it would share information only with colleges, universities, and other entities providing education-related services).

bankruptcy, as demonstrated by the FTC's action in *FTC v. Toysmart.com, LLC*.⁴⁹ In *Toysmart*, the FTC filed charges against a company that marketed and sold children's toys over the Internet because the company attempted to sell its assets, including its detailed customer databases, despite having promised customers that it would "never" share customer data with third parties.⁵⁰

56. The FTC resolved the *Toysmart* case by concluding that, because the best interests of debtors and creditors in bankruptcy must be considered alongside the privacy rights of consumers, a debtor that previously promised not to sell consumer data may do so subject to the following conditions:

(a) the customer data may be sold only to an entity that is engaged in substantially the same general line of business as the debtor;

(b) the customer data must be sold as part of a larger group of assets, including trademarks, goodwill, URL names, web site source code, and database schemas;

(c) the buyer must agree to treat the customer data in accordance with the terms of the debtor's privacy policy in effect at the time the customer data was collected by the debtor; and

⁴⁹ See generally *FTC v. Toysmart.com, LLC*, No. CV-00-11341-RGS (D. Mass. July 10, 2000), <http://www.ftc.gov/os/caselist/x000075.shtm>; see also Letter from David Vladeck, Director of Bureau of Consumer Protection, to Peter Larson & Martin E. Shmagin (July 1, 2010), available at <http://www.ftc.gov/os/closings/100712xy.pdf> (noting FTC position that bankruptcy sale of sensitive magazine subscriber information would violate privacy statements made to subscribers and could thus constitute a deceptive or unfair practice in violation of FTC Act).

⁵⁰ See *FTC v. Toysmart.com, LLC*, Compl., Case No. CV-00-11341-RGS (D. Mass. July 10, 2000), <http://www.ftc.gov/os/2000/07/toysmartcomplaint.htm>.

(d) consumers must provide affirmative consent (“opt in”) to any material change in the governing privacy policy.⁵¹

57. Section 5 of the FTC Act, as enforced by the FTC, prohibits Debtor from transferring consumer data, including PII, to Buyer if doing so is contrary to Debtor’s privacy representations, unless the terms of the Sale meet the requirements set forth in *Toysmart*.⁵² Because Debtor’s May 27, 2008 Privacy Policy made different promises than its pre-May 27, 2008 Privacy Policies, the Ombudsman has analyzed each separately.

B. Application of FTC Act to Debtor’s Sale of PII

(i) Consumer Data Collected Under May 27, 2008 Privacy Policy

58. As detailed above at paragraphs 40–41, consumers who provided PII to Debtor after May 27, 2008, were on notice that their PII could be transferred to a third party as part of a sale of Debtor’s businesses.⁵³

59. The Sale is not a “transaction” in which “all” of Debtor’s assets are being sold. The Sale is of less than all Debtor’s assets, albeit substantially all of Debtor’s intellectual property assets, including PII. The transfer of PII is consistent with the May 27, 2008 Privacy Policy if such a partial sale was reasonably encompassed by that privacy policy.⁵⁴

⁵¹ See Motion to Approve Stipulation With Federal Trade Commission, *In re Toysmart.com, LLC*, Case No. 00-13995-CJK, ECF No. 113 (Bankr. D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartbankruptcy.1.htm>.

⁵² As discussed below in paragraphs 93–96, several states’ Attorneys General do not recognize the FTC’s *Toysmart* exception.

⁵³ See Exhibit A (May 27, 2008 version).

⁵⁴ The Ombudsman believes that it is not material that the sale occurs in a bankruptcy liquidation because the word “sell” is not modified by any words of limitation in the May 27, 2008 Privacy Policy. See *supra* ¶ 41.

60. As discussed in paragraph 48 above, the Ombudsman believes that it is not clear from the plain language whether the “sale” provision in the May 27, 2008 Privacy Policy applies solely to Debtor’s sale of all of its assets, or includes a sale of less than all of its assets. Under the FTC Act, the resolution of the ambiguity in the plain language is guided by whether a reasonable consumer acting reasonably under the circumstances⁵⁵ would have relied upon the distinction between a partial sale and a full sale of Debtor’s assets in making the decision to provide PII.⁵⁶ The Ombudsman concludes that a reasonable consumer would not have made a decision about whether to share PII with Debtor based on this distinction. The Ombudsman may have concluded otherwise were Debtor proposing to sell copies of its customers’ PII to multiple parties. But here, the Sale comprises a single transfer of PII in the context of a single sale of Debtor’s intellectual property in a court-supervised sale. This process provides more protection for consumers than would multiple sales of copies of the Debtor’s PII. Accordingly, the Ombudsman does not believe the sale of PII (other than information about certain audio-visual materials) collected by Debtor after May 27, 2008, is inconsistent with the May 27, 2008 Privacy Policy.

61. Nonetheless, the Ombudsman believes that four issues require consideration given Debtor’s promise in the May 27, 2008 Privacy Policy to “seek appropriate protection” of any PII transferred to a purchaser.⁵⁷

⁵⁵ See *FTC Policy Statement on Deception*, supra note 43 (“[W]e examine the practice from the perspective of a consumer acting reasonably in the circumstances.”).

⁵⁶ See *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007); *supra* ¶ 54.

⁵⁷ See Exhibit A (May 27, 2008 version).

62. First, in light of industry standards in place since May 2008, the Ombudsman concludes that a reasonable consumer would consider an appropriate protection to include a condition requiring Buyer to use the conveyed PII on terms consistent with (or more protective of consumer privacy than) the May 27, 2008 Privacy Policy.⁵⁸

63. Second, Debtor permitted consumers to opt out of receiving certain e-mail and/or direct mail communications from Debtor.⁵⁹ It would be inconsistent with the May 27, 2008 Privacy Policy to permit Buyer to send e-mail or direct mail marketing materials to consumers who opted out of receiving such materials from Debtor. In addition, the Ombudsman believes that a reasonable consumer would consider an appropriate protection to include a condition disallowing Buyer from sending such materials to these consumers. Of course, this condition would apply only insofar as the PII was obtained in the Sale, and would not apply to the extent that Buyer possesses or obtains from a different source any PII that is duplicative of that purchased in the Sale.

64. Third, a further protection that most consumers would consider appropriate would be the use of industry-standard data security protections in effecting the data transfer from Debtor to Buyer. Not only would a reasonable consumer expect this, but Section 5 of the FTC Act requires that commercial entities safeguard consumers' PII with

⁵⁸ See Motion to Approve Stipulation With Federal Trade Commission, *In re Toysmart.com, LLC*, Case No. 00-13995-CJK, ECF No. 113 (Bankr. D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartbankruptcy.1.htm>. (purchaser would not be permitted to change how the information previously collected by Toysmart was used, unless it provided notice to consumers and obtained their affirmative consent to the new uses); see also FTC, Press Release, *In re Toysmart.com LLC* (July 21, 2000), <http://www.ftc.gov/opa/2000/07/toysmart2.shtm>.

⁵⁹ See Exhibit A (May 27, 2008 version).

“reasonable and appropriate” data security safeguards.⁶⁰ The Ombudsman understands that Debtor protects the security of PII with industry-standard safeguards. Debtor and Buyer should thus be required to use industry-standard data security protections in effecting the data transfer from Debtor to Buyer, and Buyer should be required to maintain conveyed PII subject to similar safeguards and otherwise consistent with all applicable data security laws.

65. Fourth, the Ombudsman also has considered whether applicable nonbankruptcy law prohibits Debtor from transferring the PII and purchase history information of consumers who opted out of receiving marketing communications from Debtor, even if Buyer honors their opt-out requests with respect to receiving subsequent marketing communications. With respect to those consumers who have opted out of receiving marketing communications from Debtor, Debtor has represented only that it would cease sending marketing communications, not that it would delete their PII from the Consumer Marketing Database.⁶¹ Nonetheless, the FTC construes the FTC Act to require businesses to dispose of data for which they no longer have a reasonable business need.⁶² Accordingly, to the extent that Buyer determines that it does not have a legitimate business reason to retain the PII of consumers who opted out of receiving marketing communications, the Ombudsman would expect that such data would be timely destroyed.⁶³

⁶⁰ See *FTC v. Navone* (Jan. 20, 2010), <http://www.ftc.gov/os/caselist/0723067/index.shtm>.

⁶¹ See Exhibit C (Consumer Service Email Opt-out page).

⁶² At least three of the Commission’s data security cases — against DSW Shoe Warehouse, BJ’s Wholesale Club, and Card Systems — involved allegations that companies violated the FTC Act by retaining sensitive data much longer than they had a business need to do so. See *CardSystems Solutions, Inc.*, No. C-4168, 2006 WL 2709787 (FTC Sept. 5, 2006) (consent order); *DSW, Inc.*, No. C-4157, 2006 WL 752215 (FTC Mar. 7, 2006) (consent order); *BJ’s Wholesale Club, Inc.*, 140 F.T.C. 465 (2005) (consent order).

⁶³ The PII in the Consumer Marketing Database may have value for other uses other than sending marketing communications to the consumers that have opted out, including, for (continued...)

66. Subject to these four conditions, the Ombudsman concludes that the sale of PII (other than information about certain audio-visual materials) collected after May 27, 2008, is consistent with the May 27, 2008 Privacy Policy and does not violate Section 5 of the FTC Act. While there are some variations among the state mini-FTC Acts, the inquiries are largely co-extensive, and the Ombudsman is not aware of any state-specific mini-FTC Act under which a different analysis or conclusion would be warranted.⁶⁴

(ii) Consumer Data Collected Under the Pre-May 27, 2008 Privacy Policies

67. The Ombudsman must consider separately whether Debtor's sale of PII collected pursuant to the Pre-May 27, 2008 Privacy Policies violates applicable nonbankruptcy law. PII collected on or before May 27, 2008, was collected pursuant to the Pre-May 27, 2008 Privacy Policies, which provided that Debtor would not share PII with third parties without consumers' express consent.⁶⁵ These policies, unlike the May 27, 2008 Privacy Policy, did not contain a provision permitting the transfer of PII in a sale of Debtor's business. With respect to PII collected by Debtor on or before May 27, 2008, the Ombudsman believes that the Sale is contrary to such privacy policies and would violate

example, for research such as analyzing what percentage of consumers who purchased one genre of books also purchased a certain genre of music. Buyer could use such data to inform its plans to market to other, similarly-situated consumers who have not opted out of receiving marketing communications. At a minimum, Buyer will need to maintain a list of e-mail address information for the purposes of honoring the opt-out requests of consumers that have opted out of receiving marketing communications.

⁶⁴ Part II below describes certain additional limitations for transmitting certain information about audio-visual materials pursuant to the VPPA.

⁶⁵ While Debtor represented in the Pre-May 27, 2008 Privacy Policies that it might disclose personal information to third parties if legally compelled to do so based on the reasonable opinion of its counsel, a reasonable consumer would not have been on notice based on this provision that Debtor would transfer personal information to third parties as part of a sale of assets, except as discussed *infra* in connection with *Toysmart*.

Section 5 of the FTC Act unless Buyer satisfies the requirements of *Toysmart*, as discussed in paragraphs 55–56 above, and/or Debtor (separately or together with Buyer) obtains the affirmative consent of consumers whose PII was collected on or before May 27, 2008, to transfer their PII to Buyer.

68. As discussed in paragraph 56 above, the FTC in *Toysmart* agreed that a debtor, which had represented to customers that it would “never” sell PII, could sell consumer PII in the context of a similar bankruptcy proceeding under four conditions:

(a) the customer data may be sold only to an entity that is engaged in substantially the same general line of business as the debtor;

(b) the customer data must be sold as part of a larger group of assets;

(c) the buyer must agree to treat the customer data in accordance with the terms of the debtor’s privacy policy in effect at the time the customer data was collected by the debtor; and

(d) consumers must provide affirmative consent (“opt in”) to any change in the governing privacy policy, including, e.g., their information being governed by the buyer’s privacy policy instead of the debtor’s.⁶⁶

69. The first *Toysmart* condition is satisfied here because Buyer is engaged in substantially the same general line of business as Debtor. Barnes & Noble sells books, eBooks, magazines, toys, games, music, DVDs, videos, and related products and services in both physical stores and through its e-commerce platform.⁶⁷

⁶⁶ See Motion to Approve Stipulation With Federal Trade Commission, *In re Toysmart.com, LLC*, Case No. 00-13995-CJK, ECF No. 113 (Bankr. D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartbankruptcy.1.htm>.

⁶⁷ Barnes & Noble Inc., Annual Report, at 6-7 (Form 10-K) (June 29, 2011).

70. The second *Toysmart* condition is satisfied here because PII is being sold as part of a larger group of assets, e.g., licenses, trademarks, domain names, and website source code.⁶⁸

71. The third *Toysmart* condition will be satisfied if Buyer agrees to treat the PII collected under the Pre-May 27, 2008 Privacy Policies in accordance with the terms of the applicable privacy policy, which, as discussed below, the Ombudsman concludes is the Pre-May 27, 2008 Privacy Policies.

72. With regard to the third *Toysmart* condition, the Ombudsman has considered which privacy policy applies to PII collected by Debtor on or before May 27, 2008 — the May 27, 2008 Privacy Policy or the Pre-May 27, 2008 Privacy Policies. The Pre-May 27, 2008 Privacy Policies apply to information collected on or before May 27, 2008, unless the May 27, 2008 Privacy Policy may be retroactively applied to PII previously collected by Debtor. The FTC asserts that a company cannot apply a “material” change to a privacy policy retroactively, unless the company obtains the “express affirmative (‘opt-in’) consent of the consumers” whose PII is affected.⁶⁹

73. The Ombudsman believes the addition of the “sale” provision to the May 27, 2008 Privacy Policy was material. As noted above, a representation is material if a “reasonably prudent person” would “usually” rely on it, or it is “likely to affect the

⁶⁸ See Exhibit D § 1.2.

⁶⁹ *In re Gateway Learning Corp.* (Sept. 10, 2004), <http://www.ftc.gov/os/caselist/0423047/0423047.shtm>; see also Federal Trade Commission, Preliminary FTC Staff Report, Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers, at 69 (Dec. 2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>. (“[B]efore making material changes to their data policies, companies should make prominent disclosures that clearly describe such changes, and should obtain consumers’ affirmative consent.”).

consumer's conduct or decision with regard to a product or service.”⁷⁰ Prior to May 28, 2008, a reasonably prudent consumer would not have expected a sale of his or her PII, and, if apprised of the existence of a “sale” provision, might not have provided PII to Debtor.

74. Moreover, Debtor did not obtain the consent of consumers when it changed its privacy policy in May 2008. Debtor updated its privacy policy on May 27, 2008, by posting the updated version on its website. It did not otherwise notify or provide a consent mechanism for consumers to opt in to (or even to opt out of) the new policy. Accordingly, the FTC Act would disallow retroactive application of any material change effected by the May 27, 2008 Privacy Policy.

75. This analysis is not changed by Debtor's reservation of “the right to update [the] Privacy Policy from time to time.”⁷¹ The Ombudsman believes that Buyer must continue to treat all PII collected under the terms of the Pre-May 27, 2008 Privacy Policies in accordance with the terms of those policies, and Buyer may only change those terms now, or in the future, with the affirmative consent of affected consumers.

⁷⁰ *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007) (internal quotation marks omitted).

⁷¹ *See, e.g.*, Exhibit A (Apr. 12, 2007 version). The FTC has indicated that it would require an entity to obtain the affirmative (opt in) consent of consumers prior to making a material change in its privacy practices that was inconsistent with the privacy policy in effect at the time the data was collected, even if its privacy policy indicated that the entity might change its privacy practices in the future. In 2001, the FTC considered a change to Amazon.com's privacy policy, which represented that Amazon.com “[does] not sell, trade, or rent your personal information to others,” although it noted that the company might “choose to do so in the future with trustworthy third parties.” *See* Letter from Jodi Bernstein, Director, Bureau of Consumer Protection, FTC, to Jason Catlett, Junkbusters Corp. & Marc Rotenberg, Electronic Privacy Information Center (dated May 24, 2001), *available at* <http://www.ftc.gov/os/closings/staff/amazonletter.shtm>. The FTC “expect[ed] that in the event of a material change to its . . . practices, Amazon would provide adequate notice to consumers as well as a mechanism to obtain consumers' consent to the change with respect to information already collected from them.” *Id.*

76. The fourth *Toysmart* condition will be satisfied if Buyer agrees to obtain relevant consumers' affirmative consent ("opt in") before making any material changes to the privacy practices it applies to the PII collected under the Pre-May 27, 2008 Privacy Policies (including, to the extent there are material differences, before subjecting the PII to Buyer's privacy policy instead of Debtor's).

77. Several states' Attorneys General ("**State Attorneys General**") have advised the Ombudsman that they do not recognize the FTC's policy in *Toysmart* as reflecting the law under their state mini-FTC Acts. Their positions are discussed below in paragraphs 93–96. The State Attorneys General have not, however, directed the Ombudsman to any state law provision or ruling demonstrating that any analysis other than that provided by *Toysmart* applies.

(iii) Aggregate Clickstream Data

78. The Sale includes the Aggregate Clickstream Data described in paragraph 31 above. Such Aggregate Clickstream Data is not "information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically,"⁷² and, therefore, does not constitute PII under the Bankruptcy Code.

79. Further, Aggregate Clickstream Data is not "personal information" as that term is used in Debtor's privacy policies. The policies indicate that "personal information" includes "purchase history, phone number(s), email and residential addresses, and credit card data."⁷³ Aggregate Clickstream Data does not fit into any of these categories

⁷² See 11 U.S.C. § 101(41).

⁷³ See Exhibit A.

or contain any other personally identifiable information. Therefore, the Ombudsman believes that the transfer of the Aggregate Clickstream Data in the Sale is consistent with Debtor's privacy policies and Section 5 of the FTC Act.

II. The Video Privacy Protection Act of 1988

A. Relevant Legal Standards

80. The Video Privacy Protection Act of 1988 (“**VPPA**”) restricts the disclosure of customers’ “personally identifiable information”⁷⁴ by a company “engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials.”⁷⁵ Under the VPPA, “personally identifiable information includes information which identifies a person as having requested or obtained specific video materials or services.”⁷⁶ This would include information about the name of a consumer and the title of specific video materials or services that he or she purchased. Although it is not clear under the available case law, the statutory language suggests that even the mere disclosure of a customer’s name and address would be impermissible to the extent it reveals information about that customer’s specific video rental or purchasing history, e.g., where the covered company provides only one genre of videos, such as adult films.

81. A covered company may not disclose “personally identifiable information” unless one of the VPPA’s six exceptions permits such disclosure.⁷⁷ The two exceptions potentially applicable here permit disclosure (a) “to any person with informed, written consent of the consumer given at the time the disclosure is sought” or (b) “to any

⁷⁴ 18 U.S.C. § 2710(b)(1).

⁷⁵ *Id.* § 2710(a)(4).

⁷⁶ *Id.* § 2710(a)(3).

⁷⁷ *Id.* § 2710(b)(1)–(2).

person if the disclosure is incident to the ordinary course of business.”⁷⁸ “Ordinary course of business” is defined to mean “debt collection activities, order fulfillment, request processing, and the transfer of ownership.”⁷⁹ Although no statute or case law authoritatively interprets the “transfer of ownership” language, the Ombudsman believes it must be read to refer to the transfer of ownership of a covered company’s entire business. If “transfer of ownership” were read to refer to transfer of ownership of personally identifiable information, the protections of the statute would be eviscerated. This would undermine the principal goal of the statute, which is to protect consumers’ privacy concerning the videos they purchase or rent by imposing restrictions on disclosure of that information.

82. The legislative history of the VPPA clarifies that a business “that sells video tapes would be required to extend privacy protection to only those transactions involving the purchase of video tapes and not other products.”⁸⁰ Consistent with this explanation, courts have limited the scope of the VPPA’s restriction to the disclosure of records showing that an individual requested or obtained specific video materials.⁸¹

⁷⁸ *Id.* § 2710(b)(2)(B), (E). It should be noted that § 2710(b)(2)(D) permits the disclosure of name, address, and video “subject matter” information if the consumer has been provided with an opportunity to opt out of such disclosure and the subject matter information would be used solely to market goods and services directly to the consumer. The Purchase Agreement does not appear to restrict Buyer’s use of the transferred video-related consumer data to marketing goods and services directly to the consumer. As a result, the exception in § 2710(b)(2)(D) is not available here.

⁷⁹ *Id.* § 2710(a)(3).

⁸⁰ S. Rep. No. 100-599, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-10 (explaining that the definition of personally identifiable information “includes the term ‘video’ to make clear that simply because a business is engaged in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill”).

⁸¹ *See, e.g., Antoine v. Star Ledger of New Jersey*, No. 09-1827 (KSH), 2010 WL 1838611, at *4-5 (D.N.J. May 6, 2010) (dismissing VPPA claim where plaintiff failed to “plead[] anything to implicate [sic] that videotapes or information stemming from videotape rentals (continued...)”).

B. Application of VPPA to Debtor's Sale of PII

83. Debtor sold videos, including DVDs, in its physical stores and through its e-commerce platform. Although the VPPA primarily is directed at entities engaged in the sale or rental of “video cassette tapes,” the plain language of the statute covers the sale of media such as DVDs, which are “similar audio visual materials.”⁸² Debtor's Consumer Marketing Database contains records of the titles, genres, and other details about specific videos purchased by Borders Rewards Members. This information is “personally identifiable information” within the meaning of the VPPA.

84. Debtor was a large national retailer that sold many products, including DVDs of many genres. The names, addresses, and other contact information stored in the Consumer Marketing Database are not sufficient to identify particular Borders Rewards members “as having requested or obtained specific video materials or services.”⁸³ The Ombudsman thus concludes that these data elements are not “personally identifiable information,” within the meaning of the VPPA, when they are not associated with “specific

were involved in defendants' alleged misconduct”); *Gonzalez v. Central Elec. Cooperative, Inc.*, No. 08-6236-HO, 2009 WL 3415235, at *11-12 (D. Or. Oct. 15, 2009) (denying motion for protective order under VPPA because subpoenaed information did not “identif[y] a person as having requested or obtained specific video materials or services”); *Costanzo v. City of Omaha*, No. 8:04CV99, 2004 WL 2359722, at *2 (D. Neb. Oct. 19, 2004) (stating that the VPPA “protects people from having records of videotape rentals and purchases disclosed”).

⁸² 18 U.S.C. § 2710(a)(4); *see also* S. Rep. No. 100-599, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-10 (“similar audio visual materials” include “laser disks, open-reel movies, [and] CDI technology”).

⁸³ *See* 18 U.S.C. § 2710(a)(3).

video materials or services.” Accordingly, such information may be conveyed in the Sale pursuant to the restrictions discussed in paragraphs 62–65 and 71–76 above.⁸⁴

85. With respect to the titles, genres and other details about specific videos purchased by Borders Rewards Members stored in the Consumer Marketing Database, Debtor may not transfer such records unless an applicable exception applies. Because Debtor is not transferring ownership of its entire business, the Ombudsman believes that the “ordinary course of business” exception discussed in paragraph 81 will not apply. Therefore, the Ombudsman concludes that the VPPA prohibits Debtor’s transfer of records containing the titles, genres and other details about specific videos purchased by particular consumers, unless Debtor obtains the “informed, written consent of the consumer[s].”⁸⁵ To

⁸⁴ The definition of PII under the VPPA is narrower than both the Bankruptcy Code’s definition of PII and the use of that term in the analysis under the FTC Act (and the mini-FTC Acts). While the transfer of name, address, and contact information does not implicate the VPPA, it does implicate the FTC Act (and the mini-FTC Acts), and, accordingly, the transfer should be subject to the same restrictions.

⁸⁵ See *id.* § 2710(b)(2)(B). The Ombudsman recognizes that reasonable minds could differ as to whether information about genre amounts to “personally identifiable information” under the VPPA. The plain language of the VPPA suggests that it could. As noted above, § 2710(b)(2)(D)(ii) permits the disclosure of a consumer’s name, address and the “subject matter” of video materials that the consumer has purchased, provided that the disclosure is for “the exclusive use of marketing goods and services directly to the consumer” and the consumer has been given the opportunity to opt out of such disclosure. The fact that the VPAA limits the disclosure of subject matter suggests that genre information may amount to “personally identifiable information,” because genre can reveal the subject matter of a video. But at least one court has suggested that genre information may not be personally identifiable information because it does not identify a person as having requested or obtained “specific video materials.” See *Gonzalez v. Central Electric Coop.*, No. 08-6236-HO, 2009 WL 3415235, at *11 (D. Or. Oct. 15, 2009). In *Gonzalez*, the plaintiff challenged the admissibility of a record revealing that he had purchased certain videos for viewing in his hotel room on the ground that the record had been obtained in violation of the VPPA. *Id.* Although the titles of those videos were not part of the record, the price he paid for them suggested that they likely were adult videos. *Id.* The court held that this information was not “personally identifiable information” because it was not about “specific” videos he had viewed. *Id.* Although the court’s conclusion in *Gonzalez* suggests that the subject matter — (continued...)

the extent the Consumer Marketing Database reflects general categories of products purchased—including that a consumer purchased DVDs (without identifying the DVDs’ titles or genres)—the VPPA would not be implicated.⁸⁶

OTHER CONSIDERATIONS

86. Pursuant to Section 332(b) of the Bankruptcy Code, the Ombudsman also has considered the potential losses or gains of privacy to consumers, the potential costs or benefits to consumers, and the potential alternatives that would mitigate potential privacy losses or potential costs to consumers if the Sale is approved.⁸⁷

87. The Sale has potential benefits for consumers insofar as consumers who opted in to the Consumer Marketing Database presumably did so out of an interest in receiving marketing and other information about Debtor’s media and non-media products. Buyer is in a similar line of business to Debtor and, following the Sale, will be in a position to send marketing communications and promotional offers to those consumers. In addition, because Buyer’s business reputation depends in part on respecting consumer privacy, it is likely that the PII will be used in ways that are consistent with the expectations of consumers.

88. However, any sale of purchase history information relating, even if only in part, to consumption of books and movies raises some privacy questions. Moreover,

and thus the genre — of a video may not be “personally identifiable information” as defined by the VPPA, the Ombudsman is not aware of any reported case that has addressed this question directly. Given the lack of clarity on this point and the inherent limitations in the precedential value of *Gonzalez*, the Ombudsman recommends that Debtor not be permitted to transfer genre information absent the informed, written consent of affected consumers.

⁸⁶ See *Gonzalez*, 2009 WL 3415235, at *11 (record indicating that a person watched one of 15 available movies was not sufficiently “specific” to be covered by the VPPA).

⁸⁷ 11 U.S.C. § 332(b)(2)–(4).

after a consumer opted in to having his or her PII maintained by Debtor, there was no mechanism available for such a consumer to opt out of having his or her PII maintained by Debtor or to have his or her PII purged. Even consumers who opted out of receiving marketing communications from Debtor continue to be represented in the Consumer Marketing Database. However, this potential privacy loss or cost to consumers should be considered in light of the facts and circumstances under which PII was collected. The consumers whose PII is being transferred in the Sale all opted in to having their PII collected and maintained by Debtor in the first instance without a reasonable expectation that they would be able to completely purge their PII from Debtor's servers. Consumers who provided PII to Debtor after May 27, 2008, did so pursuant to a Privacy Policy that provided notice that PII might be transferred in the context of a sale.

89. In light of these facts and circumstances, the Ombudsman does not believe it is necessary to subject the transfer of PII to additional conditions beyond those required by applicable nonbankruptcy law in order to mitigate potential privacy losses or potential costs to consumers.⁸⁸

CONCERNS RAISED BY FTC AND STATES' ATTORNEYS GENERAL⁸⁹

90. The Ombudsman has received a letter from David C. Vladeck, Director of the FTC's Bureau of Consumer Protection ("**FTC Letter**") (attached hereto as **Exhibit E**), and a letter from Clark P. Russell, Assistant Attorney General of the State of New York on behalf of the Attorneys General of 25 states ("**State AGs Letter**") (attached

⁸⁸ *Id.*

⁸⁹ The FTC and State Attorneys General requested that the Ombudsman include their concerns in his Report.

hereto as **Exhibit F**).⁹⁰ Both letters express concern over the transfer of personal information in connection with the Sale, although they ultimately differ with respect to what protections will ensure that the transfer of PII in the Sale will comply with applicable nonbankruptcy law.

I. FTC Letter

91. The FTC states that the Pre-May 27, 2008 Privacy Policies and the May 27, 2008 Privacy Policy represented to consumers that their personal information would not be “rented or sold to third parties except in limited circumstances and then only with the express consent of its customers.”⁹¹ The FTC asserts that the May 27, 2008 Privacy Policy’s representation that Debtor could transfer consumers’ personal information if it decided to “sell, buy, merge or otherwise reorganize its businesses” is not sufficiently broad to encompass “dissolution of the company and piecemeal sale of assets in bankruptcy.”⁹² Accordingly, the FTC concludes initially that it “would be appropriate for Borders to obtain express consent from its customers . . . before it transfers the data.”⁹³

92. The FTC acknowledges, however, that “bankruptcy may present special circumstances, including the interest in allowing a company to get back on its feet — or alternatively, to marshal remaining assets for its creditors.”⁹⁴ The FTC cites *Toysmart* as “instructive on this point,” and concludes that, if the Bankruptcy Court does not require

⁹⁰ The State AGs Letter specifies that it represents the view of 24 states’ Attorneys General. The Ombudsman subsequently received a letter (attached hereto as **Exhibit G**) from the Office of the Attorney General in the Commonwealth of Pennsylvania, joining in the concerns expressed in the State AGs Letter, thereby bringing the number of states to 25.

⁹¹ Exhibit E, at 2.

⁹² *Id.* The Ombudsman addresses this objection in paragraphs 59–61 and footnote 54.

⁹³ Exhibit E, at 4.

⁹⁴ *Id.*

consumer consent before Debtor's transfer of personal information to Buyer, the FTC's concerns would be "greatly diminished" if the Sale satisfies the four *Toysmart* conditions.⁹⁵

II. State AGs Letter

93. The State Attorneys General take the position that the transfer of any personal information collected under the Pre-May 27, 2008 Privacy Policies is prohibited because those policies do not contain a transfer-of-control provision.⁹⁶ The State Attorneys General contend that the transfer of personal information collected under the May 27, 2008 Privacy Policy is permitted only to the extent Debtor "will continue as an ongoing concern after the transaction, or otherwise the assets will be sold together as a single unit."⁹⁷ Like the FTC, the State Attorneys General take the view that the sale provision in the May 27, 2008 Privacy Policy is insufficient to encompass a liquidation.⁹⁸ As a consequence, the State Attorneys General contend that personal information collected under any of Debtor's privacy policies may not be transferred without consumer consent.

94. The State Attorneys General do not make reference to *Toysmart* or the extent to which Debtor's bankruptcy may affect the circumstances under which personal information nevertheless can be transferred in compliance with applicable nonbankruptcy law. In a telephone conversation on September 16, 2011, a representative of the State Attorneys General expressed to the Ombudsman her view that, consistent with the action they took in *Toysmart*, the states do not believe the FTC's conditions in *Toysmart* are

⁹⁵ *Id.* at 4–5.

⁹⁶ Exhibit F, at 2–3. Although the State Attorneys General do not state so expressly, the transfer of personal information collected under the Pre-May 27, 2008 Privacy Policies presumably would be permitted with the express consent of the affected consumers.

⁹⁷ *Id.* at 3. The Ombudsman addresses this objection in paragraphs 59–61.

⁹⁸ *Id.* at 3–4. The Ombudsman addresses this objection in footnote 54.

sufficient to protect affected consumers. The Ombudsman understands the State Attorneys General position to be that the fact of bankruptcy does not and should not change the privacy analysis that applies outside of bankruptcy. The State Attorneys General notified the Ombudsman that, in their view, some form of consumer consent would be required for any personal information collected by Debtor to be transferred to Buyer in the Sale.

95. The State Attorneys General informed the Ombudsman on the September 16 telephone call that — although they prefer opt-in consent for transfer to Buyer of personal information collected by Debtor — they would be willing to consider an opt-out approach as well. The State Attorneys General acknowledged that for those affected consumers for whom Debtor may lack a valid e-mail or postal address to transmit an opt-out notice, some form of constructive notice, e.g., publication in a national newspaper, could be sufficient.

96. On the September 16 telephone call, the representatives of the State Attorneys General were not able to identify a written opinion or other legal precedent in which a state tribunal considered and rejected the approach taken by the FTC in *Toysmart* as inconsistent with state law. The State Attorneys General noted, however, that, in the past, they have challenged attempts to implement *Toysmart* in other bankruptcy proceedings and that those challenges have in some cases resulted in negotiated settlements and, in other cases, the destruction of the relevant data.

97. The representatives of the State Attorneys General expressed a preference for effectuating the transfer of PII in the Sale pursuant to a negotiated process involving the State Attorneys General, the FTC, Debtor, and Buyer.

III. Negotiated Solution to Concerns of FTC and State Attorneys General

98. The Ombudsman understands that Debtor, Buyer, FTC and the State Attorneys General are engaged in discussions with a goal of reaching agreement on terms acceptable to the relevant parties for the Sale of the PII, including the conditions or restrictions on the transfer by Debtor and use by Buyer of PII. Because the FTC and the State Attorneys General are the very parties who would take enforcement or other action against Debtor and/or Buyer in the event that they take issue with the terms of the Sale, the Ombudsman supports and has encouraged a negotiated solution to address the individual concerns of the FTC and the States Attorneys General.⁹⁹

99. To the extent that such a negotiated solution provides consumers with practicable privacy protections, such as a right to opt out of having their PII transferred, without imposing costs on Debtor or Buyer that are not required under applicable nonbankruptcy law or are voluntarily agreed to by parties, the Ombudsman would encourage this Court to consider any such alternative.

CONCLUSION

100. For the reasons discussed above, and subject to the qualifications therein, the Ombudsman concludes and recommends as follows:

(a) Debtor may transfer to Buyer PII (other than information about certain audio-visual materials described in subparagraph (c) below) that was collected after May 27, 2008, pursuant to Debtor's May 27, 2008 Privacy Policy, provided that (i) Buyer adheres to all material terms in Debtor's May 27, 2008 Privacy Policy (or terms that are at

⁹⁹ Indeed, the Ombudsman delayed filing this Report to allow the parties an opportunity to reach agreement.

least as protective of consumer privacy); (ii) Buyer honors the opt-out requests of any consumer that previously opted out of receiving marketing messages from Debtor; (iii) Buyer safeguards all conveyed PII in a manner consistent with industry standard data security protections and applicable information security laws; and (iv) Buyer destroys PII for which it determines it has no reasonable business need.

(b) Debtor may transfer to Buyer PII (other than information about certain audio-visual materials described in subparagraph (c) below) collected on or before May 27, 2008, provided that (i) Debtor obtains the affirmative consent of affected consumers; or (ii) Buyer agrees to treat PII collected by Debtor on or before May 27, 2008 pursuant to the terms of Debtor's privacy policy in effect at the time of such collection, and agrees to obtain affirmative consent for any material change to such policy that relates to PII collected under it.

(c) Debtor cannot transfer to Buyer any consumer's purchase history information that includes the title, genre and other details about specific audiovisual materials (e.g., videocassettes, DVDs), regardless of when it was collected, unless Debtor obtains the written consent of the affected consumer.

(d) Debtor may transfer to Buyer the Aggregate Clickstream Data.

Respectfully submitted,

/s/ Michael St. Patrick Baxter
Michael St. Patrick Baxter
Consumer Privacy Ombudsman

Dated: September 21, 2011
Washington, D.C.

EXHIBIT A

Privacy Policy

Last Modified May 27, 2008.

Borders, Inc., Borders Direct, LLC and Walden Book Company, Inc., are subsidiaries of Borders Group, Inc. Borders, Inc., Borders Direct, LLC, Walden Book Company, Inc., and their affiliated companies (collectively, "Borders", "We", or "Us") believe that your personal information—including your purchase history, phone number(s), email and residential addresses, and credit card data—belongs to you. We collect this type of information to serve you better when you provide it to us, but we do not rent or sell your information to third parties. From time to time, we may ask if you are interested in receiving information from third parties whose services or information we think would be of value to you. In those instances, we will only disclose your email address or other personal information to third parties **if you expressly consent to such disclosure.**

This privacy policy applies when you make a purchase at any Borders, Borders Outlet, Borders Express, Waldenbooks, or Brentano's store; when you visit the "Websites" (including but not limited

to www.borders.com, www.bordersmedia.com and www.bordersrewardsperks.com); when you access and use any Borders Website on any in-store computer kiosk (the "kiosks"); when you add items to an online shopping cart; when you subscribe to any of our email programs or mobile content delivery programs; when you sign up for Borders Rewards and Borders Rewards Perks; or when you email content from the kiosk or any Borders Websites.

Your California Privacy Rights

The following only applies to California residents who have an established business relationship with Borders.

If we collect your name or other personal information from you (whether online or offline), and you have given us permission to share your personal information by clicking on the appropriate box or button on the Websites or by any other means we may provide, we may occasionally make that personal information available to our parent or other affiliated companies, or to other third parties who have products or services that we believe will be of interest to you, for their direct marketing purposes. If you later decide that you do not want us to share your personal information with these companies for their direct marketing purposes, please click here www.borders.com/optout. Your opt-out request will be processed within thirty (30) days of the date on which we receive it. For more information on how your personal information is collected, used and shared, please read the remainder of this Privacy Policy.

Our Collection Of Information

Information Collected Directly From You

You can visit the Websites, and can use the kiosks, without entering any personal information. However, in order to access certain information or to take advantage of special programs (such as Borders Rewards, Borders Rewards Perks, and Borders Rewards Perks Plus) or promotional offers, services or features that may be contained on the Websites or on the kiosks, or to purchase any products or services (including, but not limited to, gift cards, and placement of items into an online shopping cart), we may require you to provide certain personal information. For example, we will collect certain personal information if you choose to join our Borders Rewards and/or Borders Rewards Perks programs, if you subscribe to any of our email or mobile content delivery programs, if you participate in creating and sharing wish list information, or if you choose to write and/or rate reviews of various products.

Our primary goal in collecting personal information—including your first name, last name, purchase history, phone number(s), valid email and residential address (zip code), and credit card data—is to provide you with a smooth, efficient, customized shopping experience. When we collect your personal information, you are sharing it with Borders, Inc., Borders Direct, LLC, Walden Book Company, Inc., and our affiliate, subsidiary, and parent entities as mentioned above and third parties as further described herein.

In certain instances, other demographic data may be collected. Borders uses this information to provide benefits and/or services associated with its various programs, including but not limited to Borders Rewards and Borders Rewards Perks. Borders may also receive on its Websites and/or kiosks user-generated content, which may include personal information, including but not limited to, user-created book, music and movie reviews, and user-created wish lists. This user-generated content may be collected by Borders and posted on Borders' Websites and/or kiosks. Further information regarding user-generated content is available in the Borders Terms of Use located at www.borders.com/termsfuse.

Information Collected Automatically

We may collect information about your visit to the Websites and/or the kiosks, including what pages you view, the number of bytes transferred, the links you click, the materials you access, and other actions taken within the Websites. We may also collect certain standard information that your browser sends to every website you visit, such as your Internet Protocol address, your browser type and capabilities and language, your operating system, the date and time you access the Websites, and the website from which you linked to our Websites. From time to time, we may use this information to optimize third-party offers of products and/or services through programs like Borders Rewards Perks.

Additionally, Borders and/or our service providers may collect your click-stream data and other preference information. We do this to improve the design and vendor selection of the Websites. Click-stream data represents a page-by-page history of your website usage.

Your preference data includes reminder, search, and other information-related information that you submit to the site.

Our Use Of Information

If you provide us with personal information, we may retain and use that information for several purposes. For example, we may use your personal information in order to provide transactional and/or commercial information and services via email, direct mail, or via other methods of delivery, such as via mobile content delivery programs. If you have given us permission and have not opted-out, we also may share your personal information with third parties who can offer you products and/or services that we believe may be of interest to you. In addition, we may use your personal information to ensure compliance with Borders policies and applicable law.

In order to offer you a more consistent experience in your interactions with Borders, information collected via the Websites and/or kiosks may be combined with information we collect by other means. We may also use your personal information to improve the Websites, to optimize third-party offers of products and/or services through programs like Borders Rewards Perks, or to make the Websites easier to use by eliminating the need for you to repeatedly enter the same information or by customizing the Websites to your particular preference or interests.

If you have chosen to receive communications by email from us but later wish to opt-out of receiving such communications from us at any time, simply follow the instructions for doing so included in the emails.

If you would like to opt-out of receiving any program-related and other direct mail from us, please send a written request to:

Borders

Attn: Customer Care

P.O. Box 7002

LaVergne, TN 37086

We reserve the right to send you certain communications relating to the Websites, the kiosks, the Borders Rewards and/or Borders Rewards Perks programs, or any of our email subscription or mobile content delivery programs, such as service announcements or similar administrative or transactional messages, without offering you the opportunity to opt-out of receiving them.

Aggregate Information

From time to time, we and our service providers may collect general, non-personal, statistical information about the use of the Websites and/or kiosks, such as how many visitors visit a specific page on the Websites and/or kiosks, how long they stay on that page, and which hyperlinks, if any, they click on. We and our service providers collect this information through the use of technologies such as "cookies", which are discussed in greater detail in this Privacy Policy, and those described in the "Information Collected

Automatically" section above. We and our service providers collect this information in order to determine which areas of the Websites and/or kiosks are most popular and to enhance the Websites and/or kiosks for visitors. We and our service providers may also group this information into aggregate visitor data in order to describe the use of the Websites and/or kiosks to our existing or potential business partners or other third parties, or in response to a government request. From time to time, we and our service providers may use this information to optimize third-party offers of products and/or services through programs like Borders Rewards Perks.

Borders and our service providers may share aggregated demographic and preference data with other service providers or third parties to enable the provision of targeted information and/or discounts on products and services to members. This information represents a generic overview of our users' collective viewing habits and allows vendors participating in Borders' programs, such as Borders Rewards Perks, to modify their discounts based on user traffic.

Our Use Of Cookies; Third Party Cookies; Web Beacons

Cookies are small files that websites save to your hard disk or to your browser's memory. We may use them to track the number of times you have visited the Websites and/or kiosks, to track the number of visitors to the Websites and/or kiosks, to determine and analyze visitors' use of the Websites, to store information that you provide such as your preferences, and to store technical information useful for your interactions with the Websites and/or kiosks.

The Websites and kiosks use both session ID cookies and persistent cookies. Session cookies are used to make it easier for you to navigate the site(s). A session ID cookie expires when you close your browser. A persistent cookie remains on your hard drive for an extended period of time. You can remove persistent cookies by following directions provided in your Internet browser's "help" file. Persistent cookies are set to store an encrypted link to your account information, so you don't have to enter it more than once. Persistent cookies also enable Borders to track and target the interests of users to enhance the experience on the site(s).

Most Internet browsers automatically accept cookies, but you can usually modify your browser settings to decline cookies or to notify you when a cookie is being placed on your computer. If you choose to decline cookies, you may not be able to fully experience the features of the Websites.

You may occasionally get cookies from our business partners (e.g., advertisers, tracking utilities) or other third parties with links on the Websites. Borders has no control or access to these cookies. The use of advertising cookies sent by third-party servers is standard in the Internet industry. For the sake of clarity, this Privacy Policy covers the use of cookies by Borders' Websites and private label sub-domains delivered by Borders only and does not cover the use of cookies by any advertisers.

Our Websites and/or kiosks also may contain electronic images known as web beacons—sometimes called single-pixel gifs—that allow us to count the number of users who have visited those pages. We may include web beacons in promotional email messages or newsletters in order to determine whether messages have been opened and acted upon.

When You Subscribe To Borders Email Programs

You can choose to receive email from us by signing up in store, on our Websites via program preferences pages, and on any in-store kiosk. When you sign up for email, we will send you information about our affiliated companies based on the preferences you have set. The emails we send will include special offers, promotions, updates on services offered, invitations to join other promotional programs, and notification of upcoming author events. To ensure that we are providing materials of interest to you, we may monitor whether you opened a particular email and whether you have clicked on the images and/or links therein.

Our HTML-based email messages include an invisible coded sensor that is activated when the email message is opened. This sensor communicates the date and time the message was opened and, more importantly, whether your computer is capable of receiving HTML-based email. You will receive a functioning sensor only if your computer is enabled to accept HTML email.

You may unsubscribe at any time from our email programs by clicking on the unsubscribe link at the bottom of any email message. All unsubscribe requests will be honored within ten (10) days. At any time, users may opt-out of Borders correspondence by sending an email to ccare@borders.com or by visiting www.borders.com/optout.

Users may also access their personal information, including email address, to make edits in the "Your Account" summary page of the particular Borders program website.

Users may choose to receive Borders Rewards and/or Borders Rewards Perks correspondence, including email reminders of specific vendor offers and Borders Rewards Perks newsletters. The "Your Account" summary page on Borders' Websites displays the correspondence you have elected to receive, and provides the option to unsubscribe from future Borders program related emails.

Disclosure Of Your Personal Information

Except as described in this Privacy Policy, personal information you provide to Borders through the Websites, the kiosks, the Borders Rewards or Borders Rewards Perks programs, or any of our email subscription or mobile content delivery programs, will not be shared outside of Borders and its service providers without your permission.

Disclosure regarding service providers. Borders contracts with other companies to provide services on our behalf, such as hosting the Websites, kiosks and product review pages, sending out information or promotional offers that may be of interest to you (e.g., via email, direct mail, or on mobile devices), and analyzing the Websites and kiosks. We provide these companies with only those elements of your personal information they need

to deliver those services. These companies and their employees are prohibited from using that personal information for any other purpose.

Disclosure regarding other third parties. In some cases, if we have your permission and you have not opted-out, we may make your personal information available to third parties who have products or services that we believe will be of interest to you. If you later decide that you do not want us to share your personal information with these companies please click here www.borders.com/optout.

Disclosures in connection with acquisitions or divestitures. Circumstances may arise where for strategic or other business reasons Borders decides to sell, buy, merge or otherwise reorganize its own or other businesses. Such a transaction may involve the disclosure of personal and other information to prospective or actual purchasers, or receiving it from sellers. It is Borders' practice to seek appropriate protection for information in these types of transactions. In the event that Borders or all of its assets are acquired in such a transaction, customer information would be one of the transferred assets.

Disclosure for other reasons. Borders reserves the right to disclose your personally information, including email address, as required by law and when it is believed that disclosure is necessary to protect Borders' rights and/or comply with a judicial proceeding, court order, or legal process served on the site(s), or in urgent circumstances to protect the personal safety of any individual. Further, when you RSVP for in-store retail events, limited information may be provided to participating merchants in the form of the guest list for admittance into the private event. This information is limited to your first name and last name, and if you will be bringing a guest. This information will not be used for any purposes outside of the particular event.

Security

The security of your personal information is important to us. We maintain physical, electronic, and procedural safeguards to secure your personal information. However, "perfect security" does not exist on the Internet, and there is always some risk in transmitting information electronically. The personal information we collect is stored within databases that we control directly or through our service providers. As we deem appropriate, we use security measures consistent with industry standards, such as firewalls and encryption technology, to protect your information. However, since no security system is impenetrable, we cannot guarantee the security of our databases, nor can we guarantee that information you supply will not be intercepted while being transmitted to us over the Internet. Of course, any information you post to any message board, discussion group, or other public posting area on our Websites and/or kiosks is available to anyone with Internet access.

If you create an account on the Websites and/or kiosks, and if you join the Borders Rewards and/or Borders Rewards Perks programs, you may be asked to choose a password for your account, in which case your online account information shall be

protected by your password. We recommend that you do not disclose your password to any other person. You are responsible for maintaining the confidentiality of your password and account, and are fully responsible for all activities that occur under your password or account.

Links To Other Sites

The Borders Websites and the kiosks contain links to other third-party websites. Please be aware that Borders is not responsible for the privacy practices of other websites. If you submit any personal information to a third-party website or transact a purchase after clicking on a link from Borders' Websites, you are not submitting that information to Borders and Borders has no control over the collection and/or disclosure of that submitted information. We encourage our users to be aware when they leave our site and to familiarize themselves with the privacy statements of every website that collects personally information.

Service Providers

The Websites, kiosks, and Borders programs therein, use other third parties to process credit card transactions on the Websites. When you sign up for programs such as Borders Rewards, Borders Rewards Perks, and Borders Rewards Perks Plus, Borders and our service providers may collect and/or share first name, last name, credit card information and billing address as necessary for the third party to provide that service. No other information is shared with third parties for this purpose. These third parties are prohibited from using your personal information, including email address, for any other purpose.

Third-Party Vendors' Privacy

Borders Rewards Perks (www.bordersrewardsperks.com) is a portal that enables users to purchase discounted products on the websites of participating vendors. Each vendor maintains its own privacy policy that you should be familiar with before you submit your personal information. *Our privacy policy is not applicable on any of the vendor sites.* Therefore, it is important for a potential buyer to familiarize himself with the privacy policies of each vendor.

Children's Privacy

We do not seek or knowingly collect any personal information about children under 13 years of age. If we become aware that we have unknowingly collected personal information from a child under the age of 13, we will make commercially reasonable efforts to delete such information from our database.

In Summary

Borders is committed to protecting your privacy. Borders does not sell, trade, give away, or rent personal or company information, including email address, to any outside parties

in ways other than disclosed in this Privacy Policy. Borders uses the information collected on the site to make shopping and promotional activities possible and to enhance your overall experience with Borders.

Governing Law; Visitors Residing Outside The United States

This Privacy Policy and the privacy practices of Borders will be subject exclusively to the laws of the State of Michigan within the United States of America, without regard to its conflict of law principles. Borders makes no representation that this Privacy Policy and such practices comply with the laws of any other country. Visitors who use the Websites and/or kiosks and reside outside the United States do so on their own initiative and are responsible for compliance with local laws, if and to the extent local laws are applicable. If you reside outside of the United States, by using our Websites and/or kiosks, you consent to the transfer and use of your information outside your country. Without limiting the foregoing, by providing any personally information to Borders, all Website and/or kiosk visitors, including, without limitation, Website and/or kiosk visitors in the member states of the European Union, fully understand and unambiguously consent to this Privacy Policy and to the collection, storage, and processing of such information in the United States of America.

Updates to this Policy

We reserve the right to update our Privacy Policy from time to time. When we do, we will post a notice on the Websites for a reasonable period of time after such changes are made that this Privacy Policy has been updated and we will revise the "Last Modified" date at the top of this Privacy Policy. We encourage you to check this page periodically for any updates. Your continued use of the Websites following the posting of updates to this Privacy Policy will mean you accept those updates.

Contact Us

Any questions you may have regarding our Privacy Policy should be directed via email to ccare@borders.com, or via telephone at 800.770.7811. You can also write us at:

Borders

Attn: Customer Care

P.O. Box 7002

LaVergne, TN 37086

Privacy Policy

Borders, Inc., Walden Book Company, Inc., and their related companies believe that your personal information—including your purchase history, phone number(s), email and residential addresses, and credit card data—belongs to you. We collect this type of information to serve you better when you provide it to us, but we do not rent or sell your information to third parties. From time to time, we may ask if you are interested in receiving information from third parties whose services or information we think would be of value to you. In those instances, we will only disclose your email address or other personal information to third parties **if you expressly consent to such disclosure.**

Borders, Inc., and Walden Book Company, Inc., are subsidiaries of Borders Group, Inc. This privacy policy applies when you make a purchase at any Borders, Borders Outlet, Borders Express, Waldenbooks, or Brentano's store; when you visit the www.bordersstores.com, www.bordersrewards.com, and www.waldenbooksstores.com websites; when you subscribe to any of our email programs, or when you sign up for Borders Rewards.

Since we have teamed with Amazon.com to provide you with the ultimate online shopping experience, any personal information you provide when you visit the Borders (www.borders.com) or Waldenbooks (www.waldenbooks.com) websites is subject to Amazon.com's Privacy Policy.

What We Collect and Why

Our primary goal in collecting personal information—including your purchase history, phone number(s), email and residential address, and credit card data—is to provide you with a smooth, efficient, customized shopping experience. When we collect your personal information, you are sharing it with Borders, Inc., Walden Book Company, Inc., and our affiliate and subsidiary entities as mentioned above and third parties as further described herein.

When You Join Borders Rewards

When you join Borders Rewards, we request your name, phone number, and email address, plus other information such as the frequency with which you shop for new books. This personal information is kept for the purpose of sending members their rewards information, membership information, for customer service needs, and for sending both member-exclusive and non-exclusive promotional information. You may make changes to your membership information by updating your profile on www.bordersrewards.com or by calling Borders Rewards Member Services at 800.443.7359.

When you join Borders Rewards, you are assigned a unique number, which is used to track your purchases so that we may award the rewards resulting from those purchases. Borders Rewards will use transaction-level purchase data for marketing and merchandising analysis purposes, and to better customize your communications from Borders Rewards.

We will not display title or author information when you visit www.bordersrewards.com to check your account summary. Title and author/artist information will be used eventually to shape our recommendations about the books, CDs, DVDs, and other merchandise that might be of interest to you.

Borders Rewards Members may choose to opt out of the program at any time; however, this may result in the forfeiture of accrued rewards. You can opt out of Borders Rewards at any time by visiting www.bordersrewards.com or by calling Borders Rewards Member Services at 800.443.7359.

Disclosure to Outside Parties

We work with reputable third parties to assist us in delivering services to you, including the delivery of email services. In these instances, we will provide your personal information to third parties so that they can perform these services. In addition, from time to time we may disclose your personal information to third parties based on a legal obligation; we will only accommodate these requests when it is determined to be legally necessary in the reasonable opinion of our counsel.

When You Contact Customer Service

When you contact our Customer Service department, we use your phone number, mailing and email addresses, and comments generated on previous calls to help us assist you. We may also pass your feedback along to other departments within our company in order to improve our services.

When You Purchase Gift Cards Online

We work with an outside company to sell gift cards online. When you purchase gift cards online, we use your information to process your transaction and communicate with you about the status of your order.

When You Subscribe to Borders and/or Waldenbooks Email Programs

You can choose to receive email from us by signing up in store or online. When you sign up for Borders or Waldenbooks email, we may, from time to time, send you co-branded communications (from both Borders and Waldenbooks), or we may send you information about our affiliated companies. The emails we send will include special offers, advance notice of new releases and in-store promotions, updates on services offered, and notification of upcoming author events. To ensure that we are providing materials of interest to you, we may monitor whether you opened a particular email have clicked on the images and/or links therein.

Our HTML-based email messages include an invisible coded sensor that is activated when the email message is opened. This sensor communicates the date and time the message was opened and, more importantly, whether your computer is capable of receiving HTML-based email. You will receive a functioning sensor only if your computer is enabled to accept HTML email.

You may unsubscribe at any time from our email programs by clicking on the unsubscribe link at the bottom of any email message. All unsubscribe requests will be honored within 10 business days.

A Word About Cookies

Cookies are pieces of information that are transferred to your computer's hard drive via your Web browser. They allow us to provide you with a more convenient and personalized shopping experience by recording information about your preferences (such as the list of stores you've saved using the "My Stores" feature available at www.bordersstores.com).

Most browsers will allow you to prevent your computer from accepting cookies. However, if you choose to disable cookies you will not be able to use the My Stores functionality available at www.bordersstores.com to access store event and inventory information for your favorite Borders locations.

Please note that the information in our cookies can be requested only by www.bordersstores.com and www.waldenbooksstores.com; your browser will not pass these cookies to any other site.

Children's Privacy

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Updates to this Policy

We reserve the right to update our Privacy Policy from time to time. We will make reasonable efforts to notify you of these updates. In addition, feel free to check back to this website for any additional updates.

More Information About Protecting Your Privacy Online

For more information on protecting your privacy, the United States Federal Trade Commission has created many informational guides for consumers. For more detailed information on protecting your privacy, you may also wish to consult the FTC publication *Site Seeing on the Internet*. This handbook is filled with information about how to use the Internet wisely, including tips on how to avoid fraud and deception online and how to keep personal information private. *Site Seeing* also helps parents teach children ways to have fun online without giving out private information. Consumers can order a copy of *Site Seeing* from the FTC by calling their toll-free number: 877.382.2020. The FTC has also developed a Site Seeing education campaign page. An online version of the handbook can be found at this site. We are proud to assist the FTC in its effort to provide valuable information to consumers.

Privacy Policy

Borders, Inc., Walden Book Company, Inc., and their related companies believe that your personal information—including your purchase history, phone number(s), email and residential addresses, and credit card data—belongs to you. We collect this type of information to serve you better when you provide it to us, but we do not rent or sell your information to third parties. From time to time, we may ask if you are interested in receiving information from third parties whose services or information we think would be of value to you. In those instances, we will only disclose your email address or other personal information to third parties **if you expressly consent to such disclosure.**

Borders, Inc., and Walden Book Company, Inc., are subsidiaries of Borders Group, Inc. This privacy policy applies when you make a purchase at any Borders, Borders Outlet, Borders Express, Waldenbooks, or Brentano's store; when you visit the www.bordersstores.com, www.bordersrewards.com, and www.waldenbooksstores.com websites; when you subscribe to any of our email programs, or when you sign up for Borders Rewards.

Since we have teamed with Amazon.com to provide you with the ultimate online shopping experience, any personal information you provide when you visit the Borders (www.borders.com) or Waldenbooks (www.waldenbooks.com) websites is subject to Amazon.com's Privacy Policy.

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When You Join Borders Rewards

When you join Borders Rewards, we request your name, phone number, and email address, plus other information such as the frequency with which you shop for new books. This personal information is kept for the purpose of sending members their Personal Shopping Day information, Holiday Savings Account information, membership information, for customer service needs, and for sending both member-exclusive and non-exclusive promotional information. You may make changes to your membership information by updating your profile on www.bordersrewards.com or by calling Borders Rewards Member Services at 800.443.7359.

When you join Borders Rewards, you are assigned a unique number, which is used to track your purchases so that we may award the Personal Shopping Day and Holiday Savings rewards resulting from those purchases. Borders Rewards will use transaction-level purchase data for marketing and merchandising analysis purposes, and to better customize your communications from Borders Rewards.

We will not display title or author information when you visit www.bordersrewards.com to check your account summary. Title and author/artist information will be used eventually to shape our recommendations about the books, CDs, DVDs, and other merchandise that might be of interest to you.

Borders Rewards Members may choose to opt out of the program at any time; however, this may result in the forfeiture of accrued rewards. You can opt out of Borders Rewards at any time by visiting www.bordersrewards.com or by calling Borders Rewards Member Services at 800.443.7359.

Disclosure to Outside Parties

We work with reputable third parties to assist us in delivering services to you, including the delivery of email services. In these instances, we will provide your personal information to third parties so that they can perform these services. In addition, from time to time we may disclose your personal information to third parties based on a legal obligation; we will only accommodate these requests when it is determined to be legally necessary in the reasonable opinion of our counsel.

When You Contact Customer Service

When you contact our Customer Service department, we use your phone number, mailing and email addresses, and comments generated on previous calls to help us assist you. We may also pass your feedback along to other departments within our company in order to improve our services.

When You Purchase Gift Cards Online

We work with an outside company to sell gift cards online. When you purchase gift cards online, we use your information to process your transaction and communicate with you about the status of your order.

When You Subscribe to Borders and/or Waldenbooks Email Programs

You can choose to receive email from us by signing up in store or online. When you sign up for Borders or Waldenbooks email, we may, from time to time, send you co-branded communications (from both Borders and Waldenbooks), or we may send you information about our affiliated companies. The emails we send will include special offers, advance notice of new releases and in-store promotions, updates on services offered, and notification of upcoming author events. To ensure that we are providing materials of interest to you, we may monitor whether you opened a particular email have clicked on the images and/or links therein.

Our HTML-based email messages include an invisible coded sensor that is activated when the email message is opened. This sensor communicates the date and time the message was opened and, more importantly, whether your computer is capable of receiving HTML-based email. You will receive a functioning sensor only if your computer is enabled to accept HTML email.

You may unsubscribe at any time from our email programs by clicking on the unsubscribe link at the bottom of any email message. All unsubscribe requests will be honored within 10 business days.

A Word About Cookies

Cookies are pieces of information that are transferred to your computer's hard drive via your Web browser. They allow us to provide you with a more convenient and personalized shopping experience by recording information about your preferences (such as the list of stores you've saved using the "My Stores" feature available at www.bordersstores.com).

Most browsers will allow you to prevent your computer from accepting cookies. However, if you choose to disable cookies you will not be able to use the My Stores functionality available at www.bordersstores.com to access store event and inventory information for your favorite Borders locations.

Please note that the information in our cookies can be requested only by www.bordersstores.com and www.waldenbooksstores.com; your browser will not pass these cookies to any other site.

Children's Privacy

We do not seek or knowingly collect any personal information about children under 13 years of age.

Updates to this Policy

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More Information About Protecting Your Privacy Online

For more information on protecting your privacy, the United States Federal Trade Commission has created many informational guides for consumers. For more detailed information on protecting your privacy, you may also wish to consult the FTC publication *Site Seeing on the Internet*. This handbook is filled with information about how to use the Internet wisely, including tips on how to avoid fraud and deception online and how to keep personal information private. *Site Seeing* also helps parents teach children ways to have fun online without giving out private information. Consumers can order a copy of *Site Seeing* from the FTC by calling their toll-free number: 877.382.2020. The FTC has also developed a Site Seeing education campaign page. An online version of the handbook can be found at this site. We are proud to assist the FTC in its effort to provide valuable information to consumers.

Privacy Policy

Borders believes that your personal information — including your purchase history, email and residential addresses, and credit card data — belongs to you. To service you better, we collect this type of information when you provide it to us, but we do not rent or sell your information to our partners or other third parties.

The Borders Privacy Policy as stated above applies when you make a purchase at any Borders Books & Music store, purchase a Borders Gift Card online, subscribe to any of our Borders Mail email newsletters, or visit this site.

Since we have partnered with Amazon.com to provide you with the ultimate online shopping experience, any personal information you provide when you visit the Borders teamed with Amazon.com site (www.borders.com) is subject to Amazon.com's Privacy Policy.

What We Collect & Why

Our primary goal in collecting personal information is to provide you with a smooth, efficient, customized shopping experience. Below are the different types of information we may gather:

When You Contact Customer Service

- When you contact our Customer Service department, we use your email address, telephone number, and comments to help us assist you. We may also pass your feedback along to other departments within our company in order to improve our service.

When You Purchase a Borders Gift Card

- We work with an outside company to sell Borders Gift Cards. When you purchase a Borders Gift Card, we use your information to process your transaction and communicate with you about the status of your order.

When You Subscribe to Borders Mail

- Borders customers can choose to receive email from us, including our Borders Mail newsletters as well as information about special in-store offers and promotions. To ensure that we are providing materials of interest to our customers, we may monitor whether a particular email has been opened and whether recipients have clicked on the images and links therein.
- Our HTML-based email messages include an invisible coded sensor that is activated when the email message is opened. This sensor communicates the date and time the message was opened and, more importantly, whether or not the recipient is capable of receiving HTML-based email. The sensors do not communicate any additional information. Only those recipients who are able to accept HTML email will receive a functioning sensor.
- As stated above, if you sign up to receive email communications from Borders, your email address will not be rented or sold to any third party.

A Word About Cookies

- Cookies are pieces of information that are transferred to your computer's hard drive via your Web browser. They allow us to provide you with a more convenient and personalized shopping experience by recording information about your preferences (such as the list of stores you've saved using the "My Stores" feature).
- Most browsers will allow you to prevent your computer from accepting cookies. However, if you choose to disable cookies you will not be able to use the My Stores functionality to access store event and inventory information for your favorite Borders locations.
- Please note that the information in our cookies can be requested only by Bordersstores.com; your browser will not pass these cookies to any other site.

More Information About Protecting Your Privacy Online

The United States Federal Trade Commission has created an information page, *How To Be Web Ready*, that provides general tips on how to protect your privacy online. For more detailed information on protecting your privacy, you may also wish to consult the FTC publication *Site Seeing on the Internet*. This handbook is filled with information about how to use the Internet wisely, including tips on how to avoid fraud and deception online and how to keep personal information private. *Site Seeing* also helps parents teach children ways to have fun online without giving out private information.

Consumers can order a copy of *Site Seeing* from the FTC by calling their toll-free number: 1-877-382-2020. The FTC has also developed a *Site Seeing* education campaign page. An online version of the handbook can be found at this site. Borders is proud to assist the FTC in its effort to provide valuable information to consumers.

EXHIBIT B

Borders Rewards and Borders Rewards Plus Terms and Conditions

Effective October 1, 2010

Enrollment in the BORDERS REWARDS or BORDERS REWARDS PLUS membership programs (collectively, the "Program") constitutes acceptance of the following terms and conditions (this "Agreement"), which are entered into by each BORDERS REWARDS and BORDERS REWARDS PLUS Member individually ("Member" or "You", collectively, "Members") and Borders, Inc. and Borders Direct, LLC (collectively "Borders", "Us", "We", or "Our"):

1. MEMBER BENEFITS.

BORDERS REWARDS and BORDERS REWARDS PLUS provides Members with the following benefits:

BORDERS REWARDS

- Membership is free
- Earn \$5 in Borders Bucks for the first \$150 in Qualifying Purchases you accrue in a calendar year
- Become a Gold Member by accruing \$150 in Qualifying Purchases in a calendar year. Gold Members earn \$5 in Borders Bucks for every additional \$100 in Qualifying Purchases accrued in a calendar year. Gold Members also get one Personal Shopping Day during which you will save an additional 10% off the purchase price of most everything (10% off applies after all other discounts are applied, including Borders Bucks; subject to the exclusions noted herein)
- Receive special offers in store and via email
- 30% off list price of Borders hardcover bestsellers in-store (selection and quantity of hardcover bestsellers available at this discount determined by Borders and subject to change from time to time)
- Free standard shipping on online orders of \$25 or more, subject to the exclusions herein
- New Members receive a welcome gift for a coupon to apply to your next purchase
- Purchase 5 café beverages and get the next café beverage free (excluding Coca-Cola® products)
- Gift on your birthday
- Priority access to certain events.
- Option to donate eligible Borders Bucks to teachers enrolled in Borders Rewards or Borders Rewards Plus and the Classroom Discount program who sign up to receive such donations.

BORDERS REWARDS PLUS

For a \$20 annual membership fee, Members get the following benefits in addition to the benefits of the BORDERS REWARDS program:

- 40% off list price of Borders hardcover bestsellers in-store (selection and quantity of hardcover bestsellers available at this discount determined by Borders and subject to change from time to time)
- 20% off list price of selected hardcovers in-store (selection and quantity of selected hardcovers available at this discount determined by Borders and subject to change from time to time)
- 10% off the purchase price of most everything else in-store (10% off applies after all other discounts, coupons, sale pricing, offers and promotions are applied, including Borders Bucks; may not be combined with “40% off Borders hardcover bestsellers” or “20% off selected hardcovers” discounts; subject to the exclusions noted herein)
- Free shipping on online orders, subject to the exclusions herein.

Program discounts may not be combined with other discounts, coupons, sale pricing, offers and promotions, or used online, unless otherwise indicated.

Program discounts, including but not limited to Personal Shopping Days and “10% off the purchase price of most everything else,” exclude Borders Rewards Plus membership fees, previous purchases, special orders, shipping, gift cards, coupon books, newspapers, magazines, comics, audiobook downloads, music downloads, vinyl LPs, software, video games, all electronics, including eReaders, and certain eBooks (see the applicable eBook product detail page on Borders.com to determine if excluded). Subject to further exclusions noted herein.

Certain Program discounts may not be available at Borders airport locations.

2. GENERAL TERMS AND CONDITIONS.

a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member of BORDERS REWARDS; membership in BORDERS REWARDS PLUS, however, requires an annual fee of \$20.00. Member must be a legal resident of the United States or Puerto Rico and 18 years of age or older to participate in the Program.

b. BORDERS REWARDS and BORDERS REWARDS PLUS membership and its benefits are nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS and BORDERS REWARDS PLUS transactions. Member benefits are all prospective from the date of membership enrollment, and will not be applied retroactively to any prior purchases.

c. Borders is not responsible for lost or stolen membership cards.

d. Member agrees the BORDERS REWARDS and BORDERS REWARDS PLUS program (as applicable) and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS and BORDERS REWARDS PLUS Member Services Department. Members may update their personal information online at www.borders.com or by calling 1-800-443-7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

f. Free shipping applies to standard shipping and handling expenses on Borders.com purchases shipped to a single address within the continental U.S., Alaska, or Hawaii only. Excludes priority shipping, express shipping, and orders shipped to international addresses. Free shipping does not apply to purchases of gift cards, used items offered via Borders Marketplace and any other item in Borders' discretion.

g. Borders reserves the right to change or discontinue any Program benefit in Borders' sole discretion at any time without notice.

3. BORDERS BUCKS REWARDS ACCRUAL.

a. Shop at Borders, Borders Express, Borders Outlet or Waldenbooks in the United States and Puerto Rico or online at Borders.com (collectively, "Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Qualifying purchases are purchases made at Participating Stores, excluding membership fees, purchases of gift cards and gift certificates and certain eBooks (see applicable eBook product detail page at the time of purchase to determine eligibility), after redeemed Borders Bucks and other discounts and coupons and before shipping charges, gift wrap charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for Borders Bucks rewards accrual at the time of purchase. After \$150.00 in Qualifying Purchases is spent, the threshold to earn Borders Bucks is \$100.00 so that for every \$100.00 spent after the first \$150.00, Members get five (5) Borders Bucks. Borders Bucks may be redeemed for eligible purchases (see restrictions below) at Participating Stores until the end of the month issued. Any amount in excess of one hundred fifty dollars (\$150.00) (and below the next \$100.00 threshold) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.

b. To illustrate, if you spend \$175 on Qualifying Purchases in September, you would receive five (5) Borders Bucks in the first week of October, which can be used until the end of October, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in October, you would receive an additional five (5) Borders Bucks in November, which could be used until the end of November, and

\$70.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as or toward a Qualifying Purchase.

c. Discount programs such as the Business, Institutional and Government savings programs ("Discount Programs") may not be combined with the Program discounts and purchases made with the Discount Programs shall not be applicable toward Borders Bucks rewards accrual. Notwithstanding the foregoing, Qualifying Purchases made with the Classroom Discount program may be applied toward Borders Bucks rewards accrual upon Member's request at the time of purchase.

d. Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with Discount Programs (except the Classroom Discount program). Borders Bucks cannot be used towards the purchase of any of the following items: Borders Rewards Plus membership fees, certain eBooks (see applicable eBook product detail page at the time of purchase to determine eligibility), gift cards and certificates, rush fees, special-order deposits, shipping charges, gift wrap charges and tickets. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed (or, if eligible for donation, donated to an eligible teacher) by the end of the month earned will be forfeited.

In lieu of redemption, eligible Borders Bucks may be donated to teachers enrolled in Borders Rewards or Borders Rewards Plus and the Classroom Discount program, who sign up to receive such donations. Only Borders Bucks which have been earned by making the requisite amount of Qualifying Purchases, as applicable, are eligible for donation; notwithstanding anything to the contrary in the foregoing, "Bonus" Borders Bucks, Borders Bucks acquired via special promotion or accommodation, donated Borders Bucks, Borders Bucks acquired by means not requiring Qualifying Purchases, and any other Borders Bucks determined by Borders from time to time in its sole discretion, are not eligible for donation. Donated Borders Bucks are subject to the terms and conditions of the Program and the Classroom Discount program. Donated Borders Bucks not redeemed by the end of the month following donation will be forfeited.

5. AUTOMATIC RENEWAL TERMS FOR BORDERS REWARDS PLUS.

Description

BORDERS REWARDS PLUS is an annual (from the date of enrollment) fee-based, automatically renewing membership program that provides Members with the benefits of BORDERS REWARDS as well as the additional benefits detailed above.

Unless a Member opts-out of automatic renewal or cancels his/her membership, the then-current renewal membership fee will be charged each year on or around thirty (30) days prior to each anniversary of Member's membership expiration date to the credit card Borders has on file for Member as of such date. Credit card information may be updated at any time by Member by calling 1-800-443-7359.

Borders will provide notice via email to Member of the upcoming automatic renewal of Member's BORDERS REWARDS PLUS membership no less than thirty (30) days and no more than sixty (60) days prior to the current or renewal membership expiration date, as applicable. BORDERS REWARDS PLUS Members may opt-out of automatic renewal of their membership upon enrollment, or at any time during their membership by calling 1-800-443-7359.

BORDERS REWARDS PLUS Members may cancel their membership and be refunded the \$20.00 annual fee if membership is cancelled within thirty (30) days after enrollment or renewal, as applicable, by calling 1-800-443-7359 by 5 p.m. ET on the last day that Member is eligible to cancel. If a Member cancels his/her membership in BORDERS REWARDS PLUS more than thirty (30) days after the start of enrollment or the renewal membership term, as applicable, Member will not receive a refund of the \$20.00 membership fee, but Member will continue to receive Program benefits through the end of their current membership term.

Automatic Renewal Terms

BY ENROLLING IN BORDERS REWARDS PLUS, YOU UNDERSTAND AND AGREE THAT YOUR MEMBERSHIP WILL AUTOMATICALLY RENEW ANNUALLY EACH YEAR AFTER YOUR INITIAL MEMBERSHIP YEAR ENDS. YOU HEREBY AUTHORIZE BORDERS TO CHARGE YOUR CREDIT CARD FOR THE RENEWAL TERM AT THE THEN-CURRENT MEMBERSHIP FEE. YOU MAY CANCEL YOUR MEMBERSHIP AT ANY TIME IN ACCORDANCE WITH THE INSTRUCTIONS HEREIN.

YOUR SAME CREDIT CARD THAT YOU USED TO ENROLL INITIALLY IN BORDERS REWARDS PLUS WILL BE AUTOMATICALLY CHARGED UPON RENEWAL, UNLESS YOU CANCEL YOUR MEMBERSHIP OR YOU PROVIDE AN ALTERNATIVE CARD PRIOR TO RENEWAL. YOUR MEMBERSHIP IN BORDERS REWARDS PLUS IS CONDITIONAL UPON BORDERS' RECEIPT OF PAYMENT. IF PAYMENT CANNOT BE CHARGED TO YOUR CREDIT CARD OR IF PAYMENT IS NOT RECEIVED BY BORDERS FOR ANY REASON, INCLUDING CHARGEBACK, BORDERS RESERVES THE RIGHT TO IMMEDIATELY AND WITHOUT NOTICE, EITHER SUSPEND OR TERMINATE YOUR MEMBERSHIP. YOU ARE REQUIRED TO PAY ANY AMOUNTS STILL OWED TO BORDERS AT THE TIME YOUR ACCOUNT IS SUSPENDED OR TERMINATED.

EXCEPT WHERE PROSCRIBED BY LAW, YOU AGREE THAT BORDERS IS NOT OBLIGATED TO SEND YOU ANY RENEWAL OR ADVANCE BILLING NOTICES OR OTHER NOTICES INDICATING THAT YOUR CREDIT CARD WILL BE OR HAS BEEN CHARGED. NOTWITHSTANDING THE FOREGOING, BORDERS WILL USE COMMERCIALY REASONABLE EFFORTS TO SEND YOU ONE NOTICE, NO LESS THAN THIRTY (30) DAYS AND NO MORE THAN SIXTY (60) DAYS BEFORE THE END OF THE THEN CURRENT 1 YEAR MEMBERSHIP TERM, WHICH INDICATES: A) THE DATE ON WHICH THE RENEWAL WILL BE EFFECTIVE ; B) ENOUGH INFORMATION REGARDING THE CREDIT CARD BEING CHARGED FOR THE MEMBER TO VERIFY THE DETAILS, WITHOUT PROVIDING FULL CARD DETAILS; C) A REMINDER THAT YOU CAN CANCEL AT ANY TIME; D) THE MEANS TO CONTACT BORDERS IN THE EVENT THAT YOU WISH TO CANCEL YOUR MEMBERSHIP, E) THE AMOUNT YOUR CREDIT CARD WILL BE CHARGED; F) THE LENGTH OF THE SUBSCRIPTION TERM WHICH THE NEW CHARGE ENABLES; G) THE DEADLINE BY WHICH YOU MUST CANCEL TO AVOID ANY CHARGES INCLUDING RENEWAL OF YOUR SUBSCRIPTION; AND H) NOTICE THAT YOUR CREDIT CARD WILL BE CHARGED ON OR AROUND THIRTY (30) DAYS PRIOR TO THE END OF YOUR THEN CURRENT TERM.

6. PARTICIPATING STORES.

The BORDERS REWARDS and BORDERS REWARDS PLUS cards are accepted at all Borders, Waldenbooks, Borders Outlet and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS and BORDERS REWARDS PLUS cards are not accepted at any other locations.

7. MEMBER PRIVACY.

By becoming a Member of the BORDERS REWARDS and/or BORDERS REWARDS PLUS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, Borders.com and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at

http://www.borders.com/online/store/CustomerServiceView_privacypolicy.

8. MODIFICATION AND TERMINATION.

The sponsors of the Program are Borders, Inc. and Borders Direct, LLC (collectively referred to herein as "Borders.") Borders may change or terminate the program in its sole discretion with immediate effect with or without notice. Continued use of Member's membership benefits constitutes acceptance of the then-current terms and conditions of the Program. The most current terms and conditions of the Program can be found at www.borders.com/rewards. Upon termination of the Program, Member shall forfeit all unredeemed rewards and accruals as of the termination date. Notwithstanding the foregoing, in Borders' discretion, Borders may honor Program benefits through the end

of Member's current membership or renewal term, or through the end of the applicable calendar year, or provide a pro-rata refund of the membership fee (if applicable), or provide an alternative benefit in Borders' discretion. Member may choose to cancel membership or opt out of the Program at any time as noted herein; however, this may result in the forfeiture of accrued rewards.

9. GOVERNING LAW AND ARBITRATION.

This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS or BORDERS REWARDS PLUS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No Member's arbitration under this Agreement shall be consolidated with any other Member's arbitration.

10. NO WARRANTY.

TO THE EXTENT PERMITTED BY LAW, BORDERS EXPRESSLY DISCLAIMS AND MAKES NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO, AND THE PROGRAM, INCLUDING ANY CONTENT, PRODUCTS, OR SERVICES PROVIDED VIA THE PROGRAM, ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING AND TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, BORDERS DOES NOT WARRANT AND EXPRESSLY DISCLAIMS THAT: (i) MEMBER USE OF THE PROGRAM AND ACCESS TO AND USE OF ALL OF THE FEATURES AND BENEFITS THEREOF WILL BE UNINTERRUPTED, ERROR-FREE, OR SECURE, (ii) THAT ANY INFORMATION OBTAINED VIA THE PROGRAM IS ACCURATE, RELIABLE OR COMPLETE, (iii) THAT DEFECTS WILL BE CORRECTED, (iv) THAT THE PROGRAM SHALL BE AVAILABLE WITHOUT DELAY, FAILURE, INTERRUPTION OR CORRUPTION DUE TO FACTORS OUTSIDE OF THEIR CONTROL, OR (v) THAT ANY SOFTWARE, SERVICES, WEBSITE OR SERVER(S) ON WHICH THE PROGRAM IS HOSTED ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. YOUR USE OF THE PROGRAM AND ANY INFORMATION, MATERIALS, FEATURES, OR BENEFITS PROVIDED THROUGH THE PROGRAM IS ENTIRELY AT YOUR OWN RISK. IF A TERM IS IMPLIED BY LAW INTO THESE TERMS AND CONDITIONS AND THE LAW PROHIBITS PROVISIONS IN A CONTRACT EXCLUDING OR MODIFYING LIABILITY UNDER THAT TERM, THEN IT WILL BE INCLUDED IN THESE TERMS AND CONDITIONS. HOWEVER, BORDERS' LIABILITY FOR BREACH

OF SUCH TERM WILL, TO THE EXTENT PERMITTED BY APPLICABLE LAW, BE LIMITED, AT ITS OPTION, TO THE SUPPLY OF THE RELEVANT SERVICE OR THE PAYMENT OF THE COST OF HAVING THE PROGRAM SUPPLIED TO YOU.

11. RELEASE OF LIABILITY.

TO THE EXTENT PERMITTED BY LAW, MEMBER HEREBY RELEASES BORDERS AND ITS PARENT AND AFFILIATES (THE "BORDERS PARTIES") FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS OR BORDERS REWARDS PLUS MEMBERSHIP OR THIS AGREEMENT. MOREOVER, YOU AGREE THAT THE BORDERS PARTIES SHALL NOT HAVE ANY LIABILITY TO YOU UNDER ANY THEORY OF LIABILITY OR INDEMNITY IN CONNECTION WITH YOUR USE OF AND MEMBERSHIP IN THE PROGRAM. YOU FURTHER AGREE TO HEREBY AND FOREVER RELEASE AND WAIVE ANY AND ALL CLAIMS YOU MAY HAVE AGAINST THE BORDERS PARTIES FOR ANY AND ALL CLAIMS, CAUSES, DAMAGES OR LOSSES UNDER ANY THEORY OF LIABILITY (INCLUDING ATTORNEYS' FEES AND ASSOCIATED COSTS AND EXPENSES) ARISING FROM YOUR USE OF AND MEMBERSHIP IN THE PROGRAM.

NOTWITHSTANDING THE FOREGOING, IF ANY OF THE BORDERS PARTIES ARE HELD LIABLE UNDER THIS AGREEMENT, TOTAL LIABILITY TO YOU SHALL NOT EXCEED THE MEMBERSHIP FEES PAID BY YOU DURING YOUR MEMBERSHIP TERM. IN ADDITION, SHOULD YOUR CLAIM ARISE FROM A PURCHASE MADE ON OR THROUGH OUR WEBSITE (WHETHER OR NOT ASSOCIATED WITH THIS PROGRAM), OUR TOTAL DAMAGES SHALL NOT EXCEED THE COST OF THE PRODUCT OR SERVICE PURCHASED.

12. LIMITATION OF LIABILITY.

YOU EXPRESSLY AGREE AS A CONDITION OF MEMBERSHIP IN THE PROGRAM THAT, TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, THE BORDERS PARTIES ARE NOT RESPONSIBLE OR LIABLE TO YOU OR ANYONE ELSE FOR ANY LOSS OR INJURY OR ANY DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, PUNITIVE OR OTHER DAMAGES UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY ARISING OUT OF OR RELATING IN ANY WAY TO: (i) THE USE OF OR INABILITY TO USE THE PROGRAM; (ii) ANY CONTENT MADE AVAILABLE VIA THE PROGRAM; (iii) STATEMENTS OR CONDUCT POSTED OR MADE PUBLICLY AVAILABLE VIA THE PROGRAM; (iv) ANY PRODUCT OR OTHER SERVICES PURCHASED OR OBTAINED FROM THE BORDERS PARTIES OR THROUGH THE PROGRAM; (v) ANY ACTION TAKEN IN RESPONSE TO OR AS A RESULT OF ANY INFORMATION AVAILABLE THROUGH THE PROGRAM; (vi) ANY DAMAGE CAUSED BY LOSS OF ACCESS TO, DELETION OF, FAILURE TO STORE, FAILURE TO BACK UP, OR ALTERATION OF ANY CONTENT AVAILABLE VIA THE PROGRAM, OR (vii)

ANY OTHER MATTER RELATING TO THE PROGRAM. IN NO EVENT SHALL THE BORDERS PARTIES' TOTAL LIABILITY TO YOU FOR ANY AND ALL DAMAGES, LOSSES, AND CAUSES OF ACTION (WHETHER IN CONTRACT, TORT [INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE], STATUTORY, OR OTHERWISE) EXCEED THE MEMBERSHIP FEES PAID BY YOU TO BORDERS DURING YOUR CURRENT MEMBERSHIP TERM. IN ADDITION, SHOULD YOUR CLAIM ARISE FROM A PURCHASE MADE THROUGH THE PROGRAM, THE BORDERS PARTIES' TOTAL DAMAGES SHALL NOT EXCEED THE COST OF THE PRODUCT OR SERVICE PURCHASED. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU THROUGH THE PROGRAM SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THESE TERMS OF USE.

SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR CERTAIN CATEGORIES OF DAMAGES SUCH AS INCIDENTAL OR CONSEQUENTIAL DAMAGES. ACCORDINGLY, SOME OF THE ABOVE LIMITATIONS OF THIS SECTION MAY NOT APPLY TO YOU.

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Borders Rewards and Borders Rewards Plus Terms and Conditions

Effective September 1, 2010

Enrollment in the BORDERS REWARDS or BORDERS REWARDS PLUS membership programs (collectively, the "Program") constitutes acceptance of the following terms and conditions (this "Agreement"), which are entered into by each BORDERS REWARDS and BORDERS REWARDS PLUS Member individually ("Member" or "You", collectively, "Members") and Borders, Inc. and Borders Direct, LLC (collectively "Borders", "Us", "We", or "Our"):

1. MEMBER BENEFITS.

BORDERS REWARDS and BORDERS REWARDS PLUS provides Members with the following benefits:

BORDERS REWARDS

- Membership is free
- Earn \$5 in Borders Bucks for the first \$150 in Qualifying Purchases you accrue in a calendar year
- Become a Gold Member by accruing \$150 in Qualifying Purchases in a calendar year. Gold Members earn \$5 in Borders Bucks for every additional \$100 in Qualifying Purchases accrued in a calendar year and get a Personal Shopping Day during which you will save an additional 10% off the purchase price of most everything in-store (10% off applies after all other discounts are applied, including Borders Bucks; subject to the exclusions noted herein)
- Receive special offers in store and via email
- 30% off list price of Borders hardcover bestsellers in-store (selection and quantity of hardcover bestsellers available at this discount determined by Borders and subject to change from time to time)
- Free standard shipping on online orders of \$25 or more, subject to the exclusions herein
- New Members receive a welcome gift for a coupon to apply to your next purchase
- Purchase 5 cups of coffee and get the next cup free (free cup is small, non-customized, freshly brewed coffee)
- Gift on your birthday
- Priority access to certain in store events (after becoming a Gold Member).
- Beginning October 1, 2010, option to donate Borders Bucks to teachers enrolled in Borders Rewards or Borders Rewards Plus and the Classroom Discount program, who sign up on Borders.com to receive such donations.

BORDERS REWARDS PLUS

For a \$20 annual enrollment fee, Members get the following benefits in addition to the benefits of the BORDERS REWARDS program:

- 40% off list price of Borders hardcover bestsellers in-store (selection and quantity of hardcover bestsellers available at this discount determined by Borders and subject to change from time to time)
- 20% off list price of selected hardcovers in-store (selection and quantity of selected hardcovers available at this discount determined by Borders and subject to change from time to time)
- 10% off the purchase price of most everything else in-store (10% off applies after all other discounts, coupons, sale pricing, offers and promotions are applied, including Borders Bucks; may not be combined with “40% off Borders hardcover bestsellers” or “20% off selected hardcovers” discounts; subject to the exclusions noted herein)
- Free shipping on online orders, subject to the exclusions herein.

Program discounts may not be combined with other discounts, coupons, sale pricing, offers and promotions, or used online, unless otherwise indicated.

Program discounts, including but not limited to Personal Shopping Days and “10% off the purchase price of most everything else,” exclude membership fees, previous purchases, special orders, shipping, gift cards, coupon books, newspapers, magazines, comics, audiobook downloads, music downloads, vinyl LPs, software, video games, all electronics, including eReaders, and certain eBooks (see the applicable eBook product detail page on Borders.com to determine if excluded). Subject to further exclusions noted herein.

2. GENERAL TERMS AND CONDITIONS.

a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member of BORDERS REWARDS; membership in BORDERS REWARDS PLUS, however, requires an annual fee of \$20.00. Member must be a legal resident of the United States or Puerto Rico and 18 years of age or older to participate in the Program.

b. BORDERS REWARDS and BORDERS REWARDS PLUS membership and its benefits are nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS and BORDERS REWARDS PLUS transactions. Member benefits are all prospective from the date of membership enrollment, and will not be applied retroactively to any prior purchases.

c. Borders is not responsible for lost or stolen membership cards.

d. Member agrees the BORDERS REWARDS and BORDERS REWARDS PLUS program (as applicable) and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS and BORDERS REWARDS PLUS Member Services Department. Members may update their personal information online at www.borders.com or by calling 1-800-443-7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

f. Free shipping applies to standard shipping and handling expenses on Borders.com purchases shipped to a single address within the continental U.S., Alaska, or Hawaii only. Excludes priority shipping, express shipping, and orders shipped to international addresses. Free shipping does not apply to purchases of gift cards, used items offered via Borders Marketplace and any other item in Borders' discretion.

g. Borders reserves the right to change or discontinue any Program benefit in Borders' sole discretion at any time without notice.

3. BORDERS BUCKS REWARDS ACCRUAL.

a. Shop at Borders, Borders Express, Borders Outlet or Waldenbooks in the United States and Puerto Rico or online at Borders.com (collectively, "Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Qualifying purchases are purchases made at Participating Stores, excluding membership fees, purchases of gift cards and gift certificates and certain eBooks (see applicable eBook product detail page at the time of purchase to determine eligibility), after redeemed Borders Bucks and other discounts and coupons and before shipping charges, gift wrap charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for Borders Bucks rewards accrual at the time of purchase. After \$150.00 in Qualifying Purchases is spent, the threshold to earn Borders Bucks is \$100.00 so that for every \$100.00 spent after the first \$150.00, Members get five (5) Borders Bucks. Borders Bucks may be redeemed for eligible purchases (see restrictions below) at Participating Stores until the end of the month issued. Any amount in excess of one hundred fifty dollars (\$150.00) (and below the next \$100.00 threshold) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.

b. To illustrate, if you spend \$175 on Qualifying Purchases in September, you would receive five (5) Borders Bucks in the first week of October, which can be used until the end of October, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in October, you would receive an additional five (5) Borders Bucks in November, which could be used until the end of November, and

\$70.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as or toward a Qualifying Purchase.

c. Discount programs such as the Business, Institutional and Government savings programs ("Discount Programs") may not be combined with the Program discounts and purchases made with the Discount Programs shall not be applicable toward Borders Bucks rewards accrual. Notwithstanding the foregoing, Qualifying Purchases made with the Classroom Discount program may be applied toward Borders Bucks rewards accrual upon Member's request at the time of purchase.

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4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with Discount Programs (except the Classroom Discount program). Borders Bucks cannot be used towards the purchase of any of the following items: membership fees, certain eBooks (see applicable eBook product detail page at the time of purchase to determine eligibility), gift cards and certificates, rush fees, special-order deposits, shipping charges, gift wrap charges and tickets. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month earned will be forfeited.

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Description

BORDERS REWARDS PLUS is an annual (from the date of enrollment) fee-based, automatically renewing membership program that provides Members with the benefits of BORDERS REWARDS as well as the additional benefits detailed above.

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Borders will provide notice via email to Member of the upcoming automatic renewal of Member's BORDERS REWARDS PLUS membership no less than thirty (30) days and no more than sixty (60) days prior to the current or renewal membership expiration date, as applicable. BORDERS REWARDS PLUS Members may opt-out of automatic renewal of their membership upon enrollment, or at any time during their membership by calling 1-800-443-7359.

BORDERS REWARDS PLUS Members may cancel their membership and be refunded the \$20.00 annual fee if membership is cancelled within thirty (30) days after enrollment or renewal, as applicable, by calling 1-800-443-7359 by 5 p.m. ET on the last day that Member is eligible to cancel. If a Member cancels his/her membership in BORDERS REWARDS PLUS more than thirty (30) days after the start of enrollment or the renewal membership term, as applicable, Member will not receive a refund of the \$20.00 membership fee, but Member will continue to receive Program benefits through the end of their current membership term.

Automatic Renewal Terms

BY ENROLLING IN BORDERS REWARDS PLUS, YOU UNDERSTAND AND AGREE THAT YOUR MEMBERSHIP WILL AUTOMATICALLY RENEW ANNUALLY EACH YEAR AFTER YOUR INITIAL MEMBERSHIP YEAR ENDS. YOU HEREBY AUTHORIZE BORDERS TO CHARGE YOUR CREDIT CARD FOR THE RENEWAL TERM AT THE THEN-CURRENT MEMBERSHIP FEE. YOU MAY CANCEL YOUR MEMBERSHIP AT ANY TIME IN ACCORDANCE WITH THE INSTRUCTIONS HEREIN.

YOUR SAME CREDIT CARD THAT YOU USED TO ENROLL INITIALLY IN BORDERS REWARDS PLUS WILL BE AUTOMATICALLY CHARGED UPON RENEWAL, UNLESS YOU CANCEL YOUR MEMBERSHIP OR YOU PROVIDE AN ALTERNATIVE CARD PRIOR TO RENEWAL. YOUR MEMBERSHIP IN BORDERS REWARDS PLUS IS CONDITIONAL UPON BORDERS' RECEIPT OF PAYMENT. IF PAYMENT CANNOT BE CHARGED TO YOUR CREDIT CARD OR IF PAYMENT IS NOT RECEIVED BY BORDERS FOR ANY REASON, INCLUDING CHARGEBACK, BORDERS RESERVES THE RIGHT TO IMMEDIATELY AND WITHOUT NOTICE, EITHER SUSPEND OR TERMINATE YOUR MEMBERSHIP. YOU ARE REQUIRED TO PAY ANY AMOUNTS STILL OWED TO BORDERS AT THE TIME YOUR ACCOUNT IS SUSPENDED OR TERMINATED.

EXCEPT WHERE PROSCRIBED BY LAW, YOU AGREE THAT BORDERS IS NOT OBLIGATED TO SEND YOU ANY RENEWAL OR ADVANCE BILLING NOTICES OR OTHER NOTICES INDICATING THAT YOUR CREDIT CARD WILL BE OR HAS BEEN CHARGED. NOTWITHSTANDING THE FOREGOING, BORDERS WILL USE COMMERCIALY REASONABLE EFFORTS TO SEND YOU ONE NOTICE, NO LESS THAN THIRTY (30) DAYS AND NO MORE THAN SIXTY (60) DAYS BEFORE THE END OF THE THEN CURRENT 1 YEAR MEMBERSHIP TERM, WHICH INDICATES: A) THE DATE ON WHICH THE RENEWAL WILL BE EFFECTIVE ; B) ENOUGH INFORMATION REGARDING THE CREDIT CARD BEING CHARGED FOR THE MEMBER TO VERIFY THE DETAILS, WITHOUT PROVIDING FULL CARD DETAILS; C) A REMINDER THAT YOU CAN CANCEL AT ANY TIME; D) THE MEANS TO CONTACT BORDERS IN THE EVENT THAT YOU WISH TO CANCEL YOUR MEMBERSHIP, E) THE AMOUNT YOUR CREDIT CARD WILL BE CHARGED; F) THE LENGTH OF THE SUBSCRIPTION TERM

WHICH THE NEW CHARGE ENABLES; G) THE DEADLINE BY WHICH YOU MUST CANCEL TO AVOID ANY CHARGES INCLUDING RENEWAL OF YOUR SUBSCRIPTION; AND H) NOTICE THAT YOUR CREDIT CARD WILL BE CHARGED ON OR AROUND THIRTY (30) DAYS PRIOR TO THE END OF YOUR THEN CURRENT TERM.

6. PARTICIPATING STORES.

The BORDERS REWARDS and BORDERS REWARDS PLUS cards are accepted at all Borders, Waldenbooks, Borders Outlet and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS and BORDERS REWARDS PLUS cards are not accepted at any other locations.

7. MEMBER PRIVACY.

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9. GOVERNING LAW AND ARBITRATION.

This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS or BORDERS REWARDS PLUS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than

litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No Member's arbitration under this Agreement shall be consolidated with any other Member's arbitration.

10. NO WARRANTY.

TO THE EXTENT PERMITTED BY LAW, BORDERS EXPRESSLY DISCLAIMS AND MAKES NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO, AND THE PROGRAM, INCLUDING ANY CONTENT, PRODUCTS, OR SERVICES PROVIDED VIA THE PROGRAM, ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING AND TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, BORDERS DOES NOT WARRANT AND EXPRESSLY DISCLAIMS THAT: (i) MEMBER USE OF THE PROGRAM AND ACCESS TO AND USE OF ALL OF THE FEATURES AND BENEFITS THEREOF WILL BE UNINTERRUPTED, ERROR-FREE, OR SECURE, (ii) THAT ANY INFORMATION OBTAINED VIA THE PROGRAM IS ACCURATE, RELIABLE OR COMPLETE, (iii) THAT DEFECTS WILL BE CORRECTED, (iv) THAT THE PROGRAM SHALL BE AVAILABLE WITHOUT DELAY, FAILURE, INTERRUPTION OR CORRUPTION DUE TO FACTORS OUTSIDE OF THEIR CONTROL, OR (v) THAT ANY SOFTWARE, SERVICES, WEBSITE OR SERVER(S) ON WHICH THE PROGRAM IS HOSTED ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. YOUR USE OF THE PROGRAM AND ANY INFORMATION, MATERIALS, FEATURES, OR BENEFITS PROVIDED THROUGH THE PROGRAM IS ENTIRELY AT YOUR OWN RISK. IF A TERM IS IMPLIED BY LAW INTO THESE TERMS AND CONDITIONS AND THE LAW PROHIBITS PROVISIONS IN A CONTRACT EXCLUDING OR MODIFYING LIABILITY UNDER THAT TERM, THEN IT WILL BE INCLUDED IN THESE TERMS AND CONDITIONS. HOWEVER, BORDERS' LIABILITY FOR BREACH OF SUCH TERM WILL, TO THE EXTENT PERMITTED BY APPLICABLE LAW, BE LIMITED, AT ITS OPTION, TO THE SUPPLY OF THE RELEVANT SERVICE OR THE PAYMENT OF THE COST OF HAVING THE PROGRAM SUPPLIED TO YOU.

11. RELEASE OF LIABILITY.

TO THE EXTENT PERMITTED BY LAW, MEMBER HEREBY RELEASES BORDERS AND ITS PARENT AND AFFILIATES (THE "BORDERS PARTIES") FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS OR BORDERS REWARDS PLUS MEMBERSHIP OR THIS AGREEMENT. MOREOVER, YOU AGREE THAT THE BORDERS PARTIES SHALL NOT HAVE ANY LIABILITY TO YOU UNDER ANY THEORY OF LIABILITY OR INDEMNITY IN CONNECTION WITH YOUR USE OF AND

MEMBERSHIP IN THE PROGRAM. YOU FURTHER AGREE TO HEREBY AND FOREVER RELEASE AND WAIVE ANY AND ALL CLAIMS YOU MAY HAVE AGAINST THE BORDERS PARTIES FOR ANY AND ALL CLAIMS, CAUSES, DAMAGES OR LOSSES UNDER ANY THEORY OF LIABILITY (INCLUDING ATTORNEYS' FEES AND ASSOCIATED COSTS AND EXPENSES) ARISING FROM YOUR USE OF AND MEMBERSHIP IN THE PROGRAM.

NOTWITHSTANDING THE FOREGOING, IF ANY OF THE BORDERS PARTIES ARE HELD LIABLE UNDER THIS AGREEMENT, TOTAL LIABILITY TO YOU SHALL NOT EXCEED THE MEMBERSHIP FEES PAID BY YOU DURING YOUR MEMBERSHIP TERM. IN ADDITION, SHOULD YOUR CLAIM ARISE FROM A PURCHASE MADE ON OR THROUGH OUR WEBSITE (WHETHER OR NOT ASSOCIATED WITH THIS PROGRAM), OUR TOTAL DAMAGES SHALL NOT EXCEED THE COST OF THE PRODUCT OR SERVICE PURCHASED.

12. LIMITATION OF LIABILITY.

YOU EXPRESSLY AGREE AS A CONDITION OF MEMBERSHIP IN THE PROGRAM THAT, TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, THE BORDERS PARTIES ARE NOT RESPONSIBLE OR LIABLE TO YOU OR ANYONE ELSE FOR ANY LOSS OR INJURY OR ANY DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, PUNITIVE OR OTHER DAMAGES UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY ARISING OUT OF OR RELATING IN ANY WAY TO: (i) THE USE OF OR INABILITY TO USE THE PROGRAM; (ii) ANY CONTENT MADE AVAILABLE VIA THE PROGRAM; (iii) STATEMENTS OR CONDUCT POSTED OR MADE PUBLICLY AVAILABLE VIA THE PROGRAM; (iv) ANY PRODUCT OR OTHER SERVICES PURCHASED OR OBTAINED FROM THE BORDERS PARTIES OR THROUGH THE PROGRAM; (v) ANY ACTION TAKEN IN RESPONSE TO OR AS A RESULT OF ANY INFORMATION AVAILABLE THROUGH THE PROGRAM; (vi) ANY DAMAGE CAUSED BY LOSS OF ACCESS TO, DELETION OF, FAILURE TO STORE, FAILURE TO BACK UP, OR ALTERATION OF ANY CONTENT AVAILABLE VIA THE PROGRAM, OR (vii) ANY OTHER MATTER RELATING TO THE PROGRAM. IN NO EVENT SHALL THE BORDERS PARTIES' TOTAL LIABILITY TO YOU FOR ANY AND ALL DAMAGES, LOSSES, AND CAUSES OF ACTION (WHETHER IN CONTRACT, TORT [INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE], STATUTORY, OR OTHERWISE) EXCEED THE MEMBERSHIP FEES PAID BY YOU TO BORDERS DURING YOUR CURRENT MEMBERSHIP TERM. IN ADDITION, SHOULD YOUR CLAIM ARISE FROM A PURCHASE MADE THROUGH THE PROGRAM, THE BORDERS PARTIES' TOTAL DAMAGES SHALL NOT EXCEED THE COST OF THE PRODUCT OR SERVICE PURCHASED. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU THROUGH THE PROGRAM SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THESE TERMS OF USE.

SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR CERTAIN CATEGORIES OF DAMAGES SUCH AS INCIDENTAL OR CONSEQUENTIAL DAMAGES. ACCORDINGLY, SOME OF THE ABOVE LIMITATIONS OF THIS SECTION MAY NOT APPLY TO YOU.

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Date revised 08/11/10

Effective 08/26/10

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1. MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

a. Shop at Borders, Borders Express, Borders Outlet or Waldenbooks in the United States and Puerto Rico or online at Borders.com ("Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Borders Bucks may be redeemed for eligible purchases at Participating Stores until the end of the month issued. There is no limit to the amount of Borders Bucks that you can earn in a calendar month or calendar year. Any amount in excess of one hundred fifty dollars (\$150.00) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.

b. To illustrate, if you spend \$175 on Qualifying Purchases in May, you would receive five (5) Borders Bucks in the first week of June, which can be used until the end of June, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in September, you would receive an additional five (5) Borders Bucks in October, which could be used until the end of October, and \$20.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as a Qualifying Purchase.

c. Special offers in store and in your email inbox, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2. GENERAL TERMS AND CONDITIONS.

a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 18 years of age or older to participate in the Program.

b. BORDERS REWARDS membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.

c. Borders is not responsible for lost or stolen membership cards.

d. Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.borders.com/rewards or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3. REWARDS ACCRUAL.

a. Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at Participating Stores, excluding purchases of gift cards, gift certificates and certain eBooks (see the applicable eBook title detail page on Borders.com at the time of purchase to determine eligibility), after discounts and coupons and before shipping charges, gift wrap charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual at the time of purchase.

b. Group savings and services, nonprofit and institutional discount programs ("Discount Programs") may not be combined with the Program and purchases made with the Discount Programs shall not be applicable toward rewards accrual. Notwithstanding the foregoing, Qualifying Purchases made with the Educator Discount program may be applied toward rewards accrual upon Member's request at the time of purchase.

c. Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with Discount Programs (except the Educator Discount program), or the purchase of any of the following items: gift cards, gift certificates, certain eBooks (see the applicable eBook title detail page on Borders.com at the time of purchase to determine eligibility), rush fees, special-order deposits, shipping charges, gift wrap charges, tickets and donations. Borders Bucks can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices) and employee discounts. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month earned will be forfeited.

5. PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Borders Outlet and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS cards are not accepted at Borders international locations.

6. MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, Borders.com and their affiliates. Your

personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.borders.com.

7. MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc. and Borders Direct, LLC (collectively referred to herein as "Borders"). Borders may change or terminate the program in its sole discretion with immediate effect with or without notice. Continued use of Member's membership benefits constitutes acceptance of the then-current terms and conditions of the Program. The most current terms and conditions of the Program can be found at www.borders.com. Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8. GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

9. NO WARRANTY. BORDERS, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

10. RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

Date revised 07/08/10

Effective 07/23/10

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1. MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

a. Shop at Borders, Borders Express, Borders Outlet or Waldenbooks in the United States and Puerto Rico or online at Borders.com ("Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Borders Bucks may be redeemed for eligible purchases at Participating Stores until the end of the month issued. There is no limit to the amount of Borders Bucks that you can earn in a calendar month or calendar year. Any amount in excess of one hundred fifty dollars (\$150.00) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.

b. To illustrate, if you spend \$175 on Qualifying Purchases in May, you would receive five (5) Borders Bucks in the first week of June, which can be used until the end of June, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in September, you would receive an additional five (5) Borders Bucks in October, which could be used until the end of October, and \$20.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as a Qualifying Purchase.

c. Special offers in store and in your email inbox, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2. GENERAL TERMS AND CONDITIONS.

a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 18 years of age or older to participate in the Program.

b. BORDERS REWARDS membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.

c. Borders is not responsible for lost or stolen membership cards.

d. Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.borders.com/rewards or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3. REWARDS ACCRUAL.

a. Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at Participating Stores, excluding purchases of gift cards, gift certificates and certain eBooks (see the applicable eBook title detail page on Borders.com at the time of purchase to determine eligibility), after discounts and coupons and before shipping charges, gift wrap charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual at the time of purchase.

b. Group savings and services, nonprofit and institutional discount programs ("Discount Programs") may not be combined with the Program and purchases made with the Discount Programs shall not be applicable toward rewards accrual. Notwithstanding the foregoing, Qualifying Purchases made with the Educator Discount program may be applied toward rewards accrual upon Member's request at the time of purchase.

c. Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with Discount Programs (except the Educator Discount program), or the purchase of any of the following items: gift cards, gift certificates, certain eBooks (see the applicable eBook title detail page on Borders.com at the time of purchase to determine eligibility), rush fees, special-order deposits, shipping charges, gift wrap charges, tickets and donations. Borders Bucks can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices) and employee discounts. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month earned will be forfeited.

5. PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Borders Outlet and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS cards are not accepted at Borders international locations.

6. MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, Borders.com and their affiliates. Your

personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.borders.com.

7. MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc. and Borders Direct, LLC (collectively referred to herein as "Borders"). Changes to the Program terms and conditions will be posted to the borders.com website 15 days prior to the effective date. Continued use of Member's membership card constitutes acceptance of any amendment to the Program. The most current terms and conditions of the Program can be found at www.borders.com. Borders may terminate the Program at any time through written notice sent to Member via email (members without email will be notified the next time their card is presented at a Participating Store). Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8. GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

9. NO WARRANTY. BORDERS, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

10. RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

Date revised 08/26/09
Effective 09/10/09

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1. MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

a. Shop at Borders, Borders Express, Borders Outlet or Waldenbooks in the United States and Puerto Rico or online at Borders.com ("Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Borders Bucks may be redeemed for eligible purchases at Participating Stores until the end of the month issued. There is no limit to the amount of Borders Bucks that you can earn in a calendar month or calendar year. Any amount in excess of one hundred fifty dollars (\$150.00) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.

b. To illustrate, if you spend \$175 on Qualifying Purchases in May, you would receive five (5) Borders Bucks in the first week of June, which can be used until the end of June, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in September, you would receive an additional five (5) Borders Bucks in October, which could be used until the end of October, and \$20.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as a Qualifying Purchase.

c. Special offers in store and in your email inbox, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2. GENERAL TERMS AND CONDITIONS.

a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 18 years of age or older to participate in the Program.

b. BORDERS REWARDS membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.

c. Borders is not responsible for lost or stolen membership cards.

d. Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.borders.com/rewards or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3. REWARDS ACCRUAL.

a. Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at Participating Stores, excluding purchases of gift cards and gift certificates, after discounts and coupons and before shipping charges, gift wrap charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual at the time of purchase.

b. Group savings and services, nonprofit and institutional discount programs ("Discount Programs") may not be combined with the Program and purchases made with the Discount Programs shall not be applicable toward rewards accrual. Notwithstanding the foregoing, Qualifying Purchases made with the Educator Discount program may be applied toward rewards accrual upon Member's request at the time of purchase.

c. Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with Discount Programs (except the Educator Discount program), or the purchase of any of the following items: gift cards and certificates, rush fees, special-order deposits, shipping charges, gift wrap charges, tickets and donations. Borders Bucks can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices) and employee discounts. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month earned will be forfeited.

5. PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Borders Outlet and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS cards are not accepted at Borders international locations.

6. MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, Borders.com and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.borders.com.

7. MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc., Walden Book Company, Inc. and Borders Direct, LLC (collectively referred to herein as "Borders"). Changes to the Program terms and conditions will be posted to the borders.com website 15 days prior to the effective date. Continued use of Member's membership card constitutes acceptance of any amendment to the Program. The most current terms and conditions of the Program can be found at www.borders.com. Borders may terminate the Program at any time through written notice sent to Member via email (members without email will be notified the next time their card is presented at a Participating Store). Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8. GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

9. NO WARRANTY. BORDERS, INC., WALDEN BOOK COMPANY, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

10. RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., WALDEN BOOK COMPANY, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

Date revised 10/17/08

Effective 11/03/08

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1. MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

- a. Shop at Borders, Borders Express, Borders Outlet, Brentano's, or Waldenbooks in the United States and Puerto Rico or online at Borders.com ("Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Borders Bucks may be redeemed for eligible purchases at Participating Stores until the end of the month issued. There is no limit to the amount of Borders Bucks that you can earn in a calendar month or calendar year. Any amount in excess of one hundred fifty dollars (\$150.00) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.
- b. To illustrate, if you spend \$175 on Qualifying Purchases in May, you would receive five (5) Borders Bucks in the first week of June, which can be used until the end of June, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in September, you would receive an additional five (5) Borders Bucks in October, which could be used until the end of October, and \$20.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as a Qualifying Purchase.
- c. Special offers in store and in your email inbox, just for signing up for the Program, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2. GENERAL TERMS AND CONDITIONS.

- a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 16 years of age or older to participate in the Program.
- b. BORDERS REWARDS membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.
- c. Borders is not responsible for lost or stolen membership cards.
- d. Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.borders.com/rewards or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3. REWARDS ACCRUAL.

a. Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at Participating Stores, excluding purchases of gift cards and gift certificates, after discounts and coupons and before shipping charges, gift wrap charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual at the time of purchase.

b. Group savings and services, teacher/classroom, nonprofit, and institutional discount programs ("Discount Programs") may not be combined with the Program and shall not be applicable toward rewards accrual.

c. Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with appreciation discount events (including but not limited to Educator Savings Week, Healthcare Savings Weekend, etc.), Discount Programs, or the purchase of any of the following items: gift cards and certificates, rush fees, special-order deposits, shipping charges, gift wrap charges, tickets and donations. Borders Bucks can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices) and employee discounts. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month earned will be forfeited.

5. PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Brentano's, Borders Outlet, and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS cards are not accepted at Borders international locations.

6. MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, Borders.com and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.borders.com.

7. MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc., Walden Book Company, Inc. and Borders Direct, LLC (collectively referred to herein as "Borders"). Changes to the Program terms and conditions will be posted to the borders.com website 15 days prior to the effective date. Continued use of Member's membership card constitutes acceptance of any amendment to the Program. The most current terms and conditions of the Program can be found at www.borders.com.

Borders may terminate the Program at any time through written notice sent to Member via email (members without email will be notified the next time their card is presented at a Participating Store). Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8. GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

9. NO WARRANTY. BORDERS, INC., WALDEN BOOK COMPANY, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

10. RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., WALDEN BOOK COMPANY, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

Date revised 05/11/08

Effective 05/27/2008

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1. MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

- a. Shop at Borders, Borders Express, Borders Outlet, Brentano's, or Waldenbooks in the United States and Puerto Rico or online at Borders.com ("Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Borders Bucks may be redeemed for eligible purchases at Participating Stores until the end of the month issued. There is no limit to the amount of Borders Bucks that you can earn in a calendar month or calendar year. Any amount in excess of one hundred fifty dollars (\$150.00) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.
- b. To illustrate, if you spend \$175 on Qualifying Purchases in May, you would receive five (5) Borders Bucks in the first week of June, which can be used until the end of June, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in September, you would receive an additional five (5) Borders Bucks in October, which could be used until the end of October, and \$20.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as a Qualifying Purchase.
- c. Special offers in store and in your email inbox, just for signing up for the Program, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2. GENERAL TERMS AND CONDITIONS.

- a. Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 16 years of age or older to participate in the Program.
- b. BORDERS REWARDS membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.
- c. Borders is not responsible for lost or stolen membership cards.
- d. Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e. Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.borders.com/rewards or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3. REWARDS ACCRUAL.

- a. Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at Participating Stores, excluding purchases of gift cards and gift certificates, after discounts and coupons and before shipping charges and sales tax are added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual at the time of purchase.
- b. Group savings and services, teacher/classroom, nonprofit, and institutional discount programs ("Discount Programs") may not be combined with the Program and shall not be applicable toward rewards accrual.
- c. Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4. REWARDS REDEMPTION.

Borders Bucks are redeemable at Participating Stores and cannot be combined with appreciation discount events (including but not limited to Educator Savings Week, Healthcare Savings Weekend, etc.), Discount Programs, or the purchase of any of the following items: gift cards and certificates, rush fees, special-order deposits, shipping charges, tickets and donations. Borders Bucks can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices) and employee discounts. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month earned will be forfeited.

5. PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Brentano's, Borders Outlet, and Borders Express locations in the United States and Puerto Rico and online at Borders.com. BORDERS REWARDS cards are not accepted at Borders international locations.

6. MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, Borders.com and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.bordersrewards.com.

7. MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc., Walden Book Company, Inc. and Borders Direct, LLC (collectively referred to herein as "Borders"). Changes to the Program terms and conditions will be posted to the borders.com/rewards website 15 days prior to the effective date. Continued use of Member's membership card constitutes acceptance of any amendment to the Program. The most current terms and conditions of the Program can be found at

www.borders.com/rewards. Borders may terminate the Program at any time through written notice sent to Member via email (members without email will be notified the next time their card is presented at a Participating Store). Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8. GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

9. NO WARRANTY. BORDERS, INC., WALDEN BOOK COMPANY, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

10. RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., WALDEN BOOK COMPANY, INC., BORDERS DIRECT, LLC AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

Borders Rewards Terms and Conditions

Date revised 3/27/07

Effective 4/12/07

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1.

MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

- a. Shop at Borders, Borders Express, Borders Outlet, Brentano's, or Waldenbooks in the United States and Puerto Rico ("Participating Stores") and, for every one hundred fifty dollars (\$150.00) spent on Qualifying Purchases during any one calendar year, five (5) Borders Bucks will be issued into your "Borders Bucks Account" during the first week of the month following the month in which such Borders Bucks are earned. Borders Bucks may be redeemed for eligible purchases at Participating Stores until the end of the month issued. There is no limit to the amount of Borders Bucks that you can earn in a calendar month or calendar year. Any amount in excess of one hundred fifty dollars (\$150.00) spent on Qualifying Purchases rolls over until the end of the calendar year, at which time unused amounts are forfeited.
- b. To illustrate, if you spend \$175 on Qualifying Purchases in May, you would receive five (5) Borders Bucks in the first week of June, which can be used until the end of June, and \$25 of your Qualifying Purchases would roll over. If you spend another \$145 on Qualifying Purchases in September, you would receive an additional five (5) Borders Bucks in October, which could be used until the end of October, and \$20.00 of Qualifying Purchases would roll over until the end of the calendar year. Redeemed Borders Bucks do not count as a Qualifying Purchase.
- c. Special offers in store and in your email inbox, just for signing up for the Program, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2.

GENERAL TERMS AND CONDITIONS.

a.

Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 16 years of age or older to participate in the Program.

b.

BORDERS REWARDS Membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.

c.

Borders is not responsible for lost or stolen membership cards.

d.

Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e.

Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.bordersrewards.com or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3.

REWARDS ACCRUAL.

a.

Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at Participating Stores, excluding purchases of gift cards and gift certificates, after discounts and coupons and before sales tax is added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual at the time of purchase. Purchases on www.borders.com and www.waldenbooks.com do not qualify for rewards accrual.

b.

Group savings and services, teacher/classroom, nonprofit, and institutional discount programs ("Discount Programs") may not be combined with the Program and shall not be applicable toward rewards accrual.

c.

Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4.

REWARDS REDEMPTION.

a.

Borders Bucks are redeemable at Participating Stores for in-store merchandise only and cannot be combined with appreciation discount events (including but not limited to Educator Savings Week, Healthcare Savings Weekend, etc.), Discount Programs, or the purchase of any of the following items: gift cards and certificates, rush fees, special-order deposits and shipping, tickets and donations. Borders Bucks can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices) and employee discounts. Borders Bucks cannot be redeemed on purchases made at www.borders.com

and www.waldenbooks.com, ship-to-home purchases, and Walden-by-Mail purchases. Borders Bucks have no cash value and are not applicable to prior purchases. Borders Bucks that are not redeemed by the end of the month issued will be forfeited.

5.

PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Brentano's, Borders Outlet, and Borders Express locations in the United States and Puerto Rico. BORDERS REWARDS cards are not accepted at Borders International locations or at www.borders.com or www.waldenbooks.com.

6.

MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.bordersrewards.com.

7.

MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc., and Walden Book Company, Inc. (collectively referred to herein as "Borders"). Changes to the Program terms and conditions will be posted to the bordersrewards.com website 15 days prior to the effective date. Continued use of Member's membership card constitutes acceptance of any amendment to the Program. The most current terms and conditions of the Program can be found at www.bordersrewards.com. Borders may terminate the Program at any time through written notice sent to Member via email (members without email will be notified the next time their card is presented at a Participating Store). Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8.

TRANSITION RULES

The terms and conditions of the Program have been amended, effective as of April 12, 2007 ("Effective Date"). Member benefits that have been earned prior to the Effective Date may be redeemed after the Effective Date in the following manner: Personal Shopping Days earned prior to the Effective Date may be redeemed after the Effective Date in accordance with the terms and conditions of the Program in effect prior to the Effective Date (available upon request), and may be used in combination with Borders Bucks. Holiday Savings Rewards earned prior to the Effective Date may be redeemed immediately upon the Effective Date through January 31, 2008. Holiday Savings Rewards that are not redeemed by January 31, 2008 will be forfeited. Members who have not made at least two hundred dollars (\$200.00) in Qualifying Purchases between January 1, 2007 and April 11, 2007 will have all of their Qualifying Purchases between January 1, 2007 and April 11, 2007 applied toward the calculation of Borders Bucks. After the Effective Date, if a Member has both Borders Bucks and Holiday Savings Rewards on account, Borders Bucks will be redeemed first.

9.

GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

10.

NO WARRANTY. BORDERS, INC., WALDEN BOOK COMPANY, INC., AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

11.

RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., WALDEN BOOK COMPANY, INC., AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

Borders Rewards Terms and Conditions

Effective 2/21/06

Use of the BORDERS REWARDS card constitutes acceptance of the following terms and conditions (this "Agreement") by each BORDERS REWARDS Member ("Member"):

1.

MEMBER BENEFITS. BORDERS REWARDS (the "Program") provides customers with the following benefits:

a.

Shop at Borders, Borders Express, Borders Outlet, Brentano's, or Waldenbooks in the United States and Puerto Rico ("Participating Stores") and spend fifty dollars (\$50.00) or more in Qualifying Purchases any one calendar month, and you will earn one (1) Personal Shopping Day™ entitling you to 10% off most items at Participating Stores. Personal Shopping Days are limited to one (1) day of your choice and expire on the last day of the month subsequent to its issuance.

b.

Shop at Participating Stores and we will deposit 5% of your Qualifying Purchases into your "Holiday Savings Account." Once Member's Holiday Savings Account™ reaches more than \$10.00, Member will be awarded Holiday Savings Rewards (with subsequent Holiday Savings Rewards awarded in increments of \$0.01). Holiday Savings Rewards accrue between January 1 and December 31. Holiday Savings Rewards are redeemable between November 15 of one year and January 31 of the following year.

c.

Special offers in store and in your email inbox, just for signing up for the Program, including coupons and discounts that are made available only to BORDERS REWARDS Members.

2.

GENERAL TERMS AND CONDITIONS.

a.

Member must provide a valid email address to receive all benefits associated with the Program. No purchase is necessary to become a Member. Member must be a legal resident of the United States or Puerto Rico and 16 years of age or older to participate in the Program.

b.

BORDERS REWARDS Membership is nontransferable and may only be used by an individual Member for Member's personal benefit. Member benefits cannot be combined with benefits accrued by another Member. Borders may request proper identification with regard to BORDERS REWARDS transactions. Member benefits will not be applied retroactively to any prior purchases.

c.

Borders is not responsible for lost or stolen membership cards.

d.

Member agrees the BORDERS REWARDS program and any Member benefits related thereto do not create any property rights in favor of Member.

e.

Member shall be responsible for maintaining accurate and updated personal information with the BORDERS REWARDS Member Services Department. Members may update their personal information online at www.bordersrewards.com or by calling 800.443.7359. Borders is not responsible for rewards that are not received as a result of Member's failure to update Member's personal information.

3.

REWARDS ACCRUAL.

a.

Rewards accrual will be calculated based on Member's Qualifying Purchases. Qualifying purchases ("Qualifying Purchases") are purchases made at participating locations, excluding purchases of gift cards and gift certificates, after discounts and coupons and before sales tax is added. Items purchased or reserved through In-Store Pickup for pickup at a Borders store qualify for rewards accrual. Purchases on www.borders.com and www.waldenbooks.com do not qualify for rewards accrual.

b.

Group savings and services, teacher/classroom, nonprofit, and institutional discount programs ("Discount Programs") may not be combined with the Program and shall not be applicable toward rewards accrual.

c.

Returns will be deducted from Member's rewards accrual for Member's most recent prior transaction(s). (Negative balances may result.)

4.

REWARDS REDEMPTION.

a.

Personal Shopping Days™ are redeemable at Participating Stores for in-store merchandise only and cannot be combined with appreciation discount events (including but not limited to Educator Savings Week, Healthcare Savings Weekend, etc.), Discount Programs, percent-off total transaction coupons, employee discount, or the purchase of any of the following items: gift cards and certificates, rush fees, special-order deposits and shipping, tickets and donations. Personal Shopping Days can be combined with in-store discounts (i.e., bestseller program and Borders Original Voices). Personal Shopping Days cannot be redeemed on purchases made at www.borders.com and www.waldenbooks.com, ship-to-home purchases, and Walden-by-Mail purchases. Personal Shopping Days have no cash value and are not applicable to prior purchases.

b.

Holiday Savings Rewards™ are redeemable at Participating Stores for in-store merchandise only and cannot be combined with appreciation discount events (including

but not limited to Educator Savings Week, Health Care Savings Weekend, etc.), Discount Programs, or the purchase of any of the following items: gift cards and certificates, rush fees, special-order deposits and shipping, tickets and donations. Holiday Savings Rewards can be combined with permanent in-store discounts (e.g., bestseller program and Borders Original Voices). Holiday Savings Rewards cannot be redeemed on purchases made at www.borders.com and www.waldenbooks.com, ship-to-home purchases, and Walden-by-Mail purchases. Holiday Savings Rewards have no cash value and are not applicable to prior purchases.

c.

Holiday Savings Rewards that are not redeemed by January 31 will be forfeited.

5.

PARTICIPATING STORES. The BORDERS REWARDS card is accepted at all Borders, Waldenbooks, Brentano's, Borders Outlet, and Borders Express locations in the United States and Puerto Rico. BORDERS REWARDS cards are not accepted at Borders International locations or at www.borders.com or www.waldenbooks.com.

6.

MEMBER PRIVACY. By becoming a Member of the BORDERS REWARDS program, you agree to receive advertising, marketing materials, and other communications from Borders, Waldenbooks, and their affiliates. Your personal information will be held in accordance with the Borders Privacy Policy, which can be found at www.bordersrewards.com.

7.

MODIFICATION AND TERMINATION. The sponsors of the Program are Borders, Inc., and Walden Book Company, Inc. (collectively referred to herein as "Borders"). Changes to the Program terms and conditions will be posted to the bordersrewards.com website 15 days prior to the effective date. Continued use of Member's membership card constitutes acceptance of any amendment to the Program. The most current terms and conditions of the Program can be found at www.bordersrewards.com. Borders may terminate the Program at any time through written notice sent to Member via email (members without email will be notified the next time their card is presented at a Participating Location). Upon termination of the Program, Member shall forfeit all unredeemed rewards earned as of the termination date. Member may choose to opt out of the Program at any time; however, this may result in the forfeiture of accrued rewards.

8.

GOVERNING LAW AND ARBITRATION. This Agreement shall be governed by and construed under the substantive laws of the state of Michigan, without reference to conflict-of-laws considerations. Borders and Member agree that any dispute, claim, or controversy arising from or relating to this Agreement or Member's BORDERS REWARDS Membership shall be resolved by binding arbitration conducted in the state of Michigan. Borders and Member acknowledge and agree that each has chosen arbitration rather than litigation to resolve any such dispute, claim, or controversy. Borders and Member understand that a judgment on any arbitral award may be entered in any court having jurisdiction. No arbitration under this Agreement shall be consolidated with any other arbitration.

9.

NO WARRANTY. BORDERS, INC., WALDEN BOOK COMPANY, INC., AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS MAKE NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE MEMBERSHIP OR ANY PRODUCTS OR SERVICES RELATED THERETO.

10.

RELEASE OF LIABILITY. MEMBER HEREBY RELEASES BORDERS, INC., WALDEN BOOK COMPANY, INC., AND THEIR PARENT AND AFFILIATE ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS FROM AND AGAINST ANY AND ALL LIABILITY RELATING TO MEMBER'S BORDERS REWARDS MEMBERSHIP OR THIS AGREEMENT.

EXHIBIT C



- Jump To:
- [Borders eBooks Terms of Use](#)
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Customer Care

Borders Websites and Computer Kiosk Terms of Use

Last Modified October 28, 2010

Introduction

This website, and all other Borders websites, including but not limited to [www.borders.com](#), [www.bordersmedia.com](#), and [www.bordersrewardsperks.com](#), which may be encountered via the Internet or via computer kiosks available in Borders stores (collectively, the "Borders Sites", "Site" or "Sites"), are operated by Borders Direct, LLC ("Borders", "We", or "Us"). Borders provides its Sites to you subject to the following Terms Of Use (the "Terms"). By using the Sites, you agree to be bound by the Terms. Borders may, in its sole discretion, modify the Terms without notice to you. Therefore, please continue to review the Terms when using the Sites. By continuing to access and use the Sites after the Terms have been modified, you are agreeing to such modifications. In addition, when using particular services or features, or when ordering products on the Sites, you shall be subject to any posted guidelines or rules applicable to such services, features, products or orders that may be posted from time to time. All such guidelines or rules are hereby incorporated by reference into the Terms.

Description of Service

The Sites allow users to research, review, purchase, and/or order various entertainment, educational and other products featured on the Sites (collectively, "Products"), including, but not limited to, books, used books, gifts, stationery, and other paper goods, movies, used movies, audio CDs, used audio CDs, audio books, arts & crafts products, and scrapbooking products. The Sites also allow users to access Borders Rewards and Borders Rewards Perks and Borders Rewards Perks Plus (collectively, "Borders Rewards Perks") program accounts, create and share "Wish Lists", upload and download content (including reviews and other user generated content), and access various third-party websites offering a wide variety of products and services. The services, features and products that Borders offers to users on the Sites may be referred to herein collectively as the "Services". Unless explicitly stated otherwise, any new features or offerings on the Sites in the future that are added to or that augment or enhance the Services shall be considered part of the Services and subject to the Terms.

Purchasing Products

If you make a purchase from the Borders Sites (except a purchase of a gift card), you are transacting with Borders Direct, LLC, and ownership of any purchased items transfers to you immediately upon shipment. If you make a purchase or rent from any third-parties advertised on or linked to from the kiosks and/or the Borders Sites, you are not purchasing a product or service from Borders. You agree that neither Borders nor its affiliated companies shall be responsible for any loss or damage of any sort incurred as the result of any purchases made from any third-parties advertised on or linked to from the Borders Sites.

The purchase and download of any product or service, including audio books, digital music, and the like, from the kiosks and/or the Borders Sites, is non-refundable and may not be returned. All sales of downloadable material are final.

Gift Cards and Greeting Cards

If you make a purchase of a gift card from the Borders Sites, you are transacting with Borders, Inc. and ownership of such gift card transfers to you immediately upon shipment. Gift cards and greeting cards purchased on the Sites are provided and fulfilled by our service providers. Specific additional terms entitled "Gift Card and Greeting Card Website Terms of Service" apply to the purchase and provision of gift cards and are incorporated herein. These Gift Card and Greeting Card Website Terms of Service can be found [below](#) and are to be read in conjunction with, and do not supersede, these Terms Of Use. To the extent there is a conflict, these Terms Of Use apply.

Registration

You may be required to register for an account on the Sites in order to take advantage of certain features of the Sites, such as purchasing Products, using an online shopping cart, or using our Customer Ratings and Review Service ("CRR") or "Wish List" pages. If you choose to register on the Sites, or if you otherwise provide information on the Sites, you agree to (a) provide true, accurate, current and complete information about yourself as prompted by the Sites, and (b) as permitted, maintain and promptly update such information to keep it true, accurate, current and complete. If you provide any information to Borders that is false, inaccurate, outdated or incomplete, or Borders has reasonable grounds to suspect that such information is false, inaccurate, outdated or incomplete, Borders has the right to suspend or terminate your account and to prohibit any and all current or future use of the Services (or any portion thereof) by you.

Privacy

Any registration or other information you provide to Borders is subject to our Privacy Policy. For more information, see our [Privacy Policy](#). Our Privacy Policy is hereby incorporated into the Terms by this reference.

Member Account and Password

If you choose to register for an account with Borders or to become a member of Borders Rewards and/or Borders Rewards Perks, you will create a username and password while completing the registration process. You are responsible for maintaining the confidentiality of the password and account, and are fully responsible for all activities that occur under your password or account. You agree to (a) immediately notify Borders of any unauthorized use of your password or account or any other breach of security, and (b) ensure that you exit from your account at the end of each session. Borders (and its affiliated companies) cannot and will not be liable for any loss or damage arising from your failure to comply with this section.

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Borders will protect and use information provided by you as set forth in the Borders Privacy Policy posted on this Site. You agree not to violate or attempt to violate the security of this Site, including without limitation, (a) accessing data that is not intended for your use; (b) logging on to a server or account that you are not authorized to access; (c) probing, scanning or testing the vulnerability of any system or network related in any way to the Site without proper authorization; (d) breaching security or authentication measures without proper authorization; (e) interfering with service to any host, network, other user, including without limitation, sending unsolicited e-mail, flooding, spamming, mailbombing, or crashing; (f) sending promotions and/or advertising products and/or services; or (g) attempting to do any of the preceding.

You understand that your account information on the Site is controlled by you, through the User IDs and Passwords that you selected. You are responsible for protecting the confidentiality of those User IDs and Passwords. Borders and Cardways is entitled to rely on the fact that any Scanned Data, orders for Products or other information sent to this Site under your User ID and Password for this Site were sent by you. If you believe that the confidentiality of any of your User IDs and/or Passwords has been compromised or that someone has accessed your account without authorization, you should contact Borders immediately.

9. Applicable Law.

These Terms will be governed by and construed in accordance with the laws of the State of Michigan, without giving effect to any principles of conflicts of laws. Any action seeking legal or equitable relief arising out of or relating to this Site will be brought only in the courts of the State of Michigan or the United States District Court for the Eastern District of Michigan. A printed version of these Terms of Service will be admissible in judicial and administrative proceedings based upon or relating to these Terms to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form.

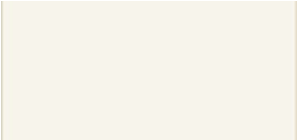
10. Return Address and Costs.

Cardways will automatically print a return address on every Product that you print and mail using this Site. The default return address is the address supplied by you for your profile. All costs and taxes are quoted in U.S. dollars. You must pay all applicable taxes on purchases made on this Site. Borders may in its sole discretion add, delete or change some or all of the prices of products and services at any time without notice, other than as set forth on this Site.

11. Miscellaneous.

For purposes of these Terms, "you" and "your" shall mean you and "we", "us," and "our" means Borders and its affiliates. Title and risk of loss for products purchased by you through this Site passes to you upon delivery of the products to our carrier or Cardways' carrier for shipment to you. We may assign our rights and responsibilities hereunder without notice to you. If any of these Terms are held invalid or unenforceable, then the invalid or unenforceable provision will be deemed superseded by a valid, enforceable provision most closely matching the intent of the original provision and the remainder of the Terms will continue in effect. We reserve the right to amend or modify these Terms or impose new conditions at any time. Such amendments and modifications will be effective immediately upon giving you notice by any means including, but not limited to, posting on this Site. These Terms constitute the entire agreement between you and us with respect to the subject matter hereof and supersede all other communications, written or oral, with regard to this Site.

The failure of Borders or Cardways to enforce any right or provision in these Terms shall not constitute a waiver of such right or provision



unless acknowledged and agreed to in writing by Borders or Cardways, as applicable. Your use of this Site, however, is subject to the additional disclaimers and caveats that may appear throughout the Borders's website(s).

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EXHIBIT D

ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (this “Agreement”), is entered into this ___ day of September, 2011, by and among (a) BORDERS GROUP, INC., a corporation formed under the laws of the State of Michigan (“Parent”), and BORDERS, INC., a corporation formed under the laws of the State of Colorado (the “Company” and, together with Parent, the “Sellers,” and each, individually, a “Seller”), and (b) BARNES & NOBLE, INC., a corporation formed under the laws of the State of Delaware (the “Buyer”). The Sellers and the Buyer are referred to herein individually as a “Party” and collectively as the “Parties.”

RECITALS

WHEREAS, the Sellers and certain of their domestic subsidiaries filed voluntary petitions for relief (such domestic subsidiaries, together with the Sellers, the “Seller Group”) under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) on February 16, 2011 in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), and such bankruptcy cases are being jointly administered under Case No. 11-10614 (MG) and are hereinafter referred to collectively as the “Cases,” and

WHEREAS, each of the Sellers wishes to sell, transfer, convey, assign and deliver to the Buyer, and the Buyer wishes to purchase, assume and acquire, in accordance with Section 363 and the other applicable provisions of the Bankruptcy Code, the Assets (as hereinafter defined) upon the terms and subject to the conditions set forth in this Agreement; and

WHEREAS, subject to the Bankruptcy Court’s entry of the Sale Order (as hereinafter defined), the Buyer shall purchase from the Sellers, and the Sellers shall sell, transfer, convey, assign and deliver to the Buyer, the Assets, upon the terms and subject to the conditions set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties mutually agree as follows:

ARTICLE 1

PURCHASE AND SALE OF ASSETS

1.1 Defined Terms. All capitalized terms used in this Agreement and not otherwise defined herein shall have the meanings set forth for such terms in Article 13.

1.2 Purchase and Sale. Subject to the terms and conditions set forth in this Agreement, the Sellers hereby agree that at the Closing, they shall, and shall cause the other members of the Seller Group to, sell, transfer, convey and assign to the Buyer and the Buyer shall purchase, assume and acquire from the Seller Group, all right, title and interest of the Seller Group in, to and under the following (collectively, the “Assets”), free and clear of all Liens and interests (other than rights under the Specified Licenses and under the Terminated Licenses as such term is defined in Section 8.2(e)):

(a) All of the interests of the Seller Group in and to all U.S. federal, state and foreign trademarks, service marks, trade names, service names, brand names, all trade dress rights, logos and corporate names and general intangibles of a like nature, together with the goodwill associated with any

of the foregoing, and all applications, registrations and renewals thereof, registered in the name of the Seller Group, including the items set forth on Schedule 1.2(a) (the “Transferred Intellectual Property”);

(b) All of the interests of the Seller Group in and rights in respect of the following (to the extent owned and transferable by the Seller Group): the social media accounts set forth on Schedule 1.2(b), including related Internet pages, content and contact/subscriber lists, and any related social media assets;

(c) All claims (including any litigation or arbitration claims and any refunds and deposits), rights, rights of offset or causes of action or choses in action existing now or arising at any time in the future that the Seller Group or their Affiliates may have against, or from (to the extent an asset and not a Liability), any Person relating to the Assets (the “Transferred Claims”), including but not limited to the claims set forth on Schedule 1.2(c), but excluding the claims set forth in Section 1.3(f);

(d) The domain names set forth on Schedule 1.2(d) and any related domain names.

(e) The website content described in Schedule 1.2(e) (to the extent owned and transferable by Seller Group);

(f) The toll-free numbers set forth on Schedule 1.2(f);

(g) All Proprietary Rights in respect of or related to the Transferred Intellectual Property and other Assets, including those relating to the Customer List but excluding any Proprietary Rights in respect of or related to any Excluded Assets;

(h) All of the interests of the Seller Group in any software or source code used for the operation of or related to the websites owned and operated by the Seller Group (to the extent owned and transferable by the Seller Group); provided, however, that the parties acknowledge that such software and/or source code is not sufficient to operate any of the websites owned and operated by the Seller Group; and

(i) Subject to the terms of Section 7.5, the Customer List.

1.3 Excluded Assets. Notwithstanding anything to the contrary contained herein, expressly excluded from the Assets are all of the right, title and interest of the Seller Group in and to all items not expressly enumerated in Section 1.2, including but not limited to the following (collectively, the “Excluded Assets”):

(a) All claims (including any litigation or arbitration claims and any refunds and deposits), rights, rights of offset or causes of action of the Seller Group or their Affiliates other than Transferred Claims;

(b) All causes of action and claims that may be asserted against the Buyer and all rights of the Sellers under this Agreement or any Ancillary Agreement or any other agreements or instruments otherwise delivered in connection with this Agreement or any Ancillary Agreement;

(c) All of the interests of the Seller Group in any Legacy v.4 IP Addresses;

(d) All of the interests of the Seller Group in hardware, software or source code (other than any source code included in Section 1.2(h));

(e) All of the interests of the Seller Group in and to all Contracts (except to the extent necessary to transfer the Transferred Claims or to transfer the Proprietary Rights to be transferable under Section 1.2(g));

(f) The claims of the Seller Group against Next Jump and/or certain of its affiliates and any other named parties set forth in the matter captioned *Borders, Inc. and Borders Properties, Inc. v. Next Jump, Inc.* Adv. Proc. No. 11-02567 in the Bankruptcy Court; provided, however, the Buyer shall have the right to participate in the prosecution of any claims in equity for injunctive relief related to the Assets and no settlement or stipulation affecting the Assets shall be entered into without the prior written consent of the Buyer, not to be unreasonably withheld. For the avoidance of doubt, any claim whether or not related to the foregoing that first arises from and after the date of the Agreement shall constitute a Transferred Claim, unless otherwise mutually agreed. Seller Group will keep Buyer reasonably informed as to the status of such claim as it relates to the Buyer's rights described above; and

(g) All Avoidance Actions.

ARTICLE 2

PURCHASE PRICE AND PAYMENT

2.1 Purchase Price. The consideration to be paid by the Buyer for the sale of the Assets shall consist of Thirteen Million Nine Hundred Thousand Dollars (\$13,900,000.00) (the "Purchase Price"). At the Closing, the Purchase Price shall be paid to the Sellers by wire transfer of immediately available funds in accordance with instructions given by the Sellers to the Buyer.

2.2 Assumed Obligations and Excluded Liabilities

(a) At the Closing, the Buyer shall assume and become responsible for no Liabilities relating to the Assets or otherwise, other than first arising after the Closing Date; provided, however, for the avoidance of doubt, that Liabilities asserted at any time (whether prior to or after the Closing Date) arising out of or in connection with obligations of the Seller Group first arising prior to the Closing Date are not assumed by the Buyer.

(b) Subject to Section 2.2(a), the Buyer shall not be subject to and shall not assume nor be liable for any Liabilities of any kind or nature, whether absolute, contingent, accrued, known or unknown, of the Seller Group (collectively, the "Excluded Liabilities"). All Liabilities of the Seller Group, including any Liabilities related to the Assets, shall be Excluded Liabilities and shall be and remain the Liabilities of the Seller Group, subject to Section 2.2(a).

2.3 Non-Assignable Assets. If any Asset is by its terms or by Applicable Law non-assignable or non-transferable, to the extent such terms are not superseded by the terms of the Sale Order, the Sellers shall use their reasonable best efforts to obtain, or cause to be obtained, on or prior to the Closing, any approvals or consents necessary to convey to the Buyer the benefit thereof. The Buyer shall cooperate with the Sellers in such manner as may be reasonably requested in connection therewith. In the event any consent or approval to an assignment contemplated hereby is not obtained on or prior to the Closing Date, the Sellers shall continue to use reasonable best efforts to obtain any such approval or consent after the Closing Date and the Sellers agree to enter into any appropriate and commercially reasonable arrangement to provide that the Buyer shall receive the Seller Group's interest in the benefits under any such Asset; *provided* that the Buyer shall undertake to pay or satisfy the corresponding liabilities for the enjoyment of such benefit to the extent the Buyer would have been responsible therefor if such consent or approval had been obtained.

2.4 Transfer Taxes. To the extent the transactions contemplated hereby are not exempt under Section 1146 of the Bankruptcy Code, the Buyer shall be liable for and pay any sales and transfer Taxes, filing fees, documentary fees or other Taxes, other than resulting income taxes, payable in connection with the purchase, sale or transfer of the Assets to the Buyer pursuant to this Agreement. The Buyer and the Sellers shall use reasonable best efforts to minimize the amount of all the foregoing Taxes and shall cooperate in providing each other with any appropriate resale exemption certifications, Tax clearance certificates and other similar documentation. The Party that is required by Applicable Law to make the filings, reports, or returns and to handle any audits or controversies with respect to any of the foregoing Taxes shall do so, and the other Party shall cooperate (and make reimbursement) with respect thereto as necessary.

2.5 Allocation of Purchase Price. No later than ninety (90) days after the Closing Date, the Buyer and the Sellers shall mutually agree upon a Tax allocation of the Purchase Price and other relevant items among the Assets in accordance with Section 1060 of the Tax Code and the regulations thereunder and any comparable provision of state or local law. Each of the Parties agrees that it or they shall file a statement (on IRS Form 8594 or other applicable form) setting forth such allocation with its or their federal and applicable state income Tax returns and shall also file such further information or take such further actions as may be necessary to comply with the Treasury Regulations that have been promulgated pursuant to Section 1060 of the Tax Code and similar applicable state laws and regulations.

2.6 Deposit. The Buyer shall, upon the execution of this Agreement, deposit into a segregated escrow account designated by the Sellers an amount equal to 10% of the Purchase Price (i.e., \$1,390,000.00) (the “Deposit”). If the Closing takes place as provided herein, then the Deposit shall be credited against the Purchase Price pursuant to Section 2.1 and paid to the Sellers at the Closing. If this Agreement is terminated in accordance with Article 10 for any reason other than pursuant to Section 10.1(d), then the Sellers shall promptly return the Deposit to the Buyer. If this Agreement is terminated pursuant to Section 10.1(d), the Deposit shall be retained by the Sellers.

ARTICLE 3

CLOSING

3.1 Closing. Consummation of the transactions contemplated hereby (the “Closing”) shall occur as soon as practicable on such date as is specified by the Buyer, but in any event not later than two (2) Business Days after the date the conditions to Closing set forth in this Agreement are satisfied or waived (other than those conditions that by their nature are to be satisfied at the Closing), at the offices of Kasowitz, Benson, Torres & Friedman LLP, New York, New York, or at such time and place as the Buyer and the Sellers may otherwise agree. The date on which the Closing actually takes place is referred to in this Agreement as the “Closing Date.”

3.2 Deliveries by the Sellers at Closing. At the Closing, the Sellers shall each execute, acknowledge and deliver to the Buyer the following (which events shall occur, each being deemed to have occurred simultaneously with the others):

(a) Trademark, trade name and domain name assignments and other intellectual property assignments in a form reasonably satisfactory to the Buyer and its counsel and the Sellers and their counsel, suitable for recording in the U.S Patent and Trademark Office, pursuant to which the Seller Group shall assign the Transferred Intellectual Property to the Buyer, as well as assignment documents for trademark and/or patent rights in other jurisdictions as reasonably requested by Buyer (the “IP Assignments”);

(b) A duly executed Bill of Sale in a form reasonably satisfactory to the Buyer and its counsel and the Sellers and their counsel;

(c) [Reserved];

(d) A copy of the Sale Order;

(e) The officer's certificate described in Section 8.2(a) below;

(f) All other documents, certificates, instruments or writings, including the Ancillary Agreements, reasonably requested by the Buyer in connection herewith, including as necessary or appropriate to convey to the Buyer the Assets.

3.3 Deliveries by the Buyer at Closing. At the Closing, the Buyer shall execute, acknowledge and deliver to the Sellers the following (which events shall occur, each being deemed to have occurred simultaneously with the others):

(a) A duly executed Bill of Sale and the IP Assignments, if any, that call for a signature by the Buyer;

(b) A duly executed Assignment and Assumption Agreement;

(c) The Purchase Price to the Sellers by wire transfer in immediately available funds, net of the Deposit;

(d) A copy of the resolutions adopted by the Buyer's Board of Directors authorizing the transactions contemplated hereby and the consummation thereof, certified by a secretary or assistant secretary of the Buyer to be a true and correct copy;

(e) The officer's certificate described in Section 8.1(a) below;

(f) A certificate of incumbency as to those officers of the Buyer executing instruments in connection with this Agreement;

(g) The Specified Licenses duly executed by the Buyer and the applicable licensees; and

(h) All other documents, certificates, instruments or writings, including the Ancillary Agreements, reasonably requested by the Sellers in connection herewith.

3.4 [Reserved].

3.5 Subsequent Documentation; Further Assurances. The Buyer and the Sellers shall, at any time and from time to time after the Closing Date, upon the reasonable request of the other, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all such further (a) assignments, transfers and conveyances as may be required for assigning, transferring, granting, conveying, recording and confirming the transactions contemplated hereby, including aiding and assisting the Buyer in collecting and reducing to possession any or all of the Assets and (b) documents and instruments as may be reasonably necessary for the further completion of any of the transactions contemplated hereby, including, without limitation, the Specified Licenses.

ARTICLE 4

REPRESENTATIONS AND WARRANTIES OF THE SELLERS

The Seller Group has delivered to Buyer and attached hereto certain disclosure schedules prepared by the Seller Group with numbered sections corresponding to the relevant sections in this Article 4 (the “Sellers’ Disclosure Schedules”), and any exception or qualification set forth in the Sellers’ Disclosure Schedules with respect to a particular representation or warranty contained in this Article 4 shall be deemed to be an exception or qualification with respect to such section of this Article 4. Where an exception or qualification would apply to more than one Section of the Sellers’ Disclosure Schedules, the Seller Group will cross-reference the exception or qualification in each section of the Sellers’ Disclosure Schedules where such reference is necessary to make the representations and warranties true and correct; provided, however, that in the absence of an explicit cross-reference such cross-reference will be deemed made into a different section of the Sellers’ Disclosure Schedules only to the extent that any exception or qualification made elsewhere in the Sellers’ Disclosure Schedules is disclosed in such a way as to make it reasonably apparent from the face of such disclosure that such exception or qualification is applicable to such other section of the Sellers’ Disclosure Schedules as it relates to this Article 4.

The Sellers, jointly and severally, represent that the following are true and correct as of the date hereof and shall be true and correct at the date of the Closing after giving effect to the Sale Order:

4.1 Organization and Power. Each Seller (a) is a corporation duly organized, validly existing and in good standing under the laws of the State of its organization, (b) has all requisite corporate power and authority to carry on its business as currently conducted, and (c) has the requisite corporate power and authority to own, lease, operate or hold the applicable Assets.

4.2 Authority; No Conflicts. Each Seller has the authority to enter into and, subject to approval pursuant to the Sale Order, consummate this Agreement and the Ancillary Agreements, and to consummate the transactions contemplated hereby and thereby. Subject to the approval of the Bankruptcy Court pursuant to the Sale Order, the execution, delivery and performance by each Seller of this Agreement and of the Ancillary Agreements to which it is a party (a) do not and shall not violate or conflict with any provision of the certificate or articles of incorporation or bylaws of such Seller, (b) do not and shall not violate any provision of any Applicable Law or any order, judgment or decree of any Governmental Entity or any Governmental Authority and (c) shall not result in the creation or imposition of any Lien (other than the Specified Licenses) upon any of the Assets.

4.3 Execution and Delivery. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby by the Sellers have been duly authorized by all necessary corporate action, and the execution and performance of the Ancillary Agreements by the Sellers has been or shall be authorized by all necessary corporate action prior to the Closing Date. Subject to Bankruptcy Court approval and entry of an Order of the Bankruptcy Court approving the terms of this Agreement, this Agreement constitutes, and upon execution of each of the Ancillary Agreements such agreements shall constitute, valid and binding obligations of the Sellers, enforceable against the Sellers in accordance with their respective terms.

4.4 Title; Sale Free and Clear of Liens. On the Closing Date, after giving effect to the Sale Order, the Assets shall be transferred to the Buyer free and clear of all Liens, subject to the Specified Licenses and the Terminated Licenses.

4.5 Litigation. Except as set forth on Schedule 4.5, and except for the Cases, there is no claim, litigation, action, arbitration or legal proceeding pending before a Governmental Entity or, to the

Sellers' Knowledge, threatened against the Sellers, relating to the Assets or affecting the Sellers' ability to perform their obligations hereunder. Subject to all of the provisions of the Bankruptcy Code, upon the Closing the Assets will not be subject to any order, writ, judgment, award, injunction or decree of any Governmental Entity that has had or could reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

4.6 Third Party Approvals. Except for (a) entry of the Sale Order and (b) approvals or consents set forth on Schedule 4.6, the execution, delivery and performance by the Sellers of this Agreement and the consummation of the transactions contemplated hereby do not require any consent, waiver, authorization or approval of, or filings with, any Person (including any Governmental Authority) that has not been obtained or is not deemed to be superseded by applicable provisions of the Bankruptcy Code (the matters described in this Section 4.6, collectively referred to as the "Consents").

4.7 Transferred Intellectual Property. Except as set forth on Schedule 4.7, the Seller Group has not been notified in writing prior to the date of this Agreement that any of the Transferred Intellectual Property is or may be infringing any trade secrets, trademarks, trade names, service marks, service names or copyrights of any third party and, to the Knowledge of the Sellers, there is no continuing infringement of the Transferred Intellectual Property by other Persons. Except as set forth on Schedule 4.7, the Seller Group as of the date of this Agreement is not bound by any outstanding judgment, injunction, order or decree restricting the use of the Transferred Intellectual Property, and any issued trademark, service mark and copyright registrations and URLs listed on Schedule 1.2(a) have not lapsed, expired or been cancelled.

4.8 Broker or Finder. Except as set forth on Schedule 4.8, no Person assisted in or brought about the negotiation of this Agreement, or the subject matter of the transactions contemplated hereby, in the capacity of broker, agent, or finder or in any similar capacity on behalf of the Sellers, and no commission or other compensation is or shall be due or owed from any of the Sellers to any Person with respect to the purchase and sale of the Assets.

4.9 DISCLAIMER OF REPRESENTATIONS AND WARRANTIES. THE ASSETS ARE BEING TRANSFERRED IN "AS IS", "WHERE IS" CONDITION AND NEITHER THE SELLERS NOR ANY EMPLOYEES, DIRECTORS, OFFICERS, SHAREHOLDERS OR REPRESENTATIVES OF THE SELLERS MAKE ANY REPRESENTATIONS OR WARRANTIES, WHETHER EXPRESS OR IMPLIED, AT LAW OR IN EQUITY, RELATING TO THE SELLER GROUP OR THE ASSETS OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, IN CONNECTION WITH THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT.

4.10 Intellectual Property.

(a) After giving effect to the Sale Order or any notice of rejection filed prior to the date of the Sale Order, except as set forth on Section 4.10(a) of the Sellers' Disclosure Schedules, the execution, delivery and performance of this Agreement and the Seller Documents, and the consummation of the transaction contemplated hereby and thereby, will not, to the Sellers' Knowledge, constitute a material breach of any Contract involving any Assets, nor cause the forfeiture or termination of any Assets.

(b) After giving effect to the Sale Order or any notice of rejection filed prior to the date of the Sale Order, Section 4.10(b) of the Sellers' Disclosure Schedules sets forth a complete and accurate list of any Contract pursuant to which any third party is authorized to use any of the Assets (the

“Seller Licenses”). Each of the Seller Licenses is valid and enforceable against the Seller Group, and, to the Sellers’ Knowledge, the other party or parties thereto, in accordance with its terms.

4.11 Termination of Representations and Warranties Upon Closing. The representations and warranties of the Sellers in this Agreement and each Ancillary Agreement shall not survive the Closing Date and shall be null and void ab initio and of no further force or effect immediately after the Closing Date.

ARTICLE 5

REPRESENTATIONS AND WARRANTIES OF THE BUYER

The Buyer represents and warrants to the Sellers that the following are true and correct as of the date hereof and shall be true and correct at the date of the Closing:

5.1 Organization and Power. The Buyer (a) is a duly organized, validly existing entity under the laws and in good standing in the state of its organization, (b) has all requisite power and authority to carry on the business in which it is now engaged, and (c) has taken all action required by Applicable Law, and by the Buyer’s organizational documents, to authorize the execution and delivery of this Agreement, and the purchase of the Assets and execution and delivery of the Specified Licenses in accordance with this Agreement.

5.2 Authority; No Conflicts. The Buyer has the requisite power and authority (including full limited liability company power and authority) to execute this Agreement and each Ancillary Agreement to which the Buyer is a party and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance by the Buyer of this Agreement and each Ancillary Agreement to which the Buyer is a party (a) do not and shall not violate or conflict with any provision of the certificate of formation or limited liability company agreement of the Buyer, and (b) do not and shall not violate any provision of any Applicable Law or any order, judgment or decree of any Governmental Entity or any Governmental Authority.

5.3 Execution and Delivery. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby has been duly authorized by all necessary corporate action on the part of the Buyer, and the execution and performance of each Ancillary Agreement to which the Buyer is a party has been or shall be authorized by all necessary corporate action on the part of the Buyer prior to the Closing Date. This Agreement constitutes, and upon execution by the Buyer of each of the Ancillary Agreements to which it is a party, such agreements shall constitute, valid and binding obligations of the Buyer, enforceable against the Buyer in accordance with their respective terms, except as limited by (i) applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors’ rights generally and (ii) general equitable principles.

5.4 Litigation. There is no claim, litigation, action or legal proceeding before a Governmental Entity or, to the Buyer’s knowledge, threatened against the Buyer, adversely affecting the Buyer’s ability to perform its obligations hereunder. There are no bankruptcy, reorganization or arrangement proceedings pending, being contemplated by or, to the Buyer’s knowledge, threatened against the Buyer.

5.5 Condition of Assets. The Buyer (i) is purchasing the Assets in “as is”, “where is” condition, and (ii) is relying solely on its own existing knowledge and inspection of the Assets and that it has completed its due diligence inspection in respect of the Assets. The Buyer expressly acknowledges

that the Sellers are not making any representations or warranties regarding the Assets (except as specifically provided for in this Agreement or any of the Ancillary Agreements).

5.6 Sufficient Funds. The Buyer has available, and will have available as of the Closing Date, funds sufficient to pay the Purchase Price and to perform its other obligations under this Agreement and the Ancillary Agreements.

5.7 No Brokers. The Buyer has not utilized the services of or contracted or dealt with a broker or finder in connection with any of the transactions contemplated by this Agreement, including the Buyer's purchase of the Assets or any portion thereof, and no commission or other compensation is or shall be due or owed from the Buyer to any Person with respect to the purchase and sale of the Assets.

5.8 Termination of Representations and Warranties Upon Closing. The representations and warranties of the Buyer in this Agreement and each Ancillary Agreement to which the Buyer is a party shall not survive the Closing Date and shall be null and void ab initio and of no further force or effect immediately after the Closing Date.

ARTICLE 6

COVENANTS OF THE SELLERS

Each Seller covenants and agrees with the Buyer that:

6.1 Reasonable Best Efforts.

(a) Each Seller shall use its reasonable best efforts to cause, to the extent within such Sellers' control, the conditions set forth in Article 8 to be satisfied and to facilitate and cause the consummation of the transactions contemplated hereby.

(b) Each of the Sellers shall take all actions, including appropriate service and notice of pleadings, in form and substance reasonably satisfactory to the Buyer, needed to obtain a Sale Order that authorizes, orders and effects a sale of all of the Assets free and clear of all Excluded Liabilities and Liens and other interests.

6.2 Sale Order. The Sellers, having filed the Debtors' Motion (the "IP Sale Motion") for Orders Pursuant to Sections 332, 363, 365 and 105 of Title 11 of the United States Code and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure: (i) Approving Bidding Procedures With Respect to Sale of Certain IP Assets, Including Expense Reimbursement for a Stalking Horse Bidder, Setting the Sale Hearing Date, and Appointing a Consumer Privacy Ombudsman; and (ii) Approving and Authorizing the Sale of IP Assets to the Highest and Best Bidder Free and Clear of all Liens, Interests, Claims and Encumbrances and the Assumption and Assignment of Certain Related Executory Contracts and Waiving the Requirements of Bankruptcy Rules 6004(h) and 6006(d) and obtained entry of the Order Pursuant to Sections 332, 363, 365 and 105 of the Bankruptcy Code and Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure Approving Bidding Procedures in Connection with the Sale of the Debtors' IP Assets Free and Clear of all Liens, Interest, Claims and Encumbrances, which, among other things, set a hearing to approve a sale of the Assets for September 20, 2011, shall use their reasonable best efforts to file any further motion or other pleading for approval of the Sale Order as soon as possible so as to obtain the entry by the Bankruptcy Court of the Sale Order no later than September 30, 2011. The Sellers shall, with the cooperation of the Buyer, diligently prosecute the IP Sale Motion, and seek to obtain entry of the Sale Order, and the Sellers shall make all reasonable efforts to deliver to the Buyer prior to filing, and as early in advance as is practicable to permit adequate and reasonable time for the Buyer and its

counsel to review and comment, copies of all proposed pleadings, motions, notices, statements schedules, applications, reports and other papers to be filed by the Sellers in connection with such motions and relief requested therein.

6.3 Notice to the Buyer. Each Seller agrees to promptly notify the Buyer in writing of any information it obtains or becomes aware of that would indicate that a representation and warranty of the Sellers made herein or in any Schedule hereto is not correct in all material respects or that any of the conditions to Closing shall not be satisfied or reasonably likely will not be satisfied.

6.4 Consents and Approvals. The Sellers shall use their reasonable best efforts to obtain all Consents required, including any required by the Bankruptcy Code or other Applicable Law, to be obtained by the Sellers or the other members of the Seller Group to effect the transactions contemplated hereby. Without limiting the foregoing, as soon as practicable after the date of this Agreement, the Sellers shall make or cause to be made all such further filings and submissions, and take or cause to be taken such further action, as may reasonably be required in connection therewith on a timely basis.

6.5 Customer List. Each Seller shall use its reasonable best efforts to address matters related to the conveyance of any Customer List or any portion thereof identified by the Sale Order.

6.6 Public Statements. From the date hereof through the Closing Date, no public release or announcement concerning the transactions contemplated by this Agreement shall be issued by any Sellers or other members of the Seller Group or the Buyer without the prior consent of the Seller Group or the Buyer, as the case may be (which consent shall not be unreasonably withheld), except as such release or announcement may be required by Applicable Law, in which case the party required to make the release or announcement shall allow the other reasonable time to comment on such release or announcement in advance of such issuance; provided, however, that the Sellers may, in consultation with the Buyer, make internal announcements to their respective employees that are consistent with the parties' prior public disclosures regarding the transactions contemplated by this Agreement after reasonable prior notice to and consultation with the Buyer. Nothing in this Section 6.6 or elsewhere in this Agreement shall limit or be deemed to limit any member of the Seller Group's right or ability to make disclosures in connection with the Cases or the Buyer's right or ability to make disclosures in connection with any regulatory obligation.

6.7 Employees. Notwithstanding any of the terms and conditions to the contrary herein or in that confidentiality letter between the Buyer and the Sellers, dated April 21, 2011 (the "Confidentiality Agreement"), the Buyer and any of its Affiliates may (i) request a list from Sellers or other members of the Seller Group of former officers or employees of Sellers or other members of the Seller Group primarily related to the Business, and (ii) solicit any current or former officer or employee of Sellers or other members of the Seller Group primarily related to the Business for the purpose of discussing the potential retention of such individuals by the Buyer or any of its Affiliates following the Closing.

6.8 Access to Information. From the date hereof until the Closing Date, each of the Sellers and other members of the Seller Group shall afford to the Buyer and its authorized personnel and representatives reasonable access during normal business hours to make such reasonable investigation of the Assets, and such examination of the relevant books and records of the Assets as the Buyer may reasonably request and to discuss the affairs, finances and accounts related to the Assets with the designated personnel thereof. Any such investigation or examination shall be conducted at times reasonably acceptable to Sellers and upon reasonable prior notice to Sellers identifying any personnel of Sellers or other members of the Seller Group with whom the Buyer desires to discuss the above referenced matters. Sellers may designate any Person to be present for any such discussion. To the extent reasonably practical, from the date hereof until the Closing Date, the Sellers shall promptly inform the Buyer of any and all material matters that arise during such period affecting the Assets of which the

Sellers have Knowledge. Notwithstanding anything herein to the contrary, no such investigation or examination shall be permitted to the extent that it would require the Sellers or any Affiliate to disclose information subject to attorney-client privilege or conflict with any confidentiality obligations to which the Sellers or any members of the Seller Group are bound, from which the Sellers will use commercially reasonable efforts to be released.

6.9 Transferred Intellectual Property Maintenance. From the date hereof to the Closing Date, the Sellers shall use commercially reasonable efforts in the ordinary course of business to protect and preserve the Transferred Intellectual Property.

6.10 Cessation of Use, Removal of Marks.

(a) The Seller Group shall cease all use of the name "Borders" for direct marketing, promotion or sales purposes to customers identified through use of the Customer List as of the date of the Closing. The Seller Group shall cease all use of the name "Borders" for marketing, promotion or sales purposes to the general public, except for a period of forty-five (45) days immediately following the Closing Date and solely insofar as may be required in connection with the winding down of Seller Group's business and the prosecution of the Cases.

(b) Subject to Section 6.10(a), after the expiration of such period but in no event for a period in excess of one hundred eighty (180) days following the Closing Date, the Seller Group may continue to use the name "Borders" to prosecute the Cases and effectuate the winding down of its operations, provided, that upon the expiration of such one hundred eighty (180) day period, the Sellers shall, within thirty (30) days after request of the Buyer, cause each entity in the Seller Group to change its names to a name that is not (and that is not confusingly similar to) "Borders" and will provide the Buyer with such consents as may be necessary to permit the Buyer or its designee to use the corporate name.

ARTICLE 7

COVENANTS OF THE BUYER

The Buyer covenants and agrees with the Sellers that:

7.1 Reasonable Best Efforts. The Buyer shall use its reasonable best efforts to cause, to the extent within the Buyer's control, the conditions set forth in Article 8 to be satisfied and to facilitate and cause the consummation of the transactions contemplated hereby.

7.2 Notice to the Sellers. The Buyer agrees to promptly notify the Sellers in writing of any information the Buyer obtains or becomes aware of that would indicate that a representation and warranty of the Buyer made herein or in any Schedule hereto is not correct in all material respects.

7.3 Bankruptcy Court Approval and Related Matters. The Buyer acknowledges and agrees to Article 11 and shall use reasonable best efforts to assist the Sellers in obtaining any orders necessary to consummate the transactions contemplated hereby and any orders ancillary hereto and agree to provide the Sellers with information necessary to obtain such orders.

7.4 Confidentiality. The Buyer shall maintain the Confidential Information in accordance with the terms of the Confidentiality Agreement. In the event the Closing does not occur for any reason, the Buyer shall immediately return to the Sellers or destroy all copies and recordings of the Confidential Information in their possession or under their control in accordance with the terms of the Confidentiality Agreement.

7.5 Privacy. On or prior to the Closing Date, the Buyer agrees to adopt a written policy with respect to protection of the confidentiality of personally identifiable information regarding the customers and employees of the Seller Group and other Persons not affiliated with the Seller Group substantially similar in all material respects to those included in the written privacy policies of the Seller Group in effect as of the date of this Agreement. From and after the Closing Date, the Buyer shall comply with such policy, or such successor policies adopted by Buyer from time to time, and Applicable Law with respect to the protection of such personally identifiable information. Prior to making any material change to these privacy policies with respect to the personally identifiable information or the use or disclosure thereof different from that specified in the Buyer policies then in effect, the Buyer agrees (a) to notify the Persons whose personally identifiable information is included in the Assets by mail or email and afford such persons the opportunity to opt-out of the changes to the privacy policy or the new uses of their information; (b) to employ appropriate information security controls and procedures (technical, operational, and managerial) to protect their information; and (c) to abide by all Applicable Laws.

ARTICLE 8

CONDITIONS TO CLOSING

8.1 Sellers' Conditions to Closing. The obligations of the Sellers at the Closing are subject, at the option of the Sellers, to the satisfaction at or prior to the Closing of the following conditions:

(a) All representations and warranties of the Buyer contained in this Agreement shall be true in all material respects at and as of the Closing and the Buyer shall have performed and satisfied all material obligations in all material respects required by this Agreement to be performed and satisfied by the Buyer at or prior to the Closing. The Buyer shall have provided the Sellers with certificates executed by a responsible officer of the Buyer to such effect;

(b) All material Consents legally required to be obtained by the Sellers for the Closing shall have been obtained; and

(c) The Buyer shall have executed and delivered the documents required to be executed and delivered pursuant to Section 3.3.

8.2 Buyer's Conditions to Closing. The obligations of the Buyer to consummate the transactions contemplated hereby at the Closing are subject, at the option of the Buyer, to the satisfaction at or prior to the Closing of the following conditions:

(a) All representations and warranties of the Sellers contained in this Agreement and the Ancillary Agreements shall be true in all material respects at and as of the Closing and the Sellers shall have performed and satisfied in all material respects all obligations required by this Agreement and the Ancillary Agreements to be performed and satisfied by the Sellers at or prior to the Closing. The Sellers shall have provided the Buyer with certificates executed by a responsible officer of the Sellers to such effect;

(b) All material Consents legally required to be obtained by the Sellers for the Closing shall have been obtained;

(c) The Sellers shall have executed and delivered the documents required to be executed and delivered pursuant to Section 3.2;

(d) The Sale Order shall not impose any material additional requirement on the Buyer not otherwise required by the terms of this Agreement; and

(e) The Seller Group shall have obtained Bankruptcy Court approval and shall have taken all necessary actions to reject or terminate the licenses specified in the Seller Group's *Notice of Winning Bidders of IP Assets* filed with the Bankruptcy Court on September 15, 2011 (the "Terminated Licenses"), and the only licenses for or relating to any of the Assets shall be the Terminated Licenses or as otherwise disclosed on Schedule 4.10(b); provided, however, that the effectiveness of the termination of any Terminated License shall not be a condition to Closing.

8.3 Conditions of the Parties to Closing. The obligations of the Parties to consummate the transactions contemplated hereby at the Closing are further subject to the satisfaction at or prior to the Closing of the following conditions, which conditions are not subject to waiver:

(a) No stay or injunction shall have been obtained by a court of competent jurisdiction restraining, prohibiting or declaring illegal the purchase and sale contemplated by this Agreement; and

(b) The Bankruptcy Court shall have entered the Sale Order with the required findings and determinations identified in Article 13 and any other Orders necessary to permit and consummate the transactions contemplated by this Agreement, the Sale Order and each such other Order to be in form and substance reasonably satisfactory to the Parties.

ARTICLE 9

ADDITIONAL OBLIGATIONS AFTER CLOSING

The Parties shall have the following additional obligations after the Closing:

9.1 Execution; Delivery of Instruments and Assistance. The Sellers and the Buyer shall each execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such instruments and take such other actions as may be necessary or advisable to carry out their obligations under this Agreement and under any document, certificate or other instrument delivered pursuant hereto or thereto or required by Applicable Law.

9.2 Access to Records. From and after the Closing Date, the Buyer shall afford the Sellers, the Official Committee of Unsecured Creditors appointed in the Sellers' Cases and any trustee appointed in the Sellers' Cases, and their respective counsel, accountants and other representatives access, on reasonable notice and during reasonable business hours, to review and make copies of any computer records sold by the Seller Group hereunder to the extent reasonably necessary in connection with winding down the estates of the Sellers' or in order to comply with obligations under applicable law.

9.3 Rejection or Termination of Contracts. Sellers shall reject or terminate as soon as reasonably practicable but in no event later than the effective date of a Chapter 11 plan any Contracts that may authorize the use of the Assets. The parties acknowledge that the effective termination date of certain of the Terminated Licenses may not occur until after the Closing. From and after the Closing, the Buyer and the Sellers shall reasonably cooperate with each other to effectuate the termination of any such Terminated Licenses.

ARTICLE 10

TERMINATION

10.1 Termination. This Agreement may be terminated as follows:

(a) At any time by the mutual written agreement of the Sellers and the Buyer;

(b) By the Sellers or the Buyer, at their respective sole election, in the event that the Closing shall not have occurred on or before September 30, 2011 (or such later date as may be ordered by the Bankruptcy Court so long as such date is not later than December 30, 2011); *provided* that the Party seeking to terminate shall not be entitled to terminate this Agreement pursuant to this Section 10.1(b) if the failure of the Closing to occur on or prior to such date results primarily from such Party itself or themselves materially breaching any representation, warranty or covenant contained in this Agreement;

(c) By the Buyer, at its sole election, in the event of a material breach of this Agreement by the Sellers that has not been cured, or if any representation or warranty of the Seller shall have become untrue in any material respect, in either case such that such breach or untruth is incapable of being cured, by September 30, 2011; and

(d) By the Sellers, at their sole election, in the event of a material breach of this Agreement by the Buyer that has not been cured, or if any representation or warranty of the Buyer shall have become untrue in any material respect, in either case such that such breach or untruth is incapable of being cured, by September 30, 2011.

10.2 Effect of Termination. Upon the termination of this Agreement in accordance with Section 10.1, the Parties shall be relieved of any further obligations or liability under this Agreement other than (a) confidentiality obligations contained in Section 7.4; (b) any obligations for breach of this Agreement occurring prior to such termination; or (c) the Buyer's right to refund of and the Seller's obligation to refund the Deposit to the Buyer, or the Sellers' right to retain the Deposit, in each case as described in Section 2.6.

ARTICLE 11

BANKRUPTCY COURT APPROVAL

11.1 Bankruptcy Court Approval. The Seller Group and Buyer each acknowledges that the obligations of the Sellers under this Agreement and the transactions contemplated hereby are contingent upon the approval and authorization of the Bankruptcy Court.

ARTICLE 12

GENERAL PROVISIONS

12.1 Notice. All notices hereunder shall be in writing, dated and signed by the Party giving the same. Each notice shall be either (a) delivered in person to the address of the Party for whom it is intended at the address of such Party as shown below, (b) delivered to the United States Postal Service in a secure and sealed envelope or other suitable wrapper addressed to the Party for whom it is intended at the address of such Party as provided below, with sufficient postage affixed, certified or registered mail, return receipt requested, (c) sent by facsimile with a confirmation sheet, or (d) delivered to a nationally recognized overnight courier service that traces any such notice. The effective date of such notice shall

be the date of delivery in the event of delivery in accordance with (a) or (c) and five (5) days after deposit in the U.S. Mail in the event of delivery in accordance with (b). The address at which any Party hereto is to receive notice may be changed from time to time by such Party by giving notice of the new address to all other parties hereto. The addresses of the Parties, until changed in accordance with the foregoing, are:

The Sellers: Borders Group, Inc.
100 Phoenix Drive
Ann Arbor, Michigan 48108
Attn: Matthew A. Chosid, Esq.
Facsimile: (734) 477-1370

And copies (which
shall not constitute
notice) to: Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, New York 10019
Attn: Andrew K. Glenn, Esq.
Facsimile: (212) 506-1800

Streambank, LLC
97 Chapel Street, 3rd Floor
Needham, Massachusetts 02492
Attn: David Peress
Facsimile: (781) 651-4272

And to counsel for the Official Committee of Unsecured Creditors of Sellers at:

Lowenstein Sandler PC
65 Livingston Avenue
Roseland, New Jersey 07068
Attn: Bruce Buechler, Esq.
Facsimile: (973) 597-2309

The Buyer: Barnes & Noble, Inc.
122 Fifth Avenue
New York, New York 10011
Attn: Eugene V. DeFelice, Esq.
Facsimile: (212) 463-5683

And a copy (which
shall not constitute
notice) to: Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Attn: Paul H. Zumbro, Esq.
Andrew R. Thompson, Esq.

12.2 Amendment. This Agreement may not be amended nor any rights hereunder waived except by an instrument in writing signed by the Parties and, if required by Applicable Law, by the Official Committee of Unsecured Creditors appointed in the Sellers' Cases.

12.3 Payment of Costs. Except as otherwise set forth herein, the Parties shall each pay their own costs incurred in negotiating this Agreement and in consummating the transactions contemplated hereby, including any fees or commission payable to any party representing them in connection with arranging or negotiating this Agreement and transactions contemplated hereby.

12.4 Headings. The headings of the sections of this Agreement are for convenience or reference only and shall not affect any of the provisions of this Agreement.

12.5 References. References made in this Agreement, including use of a pronoun, shall be deemed to include, where applicable, masculine, feminine, singular or plural, individuals, partnerships or corporations.

12.6 Applicable Law. This Agreement and the transactions contemplated hereby shall be construed in accordance with and governed by the laws of the State of New York. Each of the Parties agrees that any proceeding brought to enforce the rights and obligations of any Party under this Agreement (including the schedules attached hereto) or any Ancillary Agreement shall be commenced and maintained exclusively in the Bankruptcy Court and that the Bankruptcy Court shall have exclusive jurisdiction over any such proceeding.

12.7 Entire Agreement. This Agreement, the Schedules attached hereto, and the Ancillary Agreements (in each case incorporated herein by this reference) contain the entire agreement and understanding of the Parties hereto with respect to the transactions contemplated hereby, and supersede any and all prior agreement, arrangements, and understandings, whether oral or written, between the Parties.

12.8 Authorization of Parent as Representative of the Sellers.

(a) By entering into and executing this Agreement, the Sellers irrevocably appoint Parent as their agent, effective as of the date hereof, and authorize and empower Parent to fulfill the role of the Sellers' representative hereunder, and each Seller appoints Parent as such Person's true and lawful attorney in fact and agent, for all purposes necessary or desirable in order for Parent to take all actions contemplated by this Agreement, with the ability to execute and deliver all instruments, certificates and other documents of every kind incident to the foregoing to all intents and purposes and with the same effect as such Seller could do personally, including to give and receive notices and communications; to object to such deliveries, to agree to, negotiate, enter into settlements and compromises of, and comply with orders of courts with respect to such claims; and to take all actions necessary or appropriate in the judgment of Parent for the accomplishment of the foregoing. The power of attorney granted in this Section 12.8 is coupled with an interest and is irrevocable.

(b) The Buyer shall be entitled to rely exclusively upon any communication given or other action taken by Parent pursuant to this Agreement, and shall not be liable for any action taken or not taken in good faith reliance on a communication or other instruction from Parent.

12.9 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the Parties and, except as otherwise prohibited, their respective successors and assigns. Nothing contained in this Agreement, or implied herefrom, is intended to confer upon any Person other than the Parties any benefits, rights, or remedies.

12.10 Assignment. No Party may assign all or any portion of its respective rights or delegate any portion of its duties hereunder without (a) the approval of the Bankruptcy Court and (b) the written consent of the other Parties and the Official Committee of Unsecured Creditors appointed in the Sellers' Cases; *provided* that the Buyer may assign this Agreement in whole or in part to any direct or indirect subsidiary of the Buyer so long as the Buyer retains its obligations under this Agreement, subject to the terms and conditions hereof, to effect the consummation of the transactions contemplated hereby. All of the terms, provisions and conditions of this Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors, assigns and legal representatives.

12.11 Severability. If a court of competent jurisdiction determines that any provision of this Agreement is void, illegal or unenforceable, the other provisions of this Agreement shall remain in full force and effect and the provisions that are determined to be void, illegal or unenforceable shall be limited so that they shall remain in effect to the extent permissible by Applicable Law.

12.12 Publicity. Prior to the Closing, no Party shall issue any press release or similar public announcement concerning the transactions contemplated hereby or the contents of this Agreement without the prior written consent of the other Parties, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, nothing in this Section 12.12 shall preclude any Party (or Person controlling such Party) from making disclosures required by Applicable Law or Governmental Authority (or of any applicable stock or securities exchange or otherwise), or appropriate filings with the Bankruptcy Court in connection with the Cases or necessary and proper in conjunction with the filing of any Tax return or other document required to be filed with any Governmental Authority; *provided* that if practicable the Party required to make the release or statement shall allow the other Party reasonable time to comment on such release or statement in advance of such issuance.

12.13 Construction. The Parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local or foreign statute shall be deemed to refer to such statute as amended and to all rules and regulations promulgated thereunder, unless the context requires otherwise. The word "include" or "including" means include or including, without limitation. All references in this Agreement to Sections and Schedules shall be deemed references to Sections of, and Schedules to, this Agreement unless the context shall otherwise require.

12.14 Specific Performance. Each Party acknowledges that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed by such Party in accordance with their specific terms or were otherwise breached by such Party. Each Party accordingly agrees that, prior to the termination of this Agreement pursuant to Article 10, in addition to any other remedy to which the other Parties are entitled at law or in equity, the other Parties are entitled to injunctive relief to prevent breaches of this Agreement by such Party and otherwise to enforce specifically the provisions of this Agreement against such Party. Each Party expressly waives any requirement that any other Party obtain any bond or provide any indemnity in connection with any action seeking injunctive relief or specific enforcement of the provisions of this Agreement.

ARTICLE 13

DEFINITIONS

“Affiliate” shall mean, with respect to any Person, any direct or indirect subsidiary or such Person, and any other Person that directly, or through one or more intermediaries, controls or is controlled by or is under common control with such first Person.

“Agreement” shall have the meaning set forth in the Preamble.

“Ancillary Agreements” shall mean any ancillary agreements hereto to which each Party is or may be a party.

“Applicable Law” shall mean, with respect to any Person, any federal, state or local law (including common law), statute, code, ordinance, rule, regulation, or other requirement enacted, promulgated, issued or entered by a Governmental Authority, that is applicable to such Person or its business, properties or assets.

“Assets” shall have the meaning set forth in Section 1.2.

“Avoidance Actions” shall mean any and all actions which a trustee, debtor-in-possession or other appropriate party in interest may assert on behalf of the Sellers or their estate under applicable state statute or Chapter 5 of the Bankruptcy Code, including actions under one or more provisions of Sections 542, 543, 544, 545, 546, 547, 548, 549, 550, 551 and 553.

“Bankruptcy Code” shall have the meaning set forth in the Recitals.

“Bankruptcy Court” shall have the meaning set forth in the Recitals.

“Business” means the entirety of that portion of the business of the Seller Group and their respective Affiliates that is comprised of the ownership and/or operation of Borders commercial websites, including, without limitation, www.borders.com, all of which websites are listed in the annexed Schedules under Section 1.2, it being understood that such ownership and operation includes, without limitation, the advertising, promotion, marketing, transfer and sale of goods and services, and entry into agreements and arrangements with customers, suppliers, service providers and other parties in connection therewith.

“Business Day” shall mean any day other than Saturday, Sunday or any day on which banking institutions in the United States are closed either under Applicable Law or action of any Governmental Authority.

“Buyer” shall have the meaning set forth in the Preamble.

“Cases” shall have the meaning set forth in the Recitals.

“Closing” shall have the meaning set forth in Section 3.1.

“Closing Date” shall have the meaning set forth in Section 3.1.

“Company” shall have the meaning set forth in the Preamble.

“Confidentiality Agreement” shall have the meaning set forth in Section 7.4.

“Confidential Information” shall have the meaning set forth for “Evaluation Material” as such term is defined in the Confidentiality Agreement.

“Consents” shall have the meaning set forth in Section 4.6.

“Contract” shall mean any agreement, arrangement, contract, lease, purchase order, sale order or commitment, or any series of related agreements, arrangements, contracts, leases, purchase orders, sale orders, or commitments.

“Customer List” shall mean all customer data and membership lists of the Seller Group, including, without limitation, contact information and email addresses and purchasing history and related information, in digital or any other recorded form, with respect to the customers, rewards and loyalty program participants and gift card holders, including information regarding purchasing tendencies, but shall exclude printed records of customer data, gift card information, credit card information, social security numbers, telephone area codes, records of individuals whose addresses are outside the United States, cookie information and non-aggregate clickstream data.

“Deposit” shall have the meaning set forth in Section 2.6.

“Excluded Assets” shall have the meaning set forth in Section 1.3.

“Excluded Liabilities” shall have the meaning set forth in Section 2.2(b).

“Governmental Approvals” shall mean those approvals, authorizations, confirmations, consents, exemptions and orders from Governmental Authorities and the making of all necessary registrations and filings (including filings with Governmental Authorities) and the taking of all reasonable steps as may be necessary to consummate the transactions contemplated hereby under Applicable Law.

“Governmental Authority” shall mean any national, federal, state, provincial, local or foreign government, or any subdivision, agency, instrumentality, authority, department, commission, board or bureau thereof, or any federal, state, provincial, local or foreign court, tribunal, or arbitrator, including the Bankruptcy Court.

“Governmental Entity” shall mean any court, administrative agency or commission or other governmental authority or instrumentality, domestic or foreign.

“IP Assignments” shall have the meaning set forth in Section 3.2(a).

“IP Sale Motion” shall have the meaning set forth in Section 6.2.

“Knowledge of the Sellers” (or “the Sellers’ Knowledge”) shall mean the actual knowledge of the officers of the Sellers listed on Schedule 13.1, after reasonable inquiry.

“Liabilities” means, as to any Person, all debts, adverse claims, liabilities, commitments, responsibilities and obligations of any kind or nature whatsoever, direct, indirect, absolute or contingent, matured or unmatured of such Person, whether accrued, vested or otherwise, whether known or unknown, foreseen or unforeseen, and whether or not actually reflected, or required to be reflected, in such Person’s balance sheets or other books and records.

“Liens” shall mean any liens (including any inchoate liens and any liens for Taxes, materialmen, laborer, or mechanics’ liens, judgment liens, liens imposed by operation of law, contractual liens, and

liens arising out of or resulting from any employment agreements, employee benefits plans or laws, or collective bargaining agreements), encumbrances, burdens, claims, demands, judgments, orders, writs, injunctions, decrees, and arbitral awards, attachments, charges, security interests, mortgages, deeds of trust, pledges, hypothecations, adverse claims of title, preferential rights of purchase and/or first refusal rights, options, contracts for sale, transfer, or other disposition, and any claims or rights of any kind, description or nature whatsoever of or in favor of any creditors, Governmental Entities, or other Persons, whether or not any of the above arose, accrued, or relate to any time periods before or after the filing of the Cases, and whether or not a Chapter 11 or Chapter 7 trustee is hereafter appointed in the Cases for any reason.

“Material Adverse Effect” shall mean with respect to the Assets, any event or occurrence which shall materially and adversely affect the Assets, taken in each case as a whole; *provided* that any (a) change in general economic or industry-wide conditions, or (b) adverse effect that is solely the result of the execution or announcement of this Agreement or the transactions contemplated hereby or the consummation thereof, shall not be taken into account for purposes of determining a Material Adverse Effect hereunder.

“Order” shall mean any writ, judgment, decree, injunction or similar order, writ, ruling, directive or other requirement of any Governmental Entity (in each case whether preliminary or final).

“Parent” shall have the meaning set forth in the Preamble.

“Party” and “Parties” shall have the meanings set forth in the Preamble.

“Person” shall mean any individual, corporation, partnership, joint venture, trust, limited liability company, business association, Governmental Entity or other entity.

“Proprietary Rights” shall mean all intellectual property rights or proprietary rights of Seller relating to the Transferred Intellectual Property. Notwithstanding the foregoing, Proprietary Rights do not include an assumption of any Contracts. For the avoidance of doubt, Proprietary Rights do not include the Transferred Intellectual Property.

“Purchase Price” shall have the meaning set forth in Section 2.1.

“Sale Order” shall mean the Order of the Bankruptcy Court entered pursuant to Bankruptcy Code Sections 363 and 365 that approves the sale of the Assets to the Buyer pursuant to the terms and conditions of this Agreement and the provisions of the Bankruptcy Code (including Bankruptcy Code Section 363). The Sale Order shall find, determine and order, to the Buyer’s reasonable satisfaction, at least the following:

The procedures set forth in the Bidding Procedures Order were substantively fair to all parties. The Sellers conducted the sale process (including the Auction) in accordance with the procedures set forth in the Bidding Procedures Order;

Reasonable notice of the sale of the Assets and a reasonable opportunity to object or be heard with respect to the rejection or termination of the Terminated Licenses has been afforded to all interested persons and entities;

Subject only to entry of the Sale Order, the Sellers have (i) full power and authority to execute the Agreement, (ii) all of the power and authority necessary to consummate the transactions

contemplated by the Agreement, and (iii) taken all company action necessary to authorize and approve such transactions;

This Sale Order and consummation of the Sale are supported by good business reasons and will serve the best interests of the Sellers, their estates, and creditors by maximizing the values obtained from Sale Assets;

The Agreement was negotiated, proposed, and entered into by the Buyer without collusion, in good faith, and from an arm's length bargaining position. There is no insider relationship between affiliates of the Buyer and the Sellers. The Sellers and the Buyer have not engaged in any conduct that would cause or permit the Sale Agreement to be avoided under section 363(n) of the Bankruptcy Code;

The Buyer is a good faith purchaser under section 363(m) of the Bankruptcy Code and as such is entitled to all of the protections afforded thereby, and has acted in good faith in all respects in connection with this proceeding, in that: (i) the Buyer, in acquiring the Assets, recognized that the Sellers were free to deal with other parties in interest; (ii) the Buyer agreed to provisions in the Agreement which would enable the Sellers to accept a higher and better offer; (iii) the Buyer in no way induced or caused the Chapter 11 filing of any of the Debtors, including the Sellers; (iv) all payments to be made by the Buyer and other agreements entered into between the Buyer and the Sellers in connection with the Sale have been disclosed; (v) the negotiation and execution of the Agreement and related agreements was in good faith and an arm's length transaction; and (vi) the disclosure requirements required by Local Rule 6004-1 have been satisfied;

The consideration to be paid by the Buyer to the Sellers for the Assets is fair and reasonable, is the highest or otherwise best offer for the Sale Assets, and constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act, and any similar laws of any state or jurisdiction whose law is applicable to the sale;

The consummation of the Sale pursuant to the Agreement will be a legal, valid, and effective sale of the Assets to the Buyer and will vest the Buyer with all of the Sellers' right, title, and interest in and to the Assets, free and clear of all Liens and claims (as defined in section 101(5) of the Bankruptcy Code), in accordance with section 363(f) of the Bankruptcy Code, because one or more of the standards set forth in sections 363(f)(1)-(5) of the Bankruptcy Code has been satisfied;

The automatic stay of section 362(a) of the Bankruptcy Code shall not apply to and otherwise shall not prevent the exercise or performance by any party of its rights or obligations under the Agreement, including, without limitation, with respect to any cash held in escrow pursuant to the provisions thereof; and

Without limiting the generality of the other provisions of this Sale Order, and to the extent provided by federal law, the Buyer, under no circumstances, shall be deemed to be a successor of the Sellers. Accordingly, the Buyer shall have no successor or vicarious liabilities of any kind with respect to Sale Assets and all persons and entities shall be hereby enjoined from asserting any such claims against the Buyer.

"Seller" or "Sellers" shall have the meaning set forth in the Preamble.

“Sellers’ Disclosure Schedules” shall have the meaning set forth in the first paragraph of Article 4.

“Seller Group” shall have the meaning set forth the Recitals.

“Sellers Licenses” shall have the meaning set forth in Section 4(d).

“Specified Licenses” shall mean new trademark, trade dress and domain name licenses, in each case in a form reasonably acceptable to the Buyer and the Sellers, creating no obligations of the licensor other than to grant a perpetual, fully-paid up, royalty-free license (provided the licensee shall be obligated for any maintenance fees imposed by applicable Governmental Authorities) to use and apply the applicable “Borders” trademark in relation to the sale of goods and services as specified therein within the applicable territory, with respect to (i) Australia and New Zealand, (ii) Singapore, (iii) Malaysia and (iv) certain Persian Gulf Countries including the United Arab Emirates. The Seller Group shall receive the amount paid by the licensee to obtain the fully-paid up, royalty-free license contemplated under the Specified Licenses and the Buyer shall direct each licensee to pay such fees directly to the account of the Seller Group and, to the extent Buyer actually receives payment of such amounts, promptly transfer same to the Sellers.

“Tax” or “Taxes” shall mean (a) all taxes, charges, fees, levies, penalties or other assessments of any kind whatsoever imposed by an federal, state, local or foreign taxing authority, including, but not limited to, income, excise, property, sales, transfer, franchise, payroll, withholding, social security or other taxes, whether computed on a separate or consolidated, unitary or combined basis or in any other manner, including any interest, penalties or additions attributable thereto or (b) liability for the payment of any amounts of the type described in clause (a) above as a result of being a party to any agreement or any express or implied obligation to indemnify or otherwise succeed to the liability of any other Person.

“Tax Code” shall mean the Internal Revenue Code of 1986, as it has been and may be amended.

“Transferred Claims” shall have the meaning set forth in Section 1.2(d).

“Transferred Intellectual Property” shall mean have the meaning set forth in Section 1.2(a).

“Treasury Regulations” shall mean the federal income Tax regulations promulgated under the Tax Code, as amended, including any temporary and proposed regulations.

*Remainder of Page Intentionally Left Blank.
Signature Pages Follow.*

This Asset Purchase Agreement is executed by the Parties on the date set forth above.

SELLERS:

BORDERS GROUP, INC.

By: _____

Name: Holly Felder Etlin

Title: President

BORDERS, INC.

By: _____

Name: Holly Felder Etlin

Title: President

BUYER:

BARNES & NOBLE, INC.

By: _____

Name: Gene DeFelice, Esq.

Title: Vice President, General Counsel and
Corporate Secretary

[[NYCORP:3299478v15:3170C:09/20/11--02:11 p]]

SELLERS' DISCLOSURE SCHEDULES

EXHIBIT E



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Consumer Protection

September 14, 2011

Michael St. Patrick Baxter, Esq.
Yaron Dori, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Dear Messrs. Baxter and Dori:

This letter responds to your request, in your role as Consumer Privacy Ombudsman ("CPO"), that we provide a written description of our concerns regarding the possible sale as part of a bankruptcy proceeding of certain consumer personal information currently in the possession of Borders Group, Inc. ("Borders").¹ It is our understanding that this information is scheduled to be auctioned on September 14, 2011. We request that you consider these comments when drafting the CPO Report due before the sale hearing on September 20, 2011.² We also request that you attach this letter to your report when you submit it to the court.

Borders and Its Privacy Policies

Borders sold books, DVDs, CDs, and other merchandise through brick-and-mortar stores, kiosks, and online. In the course of conducting its business, Borders collected substantial amounts of personal information, including purchase history and email addresses, from over 20 million customers. Purchase history includes the merchandise purchased (e.g., books and videos), the location of the purchase (store, kiosk, or internet), Borders Rewards number, and, in some cases, credit card information.³ Borders represents that its current database contains consumer information collected since May 2005.

¹ For purposes of this letter, Borders is defined to include Borders Group, Inc. and its affiliated debtors in their jointly administered Chapter 11 bankruptcy cases, *In re Borders Group, Inc.*, No. 11-10614-mg (Bankr. S.D.N.Y.).

² Please note that the views expressed herein do not necessarily reflect the views of the Commission or any individual Commissioner.

³ Borders has represented that credit card information in its possession is kept separate from other consumer information and, in any case, will be purged prior to sale.

Borders collected this information under one of at least three different privacy policies it has disclosed to us.⁴ The first policy Borders has provided, published around February 21, 2006, states in relevant part:

Borders, Inc., Walden Book Company, Inc., and their related companies believe that your personal information – including your purchase history, phone number(s), and credit card data – belongs to you. We collect this type of information to serve you better when you provide it to us, but we do not rent or sell your information to third parties. From time to time, we may ask if you are interested in receiving information from third parties whose services or information we think would be of value to you. In those instances, we will only disclose your email address or other personal information to third parties **if you expressly consent to such disclosure.** (Emphasis in original).

Borders' second privacy policy, adopted around April 12, 2007, contained the same privacy language as the 2006 policy, with no substantive changes. The third policy, adopted May 27, 2008, contained the same language restricting the sale or rental of personal information, but also included information towards the end of the privacy policy describing circumstances under which Borders might disclose personal information:

Circumstances may arise where for strategic or other business reasons, Borders decides to sell, buy, merge or otherwise reorganize its own or other businesses. Such a transaction may involve the disclosure of personal or other information to prospective or actual purchasers, or receiving it from sellers. It is Borders' practice to seek appropriate protection for information in these types of transactions. In the event that Borders or all of its assets are acquired in such a transaction, customer information would be one of the transferred assets.

For the period covered by these privacy policies, Borders clearly and expressly represented that customer information would not be rented or sold to third parties except in limited circumstances and then only with the express consent of its customers. The May 2008 policy contains additional language suggesting a transfer of customer information could occur if Borders decided to sell, buy, merge or otherwise reorganize its businesses. We view this provision as applying to business transactions that would allow Borders to continue operating as a going concern and not to the dissolution of the company and piecemeal sale of assets in bankruptcy. Even if the provision were to apply in the event of a sale or divestiture of assets through bankruptcy, Borders represented that it would "seek appropriate protection" for such information.

⁴ Borders also has indicated that it had privacy policies in effect from the period May 2005, the date of the earliest record it has in its customer database, to February 2006. It has not yet produced those policies.

The representations Borders made to its customers about the privacy of their information, including email addresses and purchase history, would likely be considered very important to many customers. In particular, information about the types of books and videos customers have purchased would be considered personal to many customers.⁵ Consumers who bought such items would likely be very concerned if their information were to be transferred without restriction to an unknown purchaser for unknown uses.

Potential Sale or Transfer of Personal Information

We understand that Borders' customer information constitutes a potentially valuable estate asset. We are concerned, however, that any sale or transfer of the personal information of Borders' customers ("PI") would contravene Borders' express promise not to disclose such information and could constitute a deceptive or unfair practice.

The Commission has brought many cases alleging that the failure to adhere to promises about information privacy constitute a deceptive practice under the FTC Act.⁶ These cases include *FTC v. Toysmart*, in which the Commission sued an online toy retailer which had filed for bankruptcy and sought to auction the personal information it collected from its customers. The Commission alleged that the sharing of PI in connection with an offer for sale constituted a deceptive practice because the company had represented in its privacy policy that such information would never be shared with third parties.

⁵ See *In the Matter of MTS, Inc., d/b/a Tower Records/Books/Video*, No. C-4110 (FTC 2004) (consent order), available at <http://www.ftc.gov/os/caselist/0323209/0323209.shtm>; Letter from Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection to Reed Freeman (Mar. 12, 2010), available at <http://www.ftc.gov/os/closings/100312netflixletter.pdf>; Letter from David C. Vladeck, Director, Bureau of Consumer Protection to Jane Horvath, Google, Inc. (Sept. 2, 2009) (concerning Google Books project), available at <http://www.ftc.gov/os/closings/090903horvathletter.pdf>.

⁶ See, e.g., *FTC v. ControlScan, Inc.*, No. 1:10-cv-00532-JEC (N.D. Ga. 2010) (Stipulated Final J. and Order for Perm. Inj. and Other Equitable Relief), available at <http://www.ftc.gov/os/caselist/0723165/index.shtm>; *In the Matter of Chitika, Inc.*, No. C-4324 (FTC 2011) (consent order), available at <http://www.ftc.gov/os/caselist/1023087/110617chitikacmpt.pdf>; *In the Matter of Google, Inc.*, File No. 1023136 (FTC 2011) (proposed consent order), available at <http://www.ftc.gov/os/caselist/1023136/index.shtm>; *In the Matter of CVS Caremark Corp.*, No. C-4259 (FTC 2009) (consent order), available at <http://www.ftc.gov/os/caselist/0723119/index.shtm>; *In the Matter of Genica Corp.*, No. C-4252, (FTC 2009) (consent order), available at <http://www.ftc.gov/os/caselist/823113/index.shtm>; *In the Matter of Life is good, Inc.*, No. C-4218 (FTC 2008) (consent order), available at <http://www.ftc.gov/os/caselist/0723046/index.shtm>.

We have similar concerns about the transfer of customer information in this case. In light of the promises Borders made to its customers, we believe it would be appropriate for Borders to obtain express consent from its customers, specifying the potential purchaser, before it transfers the data. The consent process would allow customers to make their own determination as to whether a transfer of their information would be acceptable to them. For consumers who did not consent, their data would be purged.

We recognize, however, that bankruptcy may present special circumstances, including the interest in allowing a company to get back on its feet – or alternatively, to marshal remaining assets for its creditors.⁷ *Toysmart* is instructive on this point. There, the Commission entered into a settlement with the company allowing the transfer of customer information under certain limited circumstances: 1) the buyer had to agree not to sell customer information as a standalone asset, but instead to sell it as part of a larger group of assets, including trademarks and online content; 2) the buyer had to be an entity that concentrated its business in the family commerce market, involving the areas of education, toys, learning, home and/or instruction; 3) the buyer had to agree to treat the personal information in accordance with the terms of Toysmart's privacy policy; and 4) the buyer had to agree to seek affirmative consent before making any changes to the policy that affected information gathered under the Toysmart policy. These conditions were

⁷ Borders' sale of its customer information is restricted by section 363(b) of the Bankruptcy Code, 11 U.S.C. § 363(b), which provides as follows:

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless —

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease —

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Michael St. Patrick Baxter, Esq.
Yaron Dori, Esq.
September 14, 2011
Page 5

designed to protect consumer interests by ensuring that the data would be used by the purchaser consistent with Toysmart's promises.⁸

We think that, if the bankruptcy court declines to require consent to the transfer in light of other considerations, the *Toysmart* settlement is an appropriate model to apply here. As in *Toysmart*, our concerns about the transfer of customer information inconsistent with privacy promises would be greatly diminished if all the following conditions were met:

- Borders agrees not to sell the customer information as a standalone asset;
- The buyer is engaged in substantially the same lines of business as Borders;
- The buyer expressly agrees to be bound by and adhere to the terms of Borders' privacy policy;⁹ and
- The buyer agrees to obtain affirmative consent from consumers for any material changes to the policy that affect information collected under the Borders' policy.

Thank you for this opportunity to express our concerns. We appreciate your consideration of these comments and are available to answer any questions you may have.

Sincerely,



David C. Vladeck

⁸ See also Letter from David C. Vladeck, Director, FTC's Bureau of Consumer Protection to Peter Larson, et al. (July 1, 2010), *available at* <http://www.ftc.gov/os/closings/100712xy.pdf> (in case involving potential transfer of personal information in a manner inconsistent with privacy policy, staff stated that "the transfer of personal information to a new owner of the business, the use of which was strictly encumbered by the original owner's privacy policy, might be permissible under certain limited circumstances that were consistent with the original purpose for which the data was provided.")

⁹ We note that this condition is similar to a provision already contained in the form Asset Purchase Agreement proposed for the sale of Borders' intellectual property assets, including customer information. Section 9.5 of the proposed Asset Purchase Agreement requires the buyer to adopt a privacy policy that "includes provisions substantially similar to those included in the written privacy policies of the Seller Group [Borders] as of the date of this Agreement." See Debtors' Mot. for Order With Respect to Sale of Certain IP Assets, Attach. A. *In re Borders Group, Inc.*, ECF No. 1401.

EXHIBIT F



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INTERNET BUREAU

September 14, 2011

VIA EMAIL AND EXPRESS MAIL

Michael St. Patrick Baxter, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Re: Borders' Sale of Customer Information in Bankruptcy

Dear Mr. Baxter:

I am writing to you on behalf of the Offices of the Attorneys General of New York, Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, Ohio, Oregon, South Dakota, Utah, Vermont and Washington.¹ This letter reflects our concerns with Borders' proposed sale of customer information as part of its bankruptcy proceeding in the Bankruptcy Court for the Southern District of New York. The following reviews Borders' collection of customer information, the terms of the relevant privacy policies and our concerns regarding the sale of the information.

A. Brief Review of Information Collected and Relevant Privacy Policies

As we understand it, Borders collected customer information at the point of purchase, both for in-store purchases, at least to the extent the customer signed up for the Borders Rewards program, and through the Borders' website. Both points of collection are purportedly subject to the same privacy policy, which was posted on the Borders' website. Customers who signed up for the Borders Rewards program in the store would receive a copy of the program's Terms of Service, which referenced the privacy policy on the website. The customer's name, address and email information, purchase history, and birth date (but not birth year) were collected. Through its website, Borders also collected

¹ We are resending this letter, which was originally sent to you on September 12, 2011, and again on September 13, 2011, to reflect the addition of New Jersey and Washington. The substance of this letter is the same as the previous letters.

email addresses from customers who wished to receive marketing emails, as well as billing information from customers who set up online accounts. Borders also allowed users to sign up for its Rewards program through the website. Finally, we understand that certain "analytic information" has been generated by Borders through the processing of the customer data (collectively, the "Customer Information").

We understand that while certain credit card or financial account information was collected, it is not being sold, and Borders is in the process of scrubbing this information from the databases prior to the transfer. Finally, we understand that the Customer Information is separated into several different databases, including a marketing database held by Epsilon, an email marketing database held by Cheetah Mail, the Rewards Program database held by Brierly Partners, and the internal Borders customer and website databases. It is not clear at this time whether these databases will be sold together or separately.²

Borders' privacy policies have changed over time. Our understanding of the timeline is as follows:

- Prior to May 2005, Borders had a privacy policy but is unable to produce a copy. However, Borders represents that it does not have any Customer Information from prior to May 2005, and that nothing collected during that period will be sold.
- Between May 2005 and May 2008, Borders posted privacy policies on either Bordersstores.com or Borders.com. These privacy policies promised that Customer Information would only be transferred to third parties with the express consent of the customer, and only to enable third parties to aid Borders in servicing its customers. These policies did not include language addressing the sale of information in a bankruptcy proceeding or other sale or disposition of the business.
- In May 2008, Borders added language to the privacy policy providing the right to sell the Customer Information as part of a sale or transfer of Borders' assets. The change, as we understand it, was made by amending the privacy policy posted on Borders' website, but no notice of this change was sent to Borders' customers.

B. Statement of Concerns

1. Pre-May 2008 Information: Any information collected by Borders prior to May 2008 was subject to a privacy policy that prohibited the sale of customer

² It is also our understanding that telephone numbers were not collected from Borders' customers. As such, we do not believe our telemarketing privacy laws would be triggered; if we are incorrect, then those laws – and their limits on being able to carry over a prior "business relationship" authorization – would have to be reviewed as well.

information without exception. Thus, any sale of this information violates the privacy policy. While the privacy policies allowed for updates to the policy – "We reserve the right to update our Privacy Policy from time to time. We will make reasonable efforts to notify you of these updates" – and the post-May 2008 privacy policy included an exception for the sale of all assets, there are questions about whether this change is applicable to pre-May 2008 information.

First, we understand Borders' customers received no notice of this policy change; failure to provide *any* notice does not constitute the promised "reasonable efforts" to notify customers of changes. The fact that customer information may be sold to an unknown third party at a liquidation auction would be significant to a customer's decision to share that information with Borders. Customers who provided their information prior to May 2008 had a right to know that an important and substantive term in their agreement with Borders was being altered.

Second, even if the customers had received notice, it does not appear customers were given the option to opt-out of the ongoing data collection and/or to have their existing data purged from Borders' databases. As a result, Borders both undermined the expectations of its customers by unilaterally and retroactively altering important terms in its privacy policy, and denied its customers the chance to discover this change or to take action to protect information that they did not wish to be shared.

Finally, for the reasons discussed below, even if it is enforceable, the relevant exception for a sale of assets in the May 2008 policy does not appear to apply to a bankruptcy liquidation.

2. Post-May 2008 Information: In May 2008, Borders added an exception to its privacy policy's general prohibition on the sale of customer information. In particular, it provides:

Circumstances may arise where for strategic or other business reasons Borders decides to sell, buy, merge or otherwise reorganize its own or other businesses. Such a transaction may involve the disclosure of personal and other information to prospective or actual purchasers, or receiving it from sellers. It is Borders' practice to seek appropriate protection for information in these types of transactions. *In the event that Borders or all of its assets are acquired in such a transaction, customer information would be one of the transferred assets.*

(Emphasis added.)

The contemplated transaction assumes Borders will continue as an ongoing concern after the transaction, or otherwise the assets will be sold together as a single unit. There is little support for the argument that Borders intended, or customers agreed to, the

sale of Customer Information in a liquidation auction, where the Customer Information could be purchased piecemeal by third parties who wish to use it for purposes other than for the book and other media retailing business currently operated by Borders.

3. Additional Concerns

a. **Purchase History Information:** Information relating to the purchase of books, videos and related items are of special concern because they reveal a person's thoughts, interests and intents. The Video Privacy Protection Act (18 U.S.C. 2710), which prohibits the sale or release of customer information in association with the sale of DVD's/video, was enacted after information was revealed to the public about Supreme Court nominee Judge Bork's video rental preferences during his confirmation hearings. The potential sensitivity of information relating to purchases of books, movies, and the like is further highlighted by the ongoing debate over the provisions in the Patriot Act that allow the government to obtain such information. Thus, it is clear that such information raises additional privacy concerns beyond those applicable to other less sensitive purchases that should be considered in determining what information can be sold. Whether the specific provisions of the Video Privacy Protection Act and provisions of related state laws do or do not apply to the transaction, it is clear that this is a highly sensitive area that warrants special treatment.

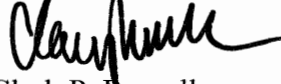
b. **Identity of Purchaser:** In light of the lack of consent to the sale provision, and the nature of the information proposed for sale, an additional concern relates to the steps that will be required to determine a) the purchaser is a bona fide venture that will not misuse the information; b) what uses the purchaser intends to make of the information (i.e., will it continue to operate an online business through which customers will receive some value from having their customer information and preferences taken into account); and c) what privacy requirements will be imposed on the purchaser.

c. **Transfer Provisions:** To the extent Borders is allowed to sell some or all of the Customer Information, we are concerned that customers will not be given an opportunity to review the accuracy of the Customer Information, and opt-in to (or at least opt-out of) the transfer prior to the transfer of data, and that otherwise Borders has sufficient resources to ensure a secure transfer of the Customer Information to the purchaser.

The Offices of the Attorneys General of New York, Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, Ohio, Oregon, South Dakota, Utah, Vermont and Washington take the privacy interests of its citizens very seriously. We emphasize the importance of protecting consumer interests. Borders has made representations to its customers about the privacy of the information they share, and these representations must be honored.

Thank you for your consideration and please feel free to contact me with any questions or comments you may have.

Very truly yours,

A handwritten signature in black ink, appearing to read "Clark P. Russell", written over the typed name.

Clark P. Russell

Assistant Attorney General

cc: Offices of the Attorneys General of Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, Ohio, Oregon, South Dakota, Utah, Vermont and Washington

EXHIBIT G



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

LINDA L. KELLY
ATTORNEY GENERAL

September 16, 2011

Bureau of Consumer Protection—Harrisburg Office
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: 717.787.9707
Facsimile: 717.705.3795

VIA ELECTRONIC MAIL TO: mbaxter@cov.com

Michael St. Patrick Baxter, Esquire
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004.2401

Re: Borders Group, Inc. – Sale of Customer Information in Bankruptcy


Dear Mr. Baxter:

I am writing on behalf of Pennsylvania Attorney General Linda L. Kelly. As the chief law enforcement office of the Commonwealth of Pennsylvania, the Office of Attorney General, through the Bureau of Consumer Protection, is responsible for enforcing its consumer protection laws, including the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* In this role, our Office has a particular interest in ensuring that representations made by Borders to consumers, regarding the privacy of their personal information, are in fact honored.

In this respect, this Office supports and joins in the letters, dated September 12, 13 and 14, 2011, previously submitted to you on behalf of other States' Attorneys General. We share the concerns, expressed therein, with Borders' proposed sale of customer information as part of its bankruptcy proceeding in the Bankruptcy Court for the Southern District of New York.

Thank you for your consideration of this matter.

Very truly yours,


Linda J. Williams
Chief Deputy Attorney General
Director, Bureau of Consumer Protection