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

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In the Matter of:

BORDERS GROUP, INC. et al.,

Debtors.

- - - - -x

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

September 26, 2011
4:09 PM

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

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Hearing RE: 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)

Transcribed by: Hana Copperman

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P R O C E E D I N G S

THE COURT: Please be seated. All right. We're here in Borders Group, Inc., number 11-10614-mg. I have the 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, since the last hearing on this matter to sell our intellectual property on Thursday the parties have used the time very profitably, and, I think, as we sit here today, we have a process that has significantly more robust privacy protections for the benefit of consumers. I think that there are two important facets for us to present to the Court today. One is a summary of what we have agreed to, and, for the record, we filed it around 2 o'clock today, a revised clean and blacklined order embodying the new privacy protections that we're going to summarize on the record.

THE COURT: And I have those in front of me.

MR. GLENN: Thank you. And, Your Honor, equally important, if not more important, Mr. Baxter is on the phone joining us today, and he's prepared to present to Your Honor a summary of some of the process issues about how we got to where we are. So what would you like -- we'll take it however Your Honor would like it, the process or the summary.

THE COURT: Well, why don't you go ahead and do your presentation, and then I'll hear from Mr. Baxter, and then I'll

1 allow anyone else who wants to be heard to speak as well.

2 MR. GLENN: Okay. Thank you. The revised protections
3 are embodied on Exhibit 3 to the order, I believe. I'm just
4 going to read them very briefly.

5 First, with respect to transfer, all data, regardless
6 of when that data was collected, whether previously opted out
7 or not, except video title information will be transferred to
8 Barnes & Noble pursuant to the revised order.

9 There will be a full opt-out right for all personally
10 identifiable information, and I'll call that PII for shorthand
11 going forward, transferred to Barnes & Noble.

12 Within one business day after closing, Your Honor,
13 there will be an e-mail sent out to everyone for whom we have
14 e-mail addressed. An advance copy of the e-mail will be
15 provided to the ombudsman and the official committee of
16 unsecured creditors for comment. The e-mail will disclose the
17 transfer of PII, the opportunity to opt out, that the
18 information will be subject to Barnes & Noble's privacy policy
19 on the date of the transfer, that subject matter of DVDs and
20 other video purchases will be transferred, and a link to Barnes
21 & Noble's privacy policy. The recipients of that e-mail will
22 have fifteen days from the date of the e-mail notice to opt out
23 of the transfer.

24 There will be a separate web site notice on
25 borders.com and barnesandnoble.com for customers with dead e-

1 mail addresses, i.e. ones for whom we've received bounce backs.
2 The website will be clear and conspicuous and provide thirty
3 days to opt out and have the data purged.

4 In addition, and this is, I believe, unprecedented,
5 the parties have agreed that there will be a full-page notice
6 published in the USA Today with at least as much information in
7 the e-mail opt-out notice that I summarized earlier. The cost
8 of that USA Today ad will be borne half by Barnes & Noble and
9 half by the debtors.

10 Within five days after the applicable notice period --

11 THE COURT: When will that ad appear?

12 MR. GLENN: I don't know that we've agreed on a
13 specific date. Have we?

14 THE COURT: Just even approximate period --

15 UNIDENTIFIED SPEAKER: The same as when the website
16 notice is put up.

17 MR. GLENN: Within the next --

18 UNIDENTIFIED SPEAKER: At the same time.

19 MR. GLENN: Within the next week.

20 UNIDENTIFIED SPEAKER: Within a day after closing.

21 MR. GLENN: Yes.

22 THE COURT: Okay. That's fine. Thank you, Mr. Glenn.

23 MR. GLENN: We don't have an exact close date, Your
24 Honor, given the holidays coming up, but we're trying to close
25 as fast as we can.

1 Within five days after the applicable notice period
2 ends Barnes & Noble will purge all transferred PII of customers
3 who opt out within the applicable period.

4 Barnes & Noble will not use any PII for any purpose
5 other than to verify the actual transfer during the first
6 fifteen days following publication of the opt-out notice.

7 Barnes & Noble has undertaken other privacy
8 obligations. They will safeguard all PII in a manner
9 consistent with industry standard data security protections and
10 applicable information securities laws. It will purge any PII
11 for which it determines it has or may have no reasonable
12 business need. And, finally, it will submit an affidavit of
13 compliance with the transfer provisions following the latest
14 purge date.

15 We intend to supply the Court with the form of that
16 affidavit, and we weren't able to have that when we filed
17 earlier today, but we will supply it to Your Honor's chambers
18 shortly after today's hearing.

19 So I think that summarizes what has been agreed to.
20 It's relatively simple. There will be robust publication of
21 the opportunity to opt out, both electronically and in old
22 school publication, and that's significantly more than we had
23 before, and I think that it alleviates Your Honor's concerns
24 that you articulated last Thursday.

25 Unless Your Honor has any questions about this I would

1 invite Mr. Baxter to give his presentation and then I have some
2 housekeeping matters to address at the end.

3 THE COURT: All right. Thank you very much, Mr.
4 Glenn. Mr. Baxter?

5 MR. BAXTER: Thank you, Your Honor. This is Michael
6 Baxter, the consumer privacy ombudsman. At this Court's
7 request, Your Honor, I've worked with the parties since the
8 last hearing with a view to reaching terms for the sale of PII,
9 but, more acceptable to the debtor, the committee, twenty-four
10 states' attorneys general, the Hawaii Office of Consumer
11 Protection and the FTC, as Your Honor knows, there were and
12 there continue to be sensitivities regarding the ability of
13 certain parties to state a position on the record approving the
14 terms of any settlement that are not fully compliant with their
15 policies or precedents. Those sensitivities continue, Your
16 Honor.

17 Over the last few days I've worked with the parties,
18 including the states' AGs and the FTC, to reach terms of a sale
19 of the PII that would not attract their objections, and I'm
20 pleased to present the terms of the sale of PII as reflected in
21 Exhibit 3, Your Honor, meets those requirements. The revised
22 terms of sale of PII, as set forth in Exhibit 3, Your Honor,
23 was shared by me with the states' AGs and the FTC, and each was
24 asked and each agreed to let me know by noon today if they
25 objected or intended to object to the terms of the sale or the

1 proposed sale.

2 As I appear before you today, Your Honor, I have not
3 received any objections. I have not received any notice of any
4 intention to object either. As I indicated in the ombudsman's
5 report, Your Honor, the FTC and the states' AGs are the very
6 parties who would take enforcements or other action against the
7 debtor and/or the buyer in the event that they took issue with
8 the terms of the sale of PII.

9 Since none has objected to these revised terms as set
10 forth in Exhibit 3, Your Honor, no one's contacted me by the
11 agreed upon deadline or even past that deadline, as I appear
12 today, Your Honor, I conclude, the ombudsman concludes, that
13 the terms are reasonable and appropriate for this Court to
14 consider for approval. Obviously Exhibit 3 speaks for itself,
15 Your Honor, but I make a couple of additions to what debtors'
16 counsel has summarized, because I think it's important that
17 they be reflected in the record before the Court.

18 One, with respect to audiovisual material subject to
19 the Video Privacy Protection Act, no title information will be
20 transferred. That title information is excluded from the PII
21 being transferred. And, second, Your Honor, subject matter
22 information for audiovisual materials will be used exclusively
23 for marketing goods and services directly to the consumer.

24 I'm happy to address any questions Your Honor may
25 have.

1 THE COURT: Thank you very much, Mr. Baxter. Mr.
2 Glenn, did you want to raise some additional points before I
3 ask whether anyone else wants to be heard?

4 MR. GLENN: No, Your Honor.

5 THE COURT: All right. Does anybody else wish to be
6 heard with respect to the proposed sale of intellectual
7 property to Barnes & Noble? Mr. Zumbro, do you want to be
8 heard?

9 MR. ZUMBRO: Yes, please. Good afternoon, Your Honor.
10 Paul Zumbro of Cravath, Swaine & Moore on behalf of Barnes &
11 Noble, the purchaser here. First, I just wanted to thank the
12 Court for its careful consideration of this matter. We still
13 believe that the sale in accordance with the terms of the
14 purchase agreement without more is fully consistent with the
15 applicable bankruptcy provisions, but we understand and we
16 appreciated Your Honor's observations when we were last before
17 the Court that this a murky area of the law. In light of that
18 murkiness we worked very hard to achieve an agreement on a set
19 of additional consumer protections that allowed us to come to a
20 fully negotiated resolution which was supported by the consumer
21 privacy ombudsman, Mr. Baxter.

22 In that light I would just like to take a moment for
23 the record to thank Mr. Baxter for all of his efforts in this
24 matter, particularly his efforts over the last couple of days
25 to assist the parties to reach this fully consensual

1 resolution.

2 And, finally, Your Honor, just one matter I'd like to
3 clarify for the record. When we were here last before the
4 Court Your Honor mentioned the Second Circuit's decision in the
5 Orion case. I reread Orion over the weekend, and with respect
6 to the Court I just wanted to put on the record that our view
7 is that Orion is not controlling in the context of a Section
8 363 sale, and we believe that Your Honor's order approving the
9 sale here, if the Court grants such approval, which we all hope
10 will be the case, has greater force and effect in this context
11 than Your Honor had suggested might be the case under Orion.
12 This is, obviously, not something for me to argue or for the
13 Court to decide today, but I just wanted to clarify the record
14 from our perspective.

15 THE COURT: Let me just ask this, though. I didn't
16 see anything in the order that would purport to resolve those
17 issues; that it would be left, if there was an appeal that it
18 would be left for another day for another court.

19 MR. ZUMBRO: That's correct, Your Honor. I mean, I
20 think we think this is a free and clear sale. We don't think
21 it violates any privacy. We also don't think the law would --
22 the law is such that even if Borders, for example, had violated
23 some kind of law, which we don't believe they did, in
24 transferring the data that that -- that that liability would
25 come to us. The one thing that the sale order does do which is

1 relevant to Your Honor's question is that it makes it clear
2 we're in no way a successor in interest to Borders --

3 THE COURT: Right.

4 MR. ZUMBRO: -- in any way, and we think that that's
5 all perfectly appropriate and well within the four corners of a
6 typical 363 sale order, and we think there's no ambiguity about
7 the Court having the power to do that. So, yes, we agree with
8 Your Honor that it may be the case that there is some liability
9 to Borders, but we think that we're purchasing these assets
10 free and clear pursuant to this order, and we're not a
11 successor in interest, so we don't think there is any risk to
12 those types of liabilities flowing to us.

13 THE COURT: All right. Thank you, Mr. Zumbro.

14 MR. ZUMBRO: Thank you, Your Honor.

15 THE COURT: All right. Anybody else wish to be heard?
16 Yes. Come on up.

17 MR. BENDER: At the risk of opening a can of worms,
18 Your Honor.

19 THE COURT: I'm sorry. I couldn't hear you.

20 MR. BENDER: I said at the risk of opening a can of
21 worms it's Gerald Bender from O'Melveny & Myers.

22 THE COURT: You've just opened a can of worms, Mr.
23 Bender.

24 MR. BENDER: I know. I realize that.

25 THE COURT: Mr. Bender, I can't hear you.

1 MR. BENDER: I know, Your Honor.

2 THE COURT: If you have an objection then another
3 judge is going to have to handle it. Just so the record is
4 clear, Mr. Bender is a partner at O'Melveny & Myers. Before I
5 joined the bench in November, 2006 I spent thirty-four years at
6 O'Melveny & Myers. I will not hear any contested matters that
7 involve O'Melveny & Myers. Mr. Bender, are you raising a
8 contested matter?

9 MR. BENDER: I'm not sure, Your Honor. I --

10 THE COURT: Well, it's either a yes or a no. If you
11 are we're adjourning the hearing.

12 MR. GLENN: Well, Your Honor --

13 MR. BENDER: It depends on the debtors, Your Honor,
14 more than --

15 MR. GLENN: Mr. Bender, I would ask that you allow me
16 a moment at the podium --

17 MR. BENDER: Absolutely.

18 MR. GLENN: -- to give the Court a status update, and
19 maybe this will resolve those issues.

20 THE COURT: I don't like being sandbagged. Go ahead,
21 Mr. Glenn.

22 MR. GLENN: Your Honor, the good news on this issue,
23 which I wanted to put to the second phase of this hearing, is
24 that all of the licensees for which there were disputes about
25 the terms of licensing agreements on Thursday have been

1 resolved to the satisfaction of Barnes & Noble, the debtor, and
2 the creditors' committee. The one exception is the proposed
3 transfer to Mr. Bender's client with respect to Singapore, and
4 earlier today we received a notice of termination from Mr.
5 Bender purporting to terminate his client's right or
6 obligation, we should say, to close on the sale of the license
7 in Singapore. Now, we have discussed this, and it's a 100,000
8 dollar sale. It is the proverbial tail wagging the dog in the
9 transaction --

10 THE COURT: Let me ask you this, Mr. Glenn.

11 MR. GLENN: Yes?

12 THE COURT: Can all of the rest of the transactions
13 close without regard to the Singapore license?

14 MR. GLENN: Exactly, Your Honor, and that's what we
15 were going to propose. What we're going to do is we are going,
16 with Your Honor's permission, of course, we were going to carve
17 out the right to license to Singapore on the terms and
18 conditions of the standard form of license that Barnes & Noble
19 has agreed to in the order and leave this question for another
20 day. We will either --

21 THE COURT: You can leave it for another day and for
22 another judge.

23 MR. GLENN: Well, I don't think we'll be dealing with
24 Mr. Bender as a counsel to a licensee. I think we're going to
25 go in a different direction. So we might have a contested

1 matter with respect to his client's deposit. But for today,
2 we're not going forward with Singapore. We're carving that
3 out, so I think it's correct to say that that issue is carved
4 out for another day.

5 THE COURT: Okay. Anybody else wish to be heard?

6 MR. GLENN: Oh, yes, I think we talked about this
7 briefly, Your Honor. We had a 150,000 dollar break-up fee,
8 which was originally a fee reimbursement --

9 THE COURT: Yes.

10 MR. GLENN: -- that we proposed in the order. We
11 would -- if that's in the order, it was in the order. We would
12 like that to be approved.

13 THE COURT: Okay.

14 MR. GLENN: Thank you.

15 THE COURT: All right. Does anybody else wish to be
16 heard?

17 MR. BERNARD: Your Honor, Richard Bernard, Foley &
18 Lardner, on behalf of Berjaya Books. We are one of the, I
19 guess, successful purchasers of the license. Your Honor, as
20 part of negotiations after the auction, we have agreed to pay
21 additional funds over and above our winning bid, in order to --

22 THE COURT: Is someone objecting you paying more?

23 MR. BERNARD: No, except my client. Nobody in the
24 room as far as I know. As part of that, we were getting --
25 this is -- we're buying out an existing license, however we

1 want to couch it as a termination or rejection, and then
2 entering into the new license. I just wanted to clarify for
3 the record, that is the amounts that we've agreed to in
4 addition to our winning bid are all the amounts that this
5 estate will ever be entitled to from Berjaya Books with respect
6 to the license and the rejection thereof. And it's
7 incorporated into the order.

8 MR. GLENN: Right. I confirm that on behalf of the
9 debtors, Your Honor.

10 THE COURT: Okay. Anybody else want to be heard? All
11 right. This matter first came before the Court last Thursday,
12 at a hearing last Thursday. At that time there was an
13 extensive discussion in presentation with regard to the
14 consumer ombudsman's report that Mr. Baxter submitted. As
15 discussed at that hearing, the 2005 amendments to the
16 Bankruptcy Code added provisions, a new Section 332 and Section
17 363(b)(1)(a) and (b) in its further subparts, with respect to
18 the role of a consumer privacy ombudsman, in a case involving
19 personally identifiable information.

20 There was some discussion at the last hearing whether
21 this was a case in which a consumer privacy ombudsman was
22 required to be appointed. That issue really is moot, because
23 one was appointed by the U.S. Trustee at the request initially
24 of the debtor. The Court has carefully considered Mr. Baxter's
25 report which identified a number of issues with respect to the

1 original proposed order -- the original proposed transaction,
2 where Barnes & Noble would be acquiring, for shorthand I'll
3 refer to it as the customer base, but which was acknowledged to
4 contain a considerable amount of personally identifiable
5 information.

6 At the hearing last Thursday, the Court heard from
7 many counsel, and also from Mr. Baxter. The hearing was
8 adjourned to give the parties an additional opportunity to see
9 if they could reach agreement on further protective provisions
10 that would assure the protection of confidential personal
11 information. I believe at the last hearing it was indicated
12 that Borders' customer database includes approximately 45
13 million names, and the issues that were focused upon were
14 whether and under what circumstances, the Borders' customers,
15 we'll call them that for shorthand, could opt out of any
16 transfer of personally identifiable information.

17 And earlier today I was provided with both a clean and
18 a blackline copy of a proposed order, which Mr. Glenn has
19 described on the record, and which Mr. Baxter has likewise
20 spoken to in his comments. The Court believes that all of the
21 parties and interests, and while no one from the FTC appeared
22 at the last hearing, there was a representative from the New
23 York Attorney General on behalf of, I think it was, twenty-four
24 State Attorneys General and a twenty-fifth, that in a separate
25 letter, had indicated a joiner in the position of the New York

1 Attorney General.

2 There has been, I think, considerable progress --
3 considerable improvement that was made in the form of the order
4 and specifically in the protection that's been granted to the
5 approximately 45 million people who are part of the Borders'
6 customer database, and pursuant to this proposed sale, would
7 have the rights to that information transferred to Barnes &
8 Noble, with certain exceptions. It was agreed from the start
9 that credit card information, for example, would be purged and
10 not transferred to Barnes & Noble. So some of the most
11 important items that I think are of very broad concern to the
12 public, to the consumer privacy ombudsman, to the FTC, to the
13 State Attorneys General, were never intended to be part of this
14 sale.

15 But with this revised structure, the Court is
16 satisfied that the debtors have established that the proposed
17 sale of these intellectual property assets to Barnes & Noble
18 are in the best interests of the debtors and their estates.
19 That the terms of proposed sale as presented in the order today
20 are fair, reasonable, and provide appropriate protection to the
21 privacy interest of the many people who have, in one form or
22 another, become part of the Borders' customer database.

23 So with those changes, the Court is pleased to be able
24 to approve that sale, and I do so. And in the form of the
25 order that's been provided -- I take it, Mr. Glenn, that's been

1 vetted with the committee, with obviously the purchaser, with
2 Mr. Baxter and those additional parties with whom he's
3 communicated.

4 MR. GLENN: It has, Your Honor. The one thing is,
5 we're still going to have to revise it to deal with the
6 Singapore issue --

7 THE COURT: Yes.

8 MR. GLENN: -- but otherwise I think it's in final
9 form.

10 THE COURT: Okay. So that will be approved and
11 entered by the Court. With that done there were additional
12 intellectual property assets that were auctioned and with the
13 exception of Singapore, each of those transactions is likewise
14 approved by the Court.

15 As described in the last hearing, none of those other
16 sales included any personally identifiable information. It was
17 the use of marks, things of that nature, trademarks, things of
18 that nature, and didn't raise the same issues that the sale to
19 Barnes & Noble raised. So, each of those sales, with the
20 exception of Singapore, which has been removed from this, or
21 will be removed from it, is likewise approved.

22 To the extent that there is any dispute between the
23 prospective purchaser of the Singapore assets, to the extent
24 that they're represented by O'Melveny & Myers, which I cannot
25 hear any contested matters involving, if you will notify -- if

1 that exists, if that situation exists, another judge will be
2 assigned to handle that aspect of it.

3 Okay, anything else for today, Mr. Glenn?

4 MR. GLENN: That's it, Your Honor.

5 THE COURT: All right. Anybody else wish to be heard
6 with anything? All right. We're adjourned. Thank you very
7 much. And I really do appreciate all the effort that all the
8 parties and interests made in bringing this to a successful
9 conclusion.

10 MR. GLENN: Thank you.

11 (Whereupon these proceedings were concluded at 4:33 PM)

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I N D E X

RULINGS

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except for Singapore		

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

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

Hana Copperman

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Date: September 28, 2011