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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 11-10614-mg

Adv. No. 11-02567-mg

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In the Matter of:

BORDERS GROUP, INC. et al.,
Debtors.

- - - - -x

BORDERS, INC., et al.,

v.

NEXT JUMP, INC.

- - - - -x

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

September 22, 2011
2:11 PM

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

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

[1560] Fifth Notice of Objection to Claims; Debtors' Fifth Omnibus Objection to the Allowance of Certain Claims: (I) Duplicate Claims, and (II) Amended Claims

[1401] Motion for Orders (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)

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[1561] Sixth Notice of Objection to Claims: Debtors' Sixth
Omnibus Objection to the Allowance of Certain Claims: Late
Filed Claims

[8] Adversary proceeding 11-02567-mg Borders, Inc. et al v.
Next Jump, Inc. Case Management and Scheduling Conference

[1413, 1793] Motion to Allow Claims of Administrative Expense

[1701] Joint Motion to Approve Stipulation and Agreed Order
between Carl R. Hogan and Debtors Modifying the Automatic Stay
Pursuant to Section 362 of the Bankruptcy Code

Transcribed by: Linda Ferrara

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13
14 BORDERS GROUP, INC.
15 Interested Party

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17 BY: MATT CHOSID (TELEPHONICALLY)

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20 COVINGTON & BURLING, LLP
21 Representing Consumer Privacy Ombudsman

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23 BY: YARON DORI (TELEPHONICALLY)
24 JOSHUA MCKARCHER (TELEPHONICALLY)

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ALIXPARTNERS
Chief Restructuring Officer

BY: HOLLY ETLIN (TELEPHONICALLY)

CONTRARIAN CAPITAL MANAGEMENT
Interested Party

BY: KIMBERLY B. GIANIS (TELEPHONICALLY)

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Creditor, Experian Marketing Services, Inc. &
CheetahMail, Inc.

BY: REED HEILIGMAN (TELEPHONICALLY)

HOLLAND & KNIGHT, LLP
Creditor, Plaza Las Americas Inc.

BY: JAMES H. ROLLINS (TELEPHONICALLY)

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PUBLISHERS WEEKLY

Interested Party

BY: JUDITH ROSEN (TELEPHONICALLY)

HOHMANN, TAUBE & SUMMERS, LLP

Creditor, Centre at River Oaks LP

BY: MORRIS WEISSMAN (TELEPHONICALLY)

CONNOLLY BOVE LODGE & HUTZ LLP

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P R O C E E D I N G S

THE COURT: The next matters are Borders Group, Inc., number 11-10614. All right. I have a list of appearances in front of me. Mr. Glenn?

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

Your Honor, we have a handful of matters on the calendar today. With Your Honor's permission, we would like to save the IP related sale matters last. The way we would proceed with Your Honor's permission is number one, the item marked on the agenda as the other parties' motion Cole BD Rapid City SD, LLC docket number 1413, which was a stipulation and agreed order resolving the motion for allowance of claim, we would take that first and then deal with other claims' matters, landlord matters and then finally with IP.

THE COURT: Okay.

MR. GLENN: Your Honor, the Cole claim, docket number 1413, we have submitted a proposed form of stipulation and order resolving that motion, docketed at number 1793. We received no objections to that motion. So unless Your Honor has any questions about that, we would like that approved and the landlord, I believe their counsel is on the phone as we speak, if he --

THE COURT: All right. Does anybody else wish to be

1 heard with respect to the Cole BD Rapid City Motion for
2 allowance and payment of administrative expense and the
3 proposed stipulation that's been lodged with the Court?

4 (No response)

5 THE COURT: All right. Hearing one, the stipulation
6 and agreed order which is at docket 1793 is approved.

7 MR. GLENN: Thank you, Your Honor. Next I'll cede the
8 podium to my colleague, Ms. Angell for the fifth claims
9 objection, docket number 1560.

10 MS. ANGELL: Good afternoon, Your Honor. Michele
11 Angell from Kasowitz, Benson, Torres & Friedman on behalf of
12 the debtors.

13 The debtors filed their fifth and sixth omnibus
14 objections to the allowance of certain claims on August 17.
15 These objections were filed to expunge, like the last ones, on
16 an administrative non-substantive basis, duplicate amended
17 superseded and late filed claims we've identified.

18 Additionally, on the 17th, we filed the declaration of
19 David Head of AlixPartners, once again, who coordinates the
20 claims reconciliation process in support of both the fifth and
21 the sixth claim objections. Mr. Head is dialed into the
22 hearing today and we served the claim objections and Mr. Head's
23 declarations on all claimants affected by each one and their
24 counsel, if known.

25 So I will take the fifth first; the fifth omnibus

1 objection sought to expunge duplicate claims which duplicate at
2 least one other proof of claim filed against the same debtor by
3 the same claimant and are believed by the debtors to relate to
4 the same subject matter, as well as amended superseded claims
5 which were amended and superseded by a later filed proof of
6 claim or claims by the same claimant, also believed by the
7 debtors to relate to the same subject matter. We received no
8 formal responses to the fifth omnibus objection and, in fact,
9 only two informal inquiries. We submitted a revised proposed
10 order with respect to the fifth omnibus objection on Monday at
11 docket number 1807.

12 The debtors believe that if the claims set forth as
13 claims to be disallowed on the fifth omnibus objection and the
14 revised exhibits are not disallowed and expunged, these
15 claimants will receive duplicative and extraneous recoveries to
16 the detriment of all other creditors in these cases. Affected
17 claimants were served with the objection, as was their counsel
18 and they had twenty-one days to respond as set forth in the
19 claims procedures order. The informal inquiries we received
20 were addressed to both the claimants and the debtors'
21 satisfaction and all affected claimants and their counsel were
22 also served with the revised proposed orders we filed on
23 Monday.

24 THE COURT: You amended the exhibits to omnibus
25 objection five?

1 MS. ANGELL: Yes, we amended only the duplicative
2 exhibit. There was no amendment to the amended superseded
3 exhibit and the exhibit was amended only at the request of one
4 claimant that wanted a different surviving claim, as opposed to
5 remaining claim because she had not put the case number on --

6 THE COURT: Okay.

7 MS. ANGELL: -- or the debtor on it, so --

8 THE COURT: All right. Does anybody wish to be heard
9 with respect to the fifth omnibus objection?

10 (No response)

11 THE COURT: All right. Then the objections are
12 sustained.

13 MS. ANGELL: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MS. ANGELL: I'll move on to the sixth.

16 THE COURT: Sure.

17 MS. ANGELL: The sixth omnibus objection sought to
18 expunge late filed proofs of claim which were filed after the
19 June 1 general bar date that were not filed by governmental
20 units or by any other claimant as to whom that bar date might
21 not apply, as well as to expunge claims for rejection damages
22 that were filed after that particular claimant's forty-five
23 day, from rejection bar date had passed.

24 For the sixth omnibus objection, in addition to
25 approximately six informal inquiries and responses, we did

1 receive five formal responses which are filed on the docket and
2 are listed on our agenda today. Those were filed by RepNet
3 LLC, University of Virginia Press, Andrew Vavagliagetti (ph.),
4 Santa Grosse and University Press of Kansas. RepNet had also
5 cross-moved to file a late proof of claim and Mr.
6 Vavagliagetti's response additionally included a request to
7 amend his unliquidated proof of claims to liquidate the
8 amounts.

9 Your Honor, we did take and intend to continue taking
10 a very strict stance in objecting to late filed claims. We
11 believe that the bar date is the bar date and it was noticed on
12 everyone and if proof of claims were filed after their
13 applicable bar date, we objected to them period.

14 We believed that that was the most equitable and
15 fairest way to handle it for all the debtors' stakeholders.
16 That said, to the extent we received formal or informal
17 responses, which we did, we did then consider the claimant's
18 explanation for the lateness in lieu of the pioneer standard
19 set forth by the Supreme Court for excusable neglect in
20 deciding whether we would pull claims from the sixth omnibus
21 objection for the time being.

22 The factors we weighed included prejudice to us,
23 length of the delay, the claimant's good faith and the reason
24 for the delay including whether it was within the reasonable
25 control of the claimant.

1 Accordingly, we did decide to adjourn the hearing with
2 respect to a handful of claimants including the ones that filed
3 the formal responses as is an option to us under the claims
4 procedures order. With one exception, where we had made an
5 error and the claim was filed within forty-five days of the
6 rejection, we reserved in writing to the claimants all of our
7 rights with respect to the objections we adjourned and the
8 rights to assert any other objections. And we adjourn with
9 respect to these claimants, so that we can further consider the
10 responses and explanations we received in light of Pioneer and
11 to negotiate with certain of them and to schedule a separate
12 hearing on the contested late claims if need be.

13 And we submitted a revised proposed order for the
14 sixth omnibus objection to this effect, also on Monday at
15 docket number 1808 and based on our representations, RepNet
16 filed a withdrawal of their response which had included that
17 request to file a late proof of claim at docket 1810 and Mr.
18 Vavagliagetti's counsel filed a modified response at docket
19 1833 withdrawing the request to amend the proof of claim.

20 UNIDENTIFIED SPEAKER: She's looking at the penalty of
21 (indiscernible)??51:14.

22 THE COURT: I'm sorry, I wasn't able to hear you but
23 allow counsel to finish and then I'll give you a chance to
24 respond. Go ahead, Ms. Angell.

25 MS. ANGELL: Your Honor, all of the claimants who

1 filed the late claims on the sixth omnibus objections and if
2 known, their counsel, had notice of the bar date in these
3 cases. On April 8, we served the bar date order on the master
4 service list and everyone who filed a notice of appearance on
5 April 18 and 20, we served the bar date notice and proof of
6 claim form which were approved by the Court in the bar date
7 order on all known claimants. On April 25, notice of the
8 deadlines for filing proofs of claims was published in the
9 national edition of The New York Times.

10 So the debtors believe that if the claims set forth as
11 claims to be disallowed on the sixth omnibus objection revised
12 exhibits are not disallowed and expunged, these claimants would
13 receive distributions that they are not entitled to because
14 such proofs of claims were not timely to the detriment of all
15 other creditors of these estates. Claimants were served with
16 the sixth omnibus objection as was their counsel, if known, and
17 they had the three weeks -- twenty-one days to respond. And
18 the debtors carefully considered the handful of responses we
19 did receive as I discussed and we did adjourn certain of the
20 claims from the hearing based on claimant explanation or
21 further review where we deemed it appropriate. And all
22 affected claimants and if known, their counsel, were also
23 served on Monday with the revised proposed orders.

24 THE COURT: All right. The Court notes that in
25 support of both the fifth and sixth omnibus objections, the

1 objections were supported with the declaration of David F.
2 Head, managing director of AlixPartners. That declaration can
3 be found at ECF docket number 1562. And with respect to the
4 sixth omnibus objection, the Head declaration asserts that he's
5 examined the proofs of claims subject to the sixth omnibus
6 objection and has determined that the claims listed in the rows
7 entitled claims to be disallowed, which is in Exhibit A, were
8 filed after the general bar date and/or the rejection bar date
9 had passed and they were not filed by governmental units or any
10 other claimant to whom the general bar date and rejection date
11 might not be applicable.

12 So the Court has reviewed the Head declaration with
13 respect to both the fifth and the sixth omnibus objections.
14 Does anybody else wish to be heard with respect to the sixth
15 omnibus objection? Anybody on the phone? Does anybody on the
16 phone wish to be heard with respect to anything on the sixth
17 omnibus objection?

18 (No response)

19 THE COURT: All right. The Court has reviewed the
20 sixth omnibus objection, the declaration of Mr. Head in support
21 of it and with those matters that Ms. Angell has indicated had
22 been withdrawn from this motion for -- reserving all of your
23 rights --

24 MS. ANGELL: That's correct.

25 THE COURT: -- the objection is sustained.

1 MS. ANGELL: Thank you, Your Honor.

2 THE COURT: Thank you very much.

3 MS. ANGELL: We have discs we'll hand up at the end.

4 THE COURT: Thank you very much.

5 MR. GLENN: The next item on the agenda, Your Honor,
6 is the second round lease auction lease auction sale hearing
7 matter, docket number 1399. Mr. Fliman will handle that.

8 MR. FLIMAN: Good afternoon, Your Honor. Daniel
9 Fliman on behalf of debtors and debtors-in-possession.

10 Your Honor, before the Court is the debtors motion to
11 approve the sales of various non-residential real property
12 leases. On August 11, the Court approved bidding procedures
13 that contemplated two rounds; a first round, which Your Honor
14 heard on September 8 and today we're here on the results of the
15 second round of the lease sales.

16 The debtors have agreements on ten leases, seven of
17 those agreements are lease termination agreements with the
18 landlords, three of those are assumption assignments
19 agreements, of those, one is with an affiliate of the landlord,
20 one is with a designee of the landlord and the last is to a
21 third party.

22 Of the ten agreements that I just identified, only one
23 was subject to a competitive process and that was the lease --

24 THE COURT: Whoever is on the phone, you need to put
25 your phone on mute.

1 Go ahead, Mr. Fliman.

2 MR. FLIMAN: -- and that was the lease in Puerto Rico.
3 There, the debtors conducted an auction and declared that the
4 landlord was the highest and best bidder after consultation
5 with the committee. The landlord filed an objection to the
6 auction process and we're pleased to announce that that
7 objection has been resolved. The debtors are working to
8 document a lease termination agreement with the landlord that
9 contemplates consideration of 425,000 dollars. We're
10 continuing to work on that documentation and we'll submit it to
11 the Court once it has been reviewed and approved by the
12 committee.

13 THE COURT: All right.

14 MR. FLIMAN: With respect to the nine other
15 agreements, Your Honor, they were the only bids that were
16 received with respect to each of the leases. Last night we
17 filed proposed orders and agreements for eight of those nine
18 agreements. The only agreement that we did not file last night
19 was for location 537 at San Luis Obispo, California. We have
20 an agreement in principle with the landlord that is going to be
21 an assignment to the landlord's affiliate and we're working to
22 document that with the Kelley Drye firm. And after the
23 committee's had an opportunity to review that, we'll submit it
24 to Your Honor for consideration.

25 Of the eight agreements that we filed last night, Your

1 Honor, six of them have been finalized, have been signed by
2 both parties and have been approved by the committee and we've
3 submitted them in final form for the Court's consideration.

4 And if Your Honor would like, I can identify which of those --

5 THE COURT: Sure, why don't you just list which ones
6 those are.

7 MR. FLIMAN: Sure. Those are stores 120, 130, 169,
8 237, 287 and 451. With respect to stores 464 and 547, we have
9 agreements in principle approved by the committee. We're just
10 finalizing the documentation and hope to be done with that
11 today or tomorrow.

12 THE COURT: All right. Does anybody else wish to be
13 heard? Mr. Buechler, does the committee want to be heard on
14 this?

15 MR. BUECHLER: Your Honor, with regard to this and the
16 other motions heard, I'm Bruce Buechler from Lowenstein Sandler
17 on behalf of the committee, what has been represented by the
18 debtors is accurate. The committee's reviewed this and is on
19 board with this. The only open issue, I don't know if you want
20 to deal with this, is 582 with the Vornado (ph.) lease.

21 MR. FLIMAN: Your Honor, I think what Mr. Buechler is
22 referring to is there had been a motion to compel that had been
23 filed by the landlord at Penn Plaza.

24 THE COURT: That got resolved, didn't it or --

25 MR. FLIMAN: Well, Your Honor, I have spoken to

1 counsel from Fried Frank that's here. We are working on a
2 resolution.

3 THE COURT: Okay.

4 MR. FLIMAN: And they're not asking to go forward
5 today on that.

6 THE COURT: All right. That's fine.

7 MR. FLIMAN: Okay.

8 THE COURT: Anybody else wish to be heard with respect
9 to any of the second round leases?

10 (No response)

11 THE COURT: All right. The Court has considered the
12 debtors' motion for an order pursuant to Sections 105, 363 and
13 365 and various Bankruptcy rules for approval of the sales; in
14 many cases, this is just an assignment of the leases back to
15 the landlord or an affiliate of the landlord. With respect to
16 those as to which final documentation has been submitted to the
17 Court, the Court approves those, each of those transactions.
18 For those that remain subject to final documentation, after the
19 debtors and the committee's counsel and obviously the
20 landlord's counsel have completed and come to a resolution of
21 the documentation, you can submit it to the Court, if they're
22 satisfactory in form. They'll be entered without the necessity
23 of a further hearing. All right?

24 MR. FLIMAN: All right. Thank you, Your Honor.

25 THE COURT: Thank you very much, Mr. Fliman.

1 MR. GLEIT: Good afternoon, Your Honor. Jeffrey Gleit
2 at Kasowitz, Benson on behalf of the debtor. I'm just going to
3 address the next two matters on the agenda; the first is --
4 it's a joint motion to approve stipulation and agreed order
5 between Carl Hogan and the debtors modifying the automatic stay
6 pursuant to Section 362 of the Bankruptcy Code.

7 Your Honor, the stipulation that we submitted relates
8 to an eminent domain award action appeal in the State of
9 Washington. We negotiated a stipulation with the other party,
10 which is Hogan, the landlord, and we submitted it to the Court
11 prior to today's hearing and we had provided the committee with
12 a copy and I received a few comments.

13 THE COURT: All right.

14 MR. GLEIT: And unless Your Honor has any questions, I
15 would ask that the stipulation be approved as submitted.

16 THE COURT: When you say it was with a few comments, I
17 reviewed it; is the document that I reviewed, is that the final
18 document?

19 MR. GLEIT: Yes, Your Honor. I'm sorry. The
20 committee provided comments which were incorporated.

21 THE COURT: Okay. Mr. Buechler?

22 MR. BUECHLER: That is correct, Your Honor. The
23 committee's report was submitted to the Court, provided
24 comments and we have no objection to the form it was submitted.

25 THE COURT: Thank you. The Court reviewed the

1 stipulation with Hogan. It's -- the motion was ECF document
2 number 1701 and this is clearly appropriate. The matter is on
3 appeal. The debtor's ability to recover money that's been
4 awarded, depends on the outcome of the appeal and it's in the
5 best interest of the estate that the stay be lifted and the
6 matter of the appeal go forward. So that is approved. Thank
7 you, Mr. Gleit.

8 MR. GLEIT: Thank you, Your Honor. And briefly, Your
9 Honor, on the agenda we had the case management conference for
10 Next Jump.

11 THE COURT: Yes.

12 MR. GLEIT: Yesterday we had submitted a proposed case
13 management and scheduling order -- and actually before I just
14 say that, Your Honor, Next Jump has filed a motion to withdraw
15 the reference in this adversary proceeding.

16 THE COURT: I saw it. I saw it.

17 MR. GLEIT: I believe our time to respond in September
18 30 and we're evaluating our options and we're in discussions
19 actually with Next Jump anyway, about how the action's going to
20 proceed. Yesterday I submitted a case management and
21 scheduling order. About an hour or two ago, we made one change
22 to it. I have a revised copy that I'd like to hand up.

23 THE COURT: Let me ask, is the case management and
24 scheduling order that was submitted, is that a result of
25 conferring with Next Jump's counsel? Are those dates that are

1 included agreed dates?

2 MR. GLEIT: Yes, Your Honor.

3 THE COURT: Okay. And what is the change that you
4 made?

5 MR. GLEIT: It was just in paragraph 1(c) and we made
6 a clarification which was -- it reads now, "Except for the
7 amended pleadings provided for in subsection A and B, above
8 amended pleadings may not be filed and additional parties may
9 not be joined except with leave of the Court".

10 THE COURT: Okay. And am I correct, the motion to
11 withdraw the reference has been assigned to Judge Swain?

12 MR. GLEIT: Yes, Your Honor.

13 THE COURT: All right. The only question I have is
14 that in some prior instances even where a motion to withdraw
15 the reference has been filed, I have always entered a case
16 management order, discovery ought to go forward whether the
17 case is going to go forward here or in the district court, so
18 that I'm in agreement with.

19 There have been times when I have -- let me find
20 exactly -- pursuant to 28 U.S.C. 157(b)(3), I have on occasion
21 entered included provisions in a case management order. (b)(3)
22 provides that "The bankruptcy judge shall determine, on the
23 judge's own motion or on timely motion of a party, whether a
24 proceeding is a core proceeding under this subsection or is a
25 proceeding that is otherwise related to a case under Title 11".

1 I'll stop the quote there. It goes on.

2 And so, even in instances where a motion to withdraw
3 the reference has been filed, I have from time to time required
4 the parties to brief before me the issue of whether it's core
5 or non-core. I know I looked briefly at the motion to withdraw
6 the reference and I know it in part relies on Stern v.
7 Marshall. Certainly, the complaint includes many state law
8 claims but what's not clear to me, Mr. Gleit, is whether all of
9 those claims arose during the bankruptcy case because Stern v.
10 Marshall certainly dealt with the issue of prepetition claims
11 but in passing, it seemed to suggest that the bankruptcy court
12 would have jurisdiction if the claims arose in the case itself,
13 based on the prior conferences we've had, hearings we've had,
14 I'm not sure but it -- the focus had been on things that had
15 happened during the pendency of this case. Can you clarify?

16 MR. GLEIT: Your Honor, you are correct on the vast
17 majority of the claims, if not all that did arise, the actions
18 and events occurred post-petition.

19 THE COURT: Well, if you submit the case management
20 order, I'll certainly enter -- I did review it earlier that the
21 change you're making certainly is appropriate. I just want
22 everybody to know, I may add -- enter a separate order under
23 157(b) (3) requiring the parties to brief before me this issue
24 of whether -- it's more than just whether they're core because
25 after Stern v. Marshall, there's certainly a category of core

1 claims as to which an Article I Judge can't enter a final
2 judgment but certainly the Court appeared to recognize that
3 claims arising in the case itself may be appropriate to be
4 adjudicated by an Article I Judge. So I will consider in the
5 next day or two whether to enter a separate order on that.

6 MR. GLEIT: Okay.

7 THE COURT: Okay.

8 MR. GLEIT: Thank you, Your Honor. And I believe that
9 the next matter now, Mr. Glenn's going to address which is the
10 IP asset sale motion.

11 THE COURT: Thank you.

12 MR. GLENN: Yes, moving on to docket number 1401, IP
13 asset sale, again, Andrew Glenn for the record.

14 Your Honor, as you know we had Your Honor approve
15 certain bidding procedures relating to the sale of
16 substantially all of our IP assets. Pursuant to those
17 procedures, we negotiated with an entity known as PC Mall, who
18 became the stalking horse bidder for substantially all of the
19 debtors' intellectual property.

20 On September 14 of this year, we conducted an auction
21 that spanned over nine hours with the PC Mall bid of 3.5
22 million dollars as the opening bid. At the end of the process,
23 which was conducted under the auspices of David Peress of Hilco
24 Streambank and our firm and AlixPartners, the estate is to
25 yield if Your Honor approves these transactions, 15.775 million

1 dollars.

2 We filed a notice of the auction results announcing
3 the various bidders shortly after the auction. No party-in-
4 interest has objected but as Your Honor certainly knows, the
5 ombudsman appointed in this case has issued a report with
6 respect to his findings concerning the proposed transaction.

7 We would note for the record that we've had numerous
8 conversations with the State Attorneys General that have
9 reviewed this transaction with the Federal Trade Commission and
10 various other authorities.

11 We have filed with the Court yesterday, I believe, the
12 final form of the Barnes & Noble asset purchase agreement.
13 Barnes & Noble was the winning bidder for the IP assets subject
14 to other licensees for which we also seek approval today.

15 THE COURT: Let me ask you this.

16 MR. GLENN: Yes.

17 THE COURT: The sales, other than to Barnes & Noble,
18 do they stand alone? Do they go forward, whatever the result,
19 with respect to the Barnes & Noble sale?

20 MR. GLENN: It all works together, Your Honor. The
21 Barnes and Noble asset purchase agreement has a closing
22 condition that that transaction can't close until the licenses
23 for which we're receiving separate consideration, are
24 documented. So I believe as of now, the correct answer is that
25 it's all one big ball of wax.

1 We do have the right to waive the closing condition in
2 the Barnes & Noble agreement and close the Barnes & Noble
3 agreement and not close with the separate licenses.

4 THE COURT: Well, actually I was asking just the
5 opposite. Do the other agreements close whatever the outcome
6 with respect to Barnes & Noble? I want to know whether I can
7 approve today those portions of the sale that are not the
8 subject of the ombudsman's report as to which no objections
9 have been filed.

10 MR. GLENN: One moment, Your Honor.

11 (Pause)

12 THE COURT: I mean we have a courtroom full of
13 lawyers, some of whom I suspect are here on other portions of
14 the sale and if those can be approved now, I'll approve them
15 now.

16 MR. GLENN: Okay. Your Honor, I think the answer
17 fairly is no and practically is no.

18 THE COURT: Is there something in the documents that I
19 have that says that?

20 MR. GLENN: Well, I think that the structure of the
21 transactions assumes it. Barnes & Noble is going to become the
22 owner of the intellectual property. What the other parties are
23 getting is paid up perpetual licenses in their respective
24 jurisdictions. So they're not getting ownership of that
25 intellectual property in the strict sense of the word.

1 So I think that while we could go ahead and as a
2 practical matter come up with a license that we like and the
3 licensee likes, but ultimately it's subject to the approval of
4 the actual owner of the trademarks which is Barnes & Noble.

5 THE COURT: All right.

6 MR. GLENN: Your Honor, before I proceed, does Your
7 Honor have any specific concerns about proceeding today with
8 the IP sale or is that just --

9 THE COURT: No. Well, we can proceed --

10 MR. GLENN: Okay.

11 THE COURT: -- but don't necessarily expect you're
12 going to get a result.

13 MR. GLENN: I -- we had a suspicion that that might
14 happen due to the late breaking developments yesterday. So,
15 where we are, because I think it's very important for Your
16 Honor to understand, for the licensees to understand, those
17 separate licenses that we seek to enter into have not been
18 finalized, the economic arrangements have. The parties have a
19 general understanding that the licensees are to receive paid up
20 perpetual licenses in their respective jurisdictions but on the
21 fringes of that, there are still matters that are still open.

22 THE COURT: But first to be clear, none of those,
23 other than Barnes & Noble, no one is getting personally
24 identifiable information; am I correct?

25 MR. GLENN: Not -- that's correct. That's correct.

1 So we have the licensee's counsel in court today and they have
2 articulated concerns about going forward today, given the
3 uncertainty about their licenses. The way we want to proceed
4 if Your Honor will approve it, is to have everything approved
5 today if at all possible, and then move forward on the
6 definitive documentation for these licenses, so that we can get
7 the ball rolling and execute these transactions as soon as
8 possible.

9 Going to the ombudsman's report, because that's really
10 the heart of the matter --

11 THE COURT: Well let me ask -- I have read the
12 ombudsman's report, late arriving, and I gather reading the
13 report it sounds as if the ombudsman held off on filing the
14 report to give the parties a chance to see whether they could
15 resolve the issues but it was not light reading, let me put it
16 that way.

17 MR. GLENN: I understand that.

18 THE COURT: And I read Cravath's statement on behalf
19 of Barnes & Noble and I read your very late statement as well.
20 So I've read everything. I also did and my law clerks have
21 done, a considerable amount of searching through very little
22 precedent. I've read what's available about Toy Smart which is
23 argued as an analogous, I won't say precedent because there was
24 no adjudicated result, there was a consent and most of the FTC
25 matters that were commenced were resolved by consent orders.

1 Part of what's bothering me is looking at 363(b) (1),
2 unless I conclude that the sale is consistent with Borders'
3 policy that was in effect on the date of the commencement of
4 the case, that's not a show stopper. The analysis then goes to
5 363(b) (1) (B) (i) and (ii). Those refer, certainly (B) (i),
6 requires the Court to give due consideration to the facts,
7 circumstances and conditions of such sale and I don't have any
8 sworn testimony. I have an ombudsman's report which is very
9 carefully done but relies on representations that were made to
10 the ombudsman about a lot of facts but -- and in your
11 submission as well, there's no -- it's not supported by any
12 declaration.

13 So what I have are a lot of representations about
14 facts but no facts and if the Court needs to make a
15 determination based on facts, circumstances and conditions of
16 the sale, the Court is going to do so on an evidentiary record.
17 I don't have that.

18 And I understand the argument in your papers that the
19 applicable policy, privacy policy is the May 2008 privacy
20 policy. I believe I understand the ombudsman's contrary
21 position in part relying on FTC consent orders, FTC complaints,
22 the position the FTC has taken, that a reservation of rights,
23 I'll call it that, that existed in your pre-May 2008 policy
24 statement, Borders reserved the right to change its policy, the
25 argument that that's not sufficient notice to consumers about

1 the change in policy. So it's certainly -- I don't think it is
2 clear as a matter of law that the policy in effect on the
3 commencement of this case at least as to those consumers who
4 signed up with Borders pre-May 2008, that post-May 2008 policy
5 is the one that's effective for them. So I'm concerned that I
6 don't have a factual record.

7 I mean the statute, I understand, I know it was
8 changed in 2005 and the provisions about appointment of an
9 ombudsman and then the 363 provisions that I've looked at,
10 Collier describes these sections as, I think it's my term,
11 opaque, but concludes that it's very uncertain what this all
12 means when in 363(b)(1)(B)(ii) talks about finding -- that no
13 showing was made that such sale or such lease would violate
14 applicable non-bankruptcy law. I'm not quite sure what that
15 means. What is a showing? Am I supposed to make some
16 determination?

17 Then to add to all of your uncertainty, and the briefs
18 didn't address this, the Second Circuit's decision in Orion
19 Pictures Corp. v. Showtime Network, Inc., In Re: Orion Pictures
20 Corp, 4 F.3d 1095 (2d Cir. 1993) -- are you familiar with the
21 case?

22 MR. GLENN: That's the one about proprietary
23 information?

24 THE COURT: No.

25 MR. GLENN: No?

1 THE COURT: That one is actually about -- well it's
2 arises under 365 --

3 MR. GLENN: Right.

4 THE COURT: -- assumption of an executory contract
5 where the bankruptcy court had -- there was also an adversary
6 proceeding pending at the time and the bankruptcy court in the
7 context of the 365 assumption had reached a judgment about
8 whether the contract was breached or not and the Second Circuit
9 says, 365, and I think it is analogous to 363, involves an
10 issue of exercise of business judgment by the debtor, is a
11 summary proceeding and doesn't require or permit the bankruptcy
12 court to adjudicate the underlying breach. Analogizing it
13 here, whatever I do, I do not believe and I'd certainly allow
14 briefing on this, but I have serious questions whether anything
15 I do, particularly with this standard about a showing as to
16 whether there's a violation of applicable non-bankruptcy law, I
17 don't think it precludes the FTC or a State Attorneys General
18 from commencing a police or regulatory action that wouldn't be
19 covered by the automatic stay challenging any sale that I did
20 approve. So this is all very murky to me.

21 MR. GLENN: It would help us, Your Honor, if we could
22 break this down into pieces because if Your Honor is concerned
23 about all the pieces, we might react a certain way. If Your
24 Honor is concerned only about some of the pieces, then it might
25 actually facilitate a resolution.

1 As we see it, there are three sort of categories of
2 consumers. First are the consumers who only transacted
3 business with us prior to May of 2008.

4 THE COURT: Are there any of those?

5 MR. GLENN: There's 84,000.

6 THE COURT: Of those?

7 MR. GLENN: Of those, that are on this list, that we
8 did business before 2008 but not after -- May of 2008, I should
9 be clear. There are folks that did business with us before May
10 of 2008 and then continued to do business with us after May
11 2008 when this commencement date privacy policy was in effect.

12 THE COURT: What's the number approximately for those?

13 MR. GLENN: I will try to get that number for you.

14 THE COURT: Let me just stop you for a second, okay?
15 Because I do have a question for you. Let me find your -- in
16 the debtors' statement in support of the motion at page 13 in
17 paragraph 25 -- it's really 24 and 25, in 25 you say, "Although
18 the CPO correctly concluded that such customers can be deemed
19 to have consented to the change in the privacy policy, the CPO
20 nevertheless concluded that such consent does not extend to
21 pre-May 27, 2008 transaction history", closed quote.

22 I may have missed it but I didn't find where the
23 ombudsman concluded that anybody who signed up pre-May 2008 and
24 conducted transactions after that date consented with respect
25 to the change in policy with respect to the post-May 2008

1 transactions. I see you say it but I didn't see where the
2 ombudsman said it.

3 MR. GLENN: If Your Honor looks at the conclusion
4 paragraph and I don't have the page number --

5 THE COURT: Well, if it's the -- hold on.

6 MR. GLENN: Let's see, it's the first and last page, I
7 believe. It says, "Debtor may transfer to buyer PII".

8 THE COURT: Hold on. Let me just find it; okay?

9 MR. GLENN: Okay. Sure.

10 THE COURT: Go ahead, Mr. Glenn.

11 MR. GLENN: Yes, it's paragraph A on page 1.

12 THE COURT: I'm sorry?

13 MR. GLENN: Paragraph A on page 1 of the report, I
14 believe.

15 THE COURT: Hold on. Let me find it. Okay.

16 MR. GLENN: "The debtor may transfer to buyer PII
17 other than the information about certain audio visual material
18 described in paragraph C below, that was collected after May
19 27, 2008 pursuant to debtors' May 27, 2008 privacy policy".

20 And then "Provided that buyer adheres to all the
21 material terms in the debtors' May 2008 privacy policy, (2)
22 buyer honors the opt-out request, (3) buyer safeguards all
23 conveyed PII in a manner consistent with industry standard data
24 security protections and applicable information security laws
25 and (4) buyer destroys PII for which it determines -- "

1 THE COURT: Yes, but the PII is the personally
2 identifiable information.

3 MR. GLENN: Right.

4 THE COURT: And if it was collected after May 2008, I
5 understood -- that's what I understood, okay? But the issue I
6 have is somebody signs up with Borders before May 2008. They
7 provide PII before but they continue doing transaction business
8 after. Is the ombudsman here?

9 MR. GLENN: I believe he is.

10 THE COURT: Come on up. Do you mind? Thank you.

11 MR. ST. PATRICK BAXTER: Thank you, Your Honor.

12 Michael St. Patrick Baxter with Covington & Burling. I am the
13 consumer privacy ombudsman.

14 THE COURT: Thank you. So enlighten me on this. You
15 understand the point I am raising?

16 MR. ST. PATRICK BAXTER: Yes, I understand your
17 question, Your Honor and that is, in fact, a point that I made.
18 For PII collected prior to May 27, 2008, it may not be
19 transferred, Your Honor, without consent and Your Honor's put
20 your finger directly on it. You would have to divide PII
21 collected pre-May 27 and post. So even a consumer who
22 continued to transact business with borders post-May 27, 2008,
23 that consumer for the post-May 27, 2008 PII, that may be
24 transferred but it doesn't address the pre-May 27, 2008 IP.

25 THE COURT: Is the -- but here's what I just wanted

1 clarification, you're -- is the debtor correct that you're
2 acknowledging that their transaction -- if somebody signs up
3 pre-May 2008, but continues conducting transactions after that
4 date, the post-May 2008 transaction history can be transferred?

5 MR. ST. PATRICK BAXTER: The post -- yes, Your Honor,
6 subject to the conditions that I've mentioned. There is an
7 issue as to whether the sale provision in the post-May 27, 2008
8 privacy policy includes this transaction. While it's not
9 completely clear, based on the circumstances, I conclude that
10 it does, so the post-May 27, 2008 PII may be transferred
11 subject to the conditions I point out.

12 THE COURT: All right. You've clarified that. Thank
13 you. And I may have other questions if you don't mind.

14 MR. ST. PATRICK BAXTER: Please. That's why I am
15 here, Your Honor.

16 THE COURT: Let me hear from Mr. Glenn. That
17 clarifies that point at least.

18 MR. GLENN: One moment, Your Honor.

19 THE COURT: Sure.

20 (Pause)

21 THE COURT: The time for your strategy huddle was
22 before.

23 MR. GLENN: Okay. So I think we're to some extent,
24 dancing on the head of a pin. If you --

25 THE COURT: I don't --

1 MR. GLENN: If you conduct business with Borders after
2 May of 2008, notwithstanding that you gave us your e-mail prior
3 to May 2008, we have your e-mail after May 2008 and under the
4 new privacy policy, then we're allowed -- that information is
5 under the new privacy policy.

6 THE COURT: Maybe. The states don't agree with that.

7 MR. GLENN: That's our view.

8 THE COURT: So can you strip out the pre-May 2008
9 portion?

10 MR. GLENN: I don't know. I know for the 84,000, the
11 answer was yes. The people who didn't do business with us
12 post-2008, my colleague, Mr. Gleit is telling me the answer is
13 also yes for post-May 2008.

14 THE COURT: The answer is yes meaning --

15 MR. GLENN: Meaning that if you straddled May 2008,
16 the prior transaction history can be segregated.

17 THE COURT: Can be stripped out; okay. It seems
18 pretty old and stale information.

19 MR. GLENN: Well, Barnes & Noble has its own views
20 about that. So for the last category of folks, I don't think
21 there's any dispute at all, and the ombudsman's here, he can --

22 THE COURT: Well there is dispute with the State. The
23 State doesn't agree with the Smart Toy result.

24 MR. GLENN: That after the 2008, that you conducted
25 only business pursuant to that privacy policy and I believe at

1 least according to the ombudsman that's not controversial given
2 who the buyer is and what the privacy policy is.

3 THE COURT: Let me ask you some other questions. Are
4 the computer servers that house the data still operable?

5 MR. GLENN: Yes, we have kept them operating because
6 the website has been operating to facilitate this sale.

7 THE COURT: Okay.

8 MR. GLENN: So all the data that has existed, still
9 exists.

10 THE COURT: Does Borders have the ability to e-mail
11 blast to all customers who are in the database with essentially
12 giving him the right to opt-out of any sale or transfer?

13 MR. GLENN: Yes, Your Honor. And one of the things
14 that gave us a tremendous amount of comfort and I don't know if
15 Your Honor's a Barnes & Noble customer, but that every Barnes &
16 Noble e-mail that goes out to its customers has at the bottom
17 of it the right to opt-out or unsubscribe for every
18 communication. So it's not something you have to go to the
19 website and find a way to opt-opt. They make that convenient
20 for you.

21 THE COURT: The reason I ask about whether Borders has
22 the ability to do it is that either in the ombudsman's report
23 or the FTC letter or State Attorneys General letter, they seem
24 to be -- somebody's taking the position that the debtors -- it
25 can't be Barnes & Noble who sends the -- I know there's back

1 and forth about whether it's opt-in or opt-out but that it's
2 the debtors who have to give customers the ability to opt-out.
3 And that's why I wanted to inquire whether if your systems are
4 operable and you have the ability to do an e-mail blast, giving
5 people an opportunity within some set, finite period of time to
6 opt-out whether you have the ability, capacity to do that.

7 MR. GLENN: I'm pretty certain that we do. We have
8 all these e-mails. We have that capability; yes.

9 THE COURT: One concern I have is, and I think it's in
10 some of the papers I read, how many stale e-mail addresses are
11 in your database. I don't know whether when Borders in recent
12 times would do an e-mail blast, what they would do -- do they
13 get notice when it bounces back?

14 MR. GLENN: Yes.

15 THE COURT: I mean, I send an e-mail and if I address
16 it wrong, it bounces back and I know that either I typed it
17 wrong or that's a stale e-mail address.

18 MR. GLENN: YEs, they do and they keep track of that.

19 THE COURT: And have they done anything -- what do
20 they do when e-mails bounce back? Do they do anything? I mean
21 do they --

22 MR. GLENN: I believe they're removed from the list
23 after some period of time. I can verify that.

24 THE COURT: Do you know after what period of time?

25 MR. GLENN: We'll find out the answer to that question

1 but I believe it's removed very promptly after that occurs.

2 THE COURT: Okay. One of my law clerks pointed out to
3 me a little while ago that in Readers Digest, Judge Drain
4 entered an order, it was not a contested hearing and I'm
5 very -- I think you know that I'm always cautious about --

6 MR. GLENN: Yes.

7 THE COURT: -- an order entered in another case when
8 it's not a contested matter, he required mail notice and
9 Readers Digest may be different than -- obviously, mail gets
10 very expensive.

11 MR. GLENN: We have forty-five million customers.

12 THE COURT: I understand that. Mail gets very
13 expensive. I recognize that.

14 MR. GLENN: And also a Mr. Buechler is whispering in
15 my ear from afar, we have e-mail addresses for all these folks.
16 We don't necessarily have current mailing addresses.

17 THE COURT: Yes.

18 MR. GLENN: Right.

19 THE COURT: I don't want to get in the middle of any
20 negotiations that have taken place but just tell me, did you
21 try and resolve this by having Borders do an e-mail blast to
22 everybody on the list and giving them an opt-out? Because
23 that's one of the things -- I don't know whether I'm going to
24 approve this or not but after reading all these papers, I'm
25 really very sensitive to the privacy issues.

1 MR. GLENN: And we understand --

2 THE COURT: One of the things -- let me finish. I
3 mean, one of the things that I've certainly been mulling is
4 whether to condition any order approving the sale and Borders
5 sending an e-mail to all its customers for whom it has e-mail
6 addresses, giving them a reasonable period of time to opt-out
7 and any sale would be of the customer database for those who
8 don't opt-out.

9 MR. GLENN: Your Honor, what I would ask because
10 you've asked some questions and I want to make sure that I've
11 gotten these answers correct and I want to consult with Barnes
12 & Noble on their views on that, I think the answer is that that
13 has not been specifically considered. The opt-out opportunity
14 has been offered up already for the pre-May 2008 customers, you
15 know, who were solely subject to that policy.

16 THE COURT: I saw in the ombudsman's report near the
17 end of the report, he indicates that he raised this issue of
18 whether it would be satisfactory to the State that there was an
19 opt-out rather than an opt-in. I mean I used to do a lot of
20 class actions and I -- I don't know, there are problems with
21 opt-outs, there are problems with opt-ins, but given this
22 volume, a clearly drafted notice with an opt-out right within
23 in a finite period, you know, I'll listen to anybody who wants
24 to be heard on it, strikes me as perhaps a reasonable
25 accommodation. If I'm supposed to take into account the facts,

1 circumstances and conditions of such sale, that's certainly a
2 condition that struck me as perhaps a very reasonable way of
3 trying to deal with very valid concerns.

4 MR. GLENN: Okay.

5 THE COURT: Let me raise another issue. What I read
6 indicated that even where customers have opted out in the past,
7 their data remains in this customer database and I thought the
8 reasons for doing it were fairly weak or maybe they'll sign up
9 again -- I don't know, maybe if they sign up again, you can get
10 their information again. Is it technically feasible for
11 Borders before transferring information to a purchaser, purges
12 the database of all PII for anyone who opts-out?

13 MR. GLENN: I believe the answer to that question is
14 yes but I will confirm it.

15 THE COURT: The reason I raise that and I guess I was
16 concerned when I read that the information seems to stay there
17 forever, you may stop sending them e-mails but you keep all
18 information about their buying habits, et cetera, because it is
19 not unknown today for major businesses to have their computers
20 hacked, for anyone who at least has not has -- you know, anyone
21 who has opted-out, it would seem to me a reasonable condition
22 that their information be purged before it be transferred
23 because if I read the papers correctly, you were going to
24 transfer the entire customer database including the information
25 for people who are no longer receiving e-mails because they had

1 opted out.

2 MR. GLENN: That's correct.

3 THE COURT: Is there a drop dead deadline in the
4 purchase agreement?

5 MR. GLENN: September 30.

6 THE COURT: It isn't going to happen by September 30.
7 Let me hear -- is there anything else you want to say at this
8 point? I'll give you another chance, Mr. Glenn.

9 MR. GLENN: No, Your Honor, I think that -- at this
10 time, I think it would really benefit us to confer with the
11 committee members and --

12 THE COURT: Well I want to hear if anybody else wants
13 to have anything said before we do that.

14 MR. GLENN: Not for now.

15 THE COURT: All right. Let me hear from any other
16 counsel who want to be heard.

17 MR. ZUMBRO: Good afternoon, Your Honor. Paul Zumbro
18 from Cravath Swain & Moore on behalf of Barnes & Noble, the
19 winning bidder in the auction.

20 The first point, Your Honor, there's been a lot of
21 talk about this May 27 date and pre, post-May 27 information.
22 From our perspective, even the ombudsman who we have a
23 different view of certain aspects of the non -- applicable non-
24 bankruptcy law, I don't think that even the ombudsman disputes
25 or comes to a different conclusion that the policy as in effect

1 on the date of the debtors' bankruptcy filing allows this type
2 of sale to occur.

3 THE COURT: Well he recognized that it wasn't free
4 from doubt but he resolved that doubt in favor of permitting
5 such a transaction, supporting -- not supporting but indicating
6 he didn't believe that it was improper to go forward with that
7 transaction but he recognized the ambiguity.

8 MR. ZUMBRO: Correct. But I think he concluded after
9 a lot of thought that the right answer was that the policy that
10 was in effect on the date of the debtors' bankruptcy case
11 permits this transaction and so I think under the bankruptcy --

12 THE COURT: Do you agree -- well, do you recognize the
13 risk that even if I approve the transaction with the conditions
14 or different conditions, that the FTC or a State Attorneys
15 General may decide they're not satisfied and they bring an
16 enforcement action?

17 MR. ZUMBRO: Yes, Your Honor, we recognize that's a
18 possible risk, although I don't think in light of the identity
19 of the purchaser -- the FTC and the State Attorneys General put
20 in their letters before they knew the purchaser who would be
21 the winning bidder. I've had lots of constructive
22 conversations with the attorney general. His representative is
23 here today and he can speak for himself. But I think it's fair
24 to say that they are supportive of this transaction to Barnes &
25 Noble and I think they would prefer this data to be sold to

1 Barnes & Noble instead of any of the other potential purchasers
2 because our client's a good corporate citizen. We have a
3 stated and strong commitment to privacy and the maintenance
4 of our consumers -- customer's privacy.

5 THE COURT: So if they're in favor of the transaction,
6 why haven't you resolved these issues with them?

7 MR. ZUMBRO: They have not objected. We had some
8 conversations immediately prior to the hearing where they
9 indicated that an opt-out mechanism along the lines of what
10 Your Honor suggested might be acceptable to them. They had to
11 confer with people back in their offices, so we didn't get a
12 final answer.

13 The one question I'd like to or point I'd like to
14 raise, Your Honor, is you had focused on having Borders send
15 out the blast e-mail. If we were to go and opt-out type of
16 mechanism, I think for commercial reasons, it would be
17 preferable for Barnes & Noble to be able to send out the
18 opt-out message. I think that's a detail but that's one
19 point --

20 THE COURT: Well, I think, let me just address the
21 detail. If the -- put it this way, if the ombudsman either
22 speaking for if they speak separately, the representative of
23 the Attorneys General and the FTC were amenable to Barnes &
24 Noble sending out the e-mail giving the opt-out, I don't have a
25 particular problem with that.

1 What I read in the papers, the objection was to the
2 transfer of the information without first giving the opt-out.
3 If it's acceptable to the regulators to allow the transfer with
4 the conditions imposed of an acceptable, agreed notice with
5 opt-out, that's -- I don't have a particular problem with that.
6 I don't know whether that eases your mind about that.

7 MR. ZUMBRO: It does. Thank you, Your Honor.

8 THE COURT: But the big caveat to that is if it's
9 acceptable to the debtor, the committee, the ombudsman, and so
10 far the ombudsman has been the one putting forward the position
11 expressed in writing by the Attorneys General and the FTC, if
12 that group of constituencies is amenable, I'm not going to -- I
13 would probably be amenable, as well.

14 MR. ZUMBRO: Oaky. Thank you, Your Honor. The other
15 points I feel that I need to just make sure the Court is aware
16 of, we very much are interested in purchasing these assets. We
17 were the winning bidder. We think we represent the best source
18 to maximize the value for the estates and I'm concerned that
19 the deal might fall apart over these issues unnecessarily. I
20 think the asset purchase agreement that we negotiated with the
21 debtors has sufficient and -- you know, it has adequate and
22 sufficient protections built into it on the privacy protection
23 provisions in Section 7.5 of the asset purchase agreement. So
24 the asset purchase agreement itself has a list of specific
25 provisions which I believe were previewed with the ombudsman

1 before the stalking horse bid was finalized. I wasn't part of
2 this discussion, so I can't represent that to the Court but
3 that was my understanding.

4 But they basically boil down to the fact that the
5 buyer has to have a written policy that is as least as
6 protective as Borders which we think is --

7 THE COURT: Yes, I read your policy.

8 MR. ZUMBRO: Okay. The other main protections are
9 that if you were to make a material change, you have to give
10 customers a right to opt-out and as Mr. Glenn mentioned, Barnes
11 & Noble always gives customers an ongoing right to opt-out.

12 So we think that those, together with the identity of
13 the purchaser should give sufficient comfort both to the Court
14 and to the regulatory authorities. And it's not our motion but
15 I wonder if we might -- if we could confer --

16 THE COURT: I'll let you confer but I want to hear
17 from anybody else who wants to be heard now and then we'll take
18 a recess and I'll let you all confer but I want to give anybody
19 -- and if people are happy to wait until after a recess, that's
20 fine but if you want to be heard now, I want to let them be
21 heard now.

22 MR. ZUMBRO: Okay. Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. LOPEZ SCHNABEL: Good afternoon, Your Honor. Eric
25 Lopez Schnabel on behalf of Pearson Australia Group and we

1 actually are also a winning bidder and I think -- and I really
2 want to address the first point that you raised at the outset
3 of this hearing which is whether can we close these separate
4 deals together or not and how does that work. And, Your Honor,
5 there are several different lots that were offered at the
6 auction and Barnes & Noble won the big lot and that obviously
7 has a lot of money in it.

8 But there were other lots that Barnes & Noble did not
9 win and lot six, which is my particular client's lot, we were
10 declared the winner and that's been filed on notice and as Mr.
11 Peress' affidavit and so forth. And this is basically one of
12 these licensee lots, if you will. So there's a couple of
13 other --

14 THE COURT: But who is your licensor?

15 MR. LOPEZ SCHNABEL: Well, Your Honor, that's a good
16 question. I think it's very simple. What was our bid? Let's
17 look at our bid. Our bid was a signed license agreement by my
18 client.

19 THE COURT: So that we're really cutting through it
20 all, you're ready, willing and able to close your deal.

21 MR. LOPEZ SCHNABEL: And it was with Borders and
22 Borders can sign that license agreement and it can take the
23 mark in Australia and New Zealand and give it subject to that
24 license agreement to Barnes & Noble or it could put it in SPV
25 or what have you, but --

1 THE COURT: Why don't we do this, Mr. Lopez Schnabel,
2 I understand your point. If there's another point you want to
3 make, that's fine. I understand this main point and -- go
4 ahead.

5 MR. LOPEZ SCHNABEL: Your Honor, the other point I
6 wanted to make is that the sale order that was filed is
7 substantially different than what's been redlined this morning.
8 And what they've effectively done is strip out the licensees
9 from approval and have said now that it's just a condition of
10 the Barnes & Noble deal and the APA, which I'm not a party to,
11 that they enter into these license agreements but that
12 condition can be waived. And I think that really runs amuck of
13 what the bid procedures were and what my bid was.

14 Our view is that you can close our license agreement
15 without closing Barnes & Noble but you cannot close the Barnes
16 & Noble sale without closing my license agreement because you
17 can't transfer the mark without it being subject to my license
18 because I won that lot.

19 THE COURT: All right. Why don't we do this, Mr.
20 Lopez Schnabel -- I understand your points. It may become a
21 moot point if the debtor, Barnes & Noble, the ombudsman, and
22 the regulators can resolve the issues; then everything would go
23 forward. Your point will have to be resolved in the event that
24 the Barnes & Noble transaction does not go forward.

25 So I have your points. Let me see whether anybody

1 else wants to be heard now. I'll hear you again. Don't worry
2 about that. Okay?

3 MR. LOPEZ SCHNABEL: Thank you, Your Honor.

4 THE COURT: All right. Mr. Baxter?

5 MR. ST. PATRICK BAXTER: Thank you, Your Honor.

6 Michael Baxter, the consumer privacy ombudsman.

7 Your Honor, just a couple of points I wanted to
8 clarify. Number one, the ombudsman does not agree that there's
9 only one privacy policy in effect at the commencement of the
10 case. There are, in fact, at least two privacy policies in
11 effect as of the commencement of the case and I think Your
12 Honor fully appreciates that from the report.

13 THE COURT: I appreciate your point. I'm not saying
14 one way or the other what the answer is but I understand the
15 position you laid out and I understand the position the debtor
16 has laid out.

17 MR. ST. PATRICK BAXTER: Okay.

18 THE COURT: I'm not resolving it but I understand it's
19 clearly an issue.

20 MR. ST. PATRICK BAXTER: Thank you. Second, the PII
21 under the Video Privacy Protection Act needs to be treated
22 separately. Okay? Your Honor, that information, information
23 about the type of the video, the description, the title, that
24 cannot be conveyed without consent. What can be conveyed is
25 the subject matter, if there are two conditions satisfied. And

1 one condition, Your Honor, is that there is -- the consumer has
2 an opportunity to prohibit the transfer, an opt-out and the
3 second condition, Your Honor, is that the use of that
4 information is restricted exclusively to marketing goods and
5 services to that consumer.

6 The APA does not impose any restrictions on the use of
7 that information and it's been suggested that since Barnes &
8 Noble -- excuse me, Borders didn't sell adult type videos and
9 no one should be worried about the disclosure of the subject
10 matter or the genre, that's not entirely true, Your Honor.
11 There could be someone, a consumer, who may have purchased
12 videos on divorce or perhaps alcoholism or perhaps sexual abuse
13 or perhaps psychiatric problems, that they might be very
14 concerned about the disclosure of that subject matter to
15 another party.

16 So it's not fair from the consumer's perspective to
17 say well, if it's not adult video, then we really don't care
18 and we can disclose the genre to --

19 THE COURT: Let me just --

20 MR. ST. PATRICK BAXTER: -- the consumer.

21 THE COURT: Since you're up there, and I think your
22 report is excellent. I'm not signing on to every word in there
23 but it really is a very well, carefully done document. The one
24 piece of it that I'm not yet persuaded about is the quote
25 "transfer of ownership" closed quote, language in the VPPA.

1 MR. ST. PATRICK BAXTER: Now that --

2 THE COURT: Because it just -- I thought that the
3 debtors' argument on that point was a stronger argument than on
4 some of the other points, let me put it that way. Okay? And
5 I'm not sure -- you haven't persuaded me yet that the VPPA
6 applies in this circumstance such that the consent provision
7 that you focus on has to be satisfied.

8 MR. ST. PATRICK BAXTER: Okay, Your Honor, let me
9 address that. That's a -- I'm glad you raised that. The
10 exception you're referring to is the ordinary course --

11 THE COURT: Yes, I mean it's kind of odd because you
12 know, ordinary course of business, we're dealing with a 363
13 sale. I'm asked to approve a sale outside the ordinary course
14 of business but the problem is is the VPPA in defining ordinary
15 course of business includes this language about transfer of
16 ownership which in bankruptcy is not ordinary.

17 MR. ST. PATRICK BAXTER: If the buyer's argument is
18 correct, that you can transfer the ownership of the customer
19 list, the information, the PII about a consumer, that's all you
20 need to transfer the ownership of that, what that would mean,
21 Your Honor, is anyone, including me, could buy that information
22 and the consumer would have no ability to object. It's one
23 thing if you're transferring the business. It's another thing
24 for someone to walk in and say I understand that the bankruptcy
25 judges in the Southern District of New York rent from NetFlix.

1 I'd like to buy your customer list.

2 THE COURT: Well, but this is -- look, I think the
3 debtors' argument which has some traction with me is that
4 Borders had multiple businesses. Their online business is a
5 sufficiently discrete segment. It's not as if they're selling
6 their customer lists to ten or 100 or two perspective buyers,
7 that in deciding what a transfer of ownership is, is this
8 proposed transaction to Barnes & Noble consistent with -- I
9 mean yes, you apply the plain language of the statute, if that
10 gives you the answer -- you know, if it's clear and
11 unambiguous, I think here you have to look at a little bit
12 beyond that because I don't think the statute itself provides
13 the full answer. And if you look behind it, I ask myself, is
14 this proposed transaction the sale of this online portion of
15 the business to Barnes & Noble, does it fit within the language
16 and purpose of the statute?

17 MR. ST. PATRICK BAXTER: I understand your point, Your
18 Honor and obviously that's your call.

19 THE COURT: I'm not calling it yet. I'm just telling
20 you that, you know, I wanted to be straight up with you, that
21 that's the one piece of your argument that I wasn't persuaded.
22 I'm not saying I'm persuaded by the debtor but I thought this
23 is a pretty close call.

24 MR. ST. PATRICK BAXTER: Okay. Thank you, Your Honor.
25 Finally, Your Honor, my role in the case is to assist this

1 court, okay? I am not advocating --

2 THE COURT: The statute puts a really strange role on
3 you, I must say.

4 MR. ST. PATRICK BAXTER: So I am neither advocating
5 for or against a sale. That's not my job. My job is to assist
6 this court in its consideration of the facts and circumstances
7 and the privacy issues involved.

8 That being the case, Your Honor, I don't really think
9 it's appropriate for me to engage in discussions with the
10 debtor and the buyer and the AGs and the FTC as to how they
11 resolve this. I've advised the Court according to my best
12 judgment. If this -- this Court can use that report as it
13 chooses.

14 Now the position I've taken, as I've mentioned in the
15 report is --

16 THE COURT: You want to be left off the hook.

17 MR. ST. PATRICK BAXTER: If the principle regulators
18 agree, okay? If the FTC and the States all agree, that we're
19 happy with this particular result, okay, if we do A, B, and C,
20 we're happy with that, my position as the ombudsman is I've
21 given the Court my report. If the parties who are -- the very
22 parties who would file enforcement actions, all agree that
23 they're happy with this result, I'm not standing in the way of
24 that, Your Honor.

25 THE COURT: Well, you know, at page 45 of your report,

1 III, the negotiated solution to concerns of FTC and State
2 Attorneys General, it's correct, you didn't interject yourself
3 in the middle of it. You laid out the suggestion that they try
4 and work this out. You've shown a real sophistication and
5 understanding of these issues and could probably play a
6 constructive role in meeting with those parties, without -- no
7 one's asking you to bless a transaction at the end of the day.
8 But the best solution here does seem to me to be to see whether
9 these -- I'm using parties, not necessarily because -- the FTC
10 and the Attorneys General haven't formally appeared in this
11 case -- but I think you could play a constructive role in maybe
12 being part of the dialogue, even if you're -- and I fully
13 understand your not being asked, although you did state your
14 position as to which portions of this transaction should be
15 approved or with which conditions and that sort of thing, so I
16 don't see what the difference is if they are -- I might well
17 turn to you and say are you satisfied with the conditions that
18 have been agreed upon. You laid out your own conditions. So I
19 don't know that I'm asking you to do something that you haven't
20 already done.

21 MR. ST. PATRICK BAXTER: Your Honor, if that would be
22 of assistance to this court, I'd be delighted to do that.

23 THE COURT: It would be. It would be.

24 MR. ST. PATRICK BAXTER: Thank you, Your Honor.

25 THE COURT: Mr. Glenn?

1 MR. GLENN: Your Honor, I just want to clarify what's
2 happened with the States and the FTC. Perhaps the --

3 THE COURT: Are they here?

4 MR. GLENN: I was told that one representative --

5 MR. RUSSEL: Clark Russel, New York State Attorney
6 General. The FTC is not here.

7 THE COURT: Okay.

8 MR. GLENN: But the chronology of events, Your Honor,
9 is that we received a letter or actually one or more letters
10 from State's Attorneys General before the process unfolded.
11 There was a meeting in Washington, D.C. that I did not attend,
12 I was on vacation, with Mr. Baxter and certain of the Attorneys
13 General and my understanding of those conversations after that,
14 up to the auction was that they wanted to abide the result of
15 the auction to determine what they wanted to do.

16 THE COURT: Well, they have a result.

17 MR. GLENN: So I think that we communicated with all
18 those folks since Barnes & Noble was the winner and I think
19 it's fair to characterize the response was a collective sigh of
20 relief and I don't think it's unfair to characterize that
21 they're comfortable with this transaction. I don't know --

22 THE COURT: You know --

23 MR. GLENN: -- I wouldn't go so far as to say they
24 support it but --

25 THE COURT: They're not speaking. They can say for

1 themselves whether they're comfortable or not comfortable.
2 Here's what we're going to do. We're going to take a half hour
3 recess and I recognize Mr. Russel is here and I certainly read
4 his letter on behalf of the group of AGs that are identified in
5 this letter and then there was one additional letter, the FTC
6 is not here, but give me a half hour to have some preliminary
7 discussions. Okay?

8 I have very limited time next week. I can have you
9 all back on Monday afternoon at 4 o'clock. I'm not here the
10 rest of next week. Hopefully, you could actually come to a
11 satisfactory conclusion by Monday but have preliminary
12 discussion. I would urge you to come up with a game plan as to
13 how you're going to try and meet with the FTC and the Attorneys
14 General and the buyer and the committee or some subset and see
15 whether you can work through this and then I'll have you back
16 or hear from you on Monday afternoon.

17 What strikes me, Mr. Glenn, I raised the Orion v.
18 Showtime issue, if you don't work it out with the regulators to
19 everyone's satisfaction, whatever I do I'd certainly give you a
20 chance to brief this issue but I think Orion -- again it was a
21 365 case and not a 363 case, but it's the same kind of thing;
22 business judgment is the operative standard with the gloss that
23 these provisions on the ombudsman's report have added to it.
24 But I don't think anybody is going to drive any real comfort at
25 the end of the day without working out some arrangement. So

1 let's take a break until 4 o'clock.

2 MR. GLENN: Thank you.

3 UNIDENTIFIED SPEAKER: Your Honor, can I just --

4 MR. GLENN: -- and in the Middle East, I believe,
5 those are folks that filed declarations with respect to the
6 other licenses.

7 THE COURT: Yes.

8 MR. GLENN: They are obviously available to answer
9 questions. I don't think anyone has raised any objections.

10 THE COURT: Well, let me just say that with respect to
11 the remaining licenses, the ombudsman raised no issue about it,
12 no one filed any objections. I'm certainly prepared -- if
13 there are anybody in the courtroom that's objecting, I'm
14 prepared to -- or on the phone, I'll listen to that today but
15 it seemed to me that all of the other licenses that were sold
16 at the auction could be approved. That was why I really
17 started out by asking whether they could all be approved today
18 without approving the Barnes & Noble transaction. And you and
19 Mr. Lopez Schnabel have a difference of opinion about it.

20 MR. GLENN: Well I think at this point, those folks
21 are --

22 THE COURT: Let's put it this way. I don't want to
23 hear -- I don't need to hear from any of them.

24 MR. GLENN: Okay. So that's --

25 THE COURT: So anyone who wishes to be excused can be

1 excused.

2 MR. GLENN: Thank you. Thank you very much.

3 THE COURT: Okay?

4 MR. GLENN: I'll see you at 4 o'clock.

5 (Recess from 3:31 p.m. until 4:34 p.m.)

6 THE COURT: Please be seated. We're back on the
7 record in Borders Group, Inc., 11-10614. During the recess,
8 initially counsel conferred in chambers. I had a very brief
9 chambers conference with many of the counsel who are here. The
10 only thing that really was agreed on was that we would adjourn
11 the hearing now until 4 p.m. on Monday but I believe Mr. Glenn,
12 there was something else you wanted to raise.

13 MR. GLENN: I did. I had two housekeeping matters.
14 First, with respect to the IP sale, there was one matter that
15 we didn't address earlier on. Your Honor approved a 150,000
16 dollar expense reimbursement in connection with the bidding
17 procedures. We were inclined to award that to PC Mall who was
18 the stalking horse bidder going into the auction.

19 Due to the press of time and the amount of that fee,
20 what we negotiated with PC Mall in conjunction with the
21 unsecured creditors committee was just to award them that
22 150,000 dollars as a break-up fee, the theory being we were
23 highly confident that they would come up to 150,000 dollars in
24 expense reimbursements and to spend the time to seek approval
25 of something else and to review the fees, it just didn't seem

1 to be cost effective.

2 So we're going to be seeking that relief as part of
3 the order we submit to the Court and to the extent that there
4 are any deadlines that otherwise would expire between now and
5 Monday, I believe that PC Mall's lawyer is on board with
6 extending pending further consideration.

7 THE COURT: All right. Anybody else want to be heard
8 on anything? Mr. Buechler?

9 MR. BUECHLER: That was agreed to by the committee.
10 One clarification, the bidding procedures authorized the
11 expense reimbursement up to 250,000 --

12 MR. GLENN: Oh, yes.

13 MR. BUECHLER: -- not 150, so part of the committee's
14 rationale was this was even less money.

15 MR. GLENN: Correct.

16 THE COURT: All right. So we'll deal with everything
17 Monday at 4 o'clock. Look forward to seeing you all.

18 MR. GLENN: Yes.

19 THE COURT: And hope you're able to resolve the
20 remaining issues.

21 MR. GLENN: One other general housekeeping matter,
22 Your Honor, is that we expect to be filing shortly and it could
23 be very soon, hopefully if the stars align, our proposed plan
24 of liquidation and disclosure statement. So we will be seeking
25 I believe consistent with Your Honor's case management order, a

1 separate hearing date on that in consultation with the
2 committee. We've been working with them quite constructively
3 with that and we expect it to be a smooth process and we're
4 hopeful that we're strongly inclined to try to get that
5 approved if at all possible before year end.

6 THE COURT: Very good.

7 MR. GLENN: Okay.

8 THE COURT: Let me thank everybody this afternoon
9 because I think you've made some real progress towards trying
10 to resolve the remaining issues and we'll see you on Monday.

11 MR. GLENN: Thank you, Your Honor.

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

13 (Whereupon these proceedings were concluded at 4:37 PM)

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I N D E X

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

I, Linda Ferrara, certify that the foregoing transcript is a true and accurate record of the proceedings.

Linda Ferrara

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