

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 11-10614 (MG)

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5 In the Matter of:

6

7 BORDERS GROUP, INC.,

8

9 Debtor.

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12

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 May 31, 2012

18 10:03 AM

19

20 B E F O R E :

21 HON MARTIN GLENN

22 U.S. BANKRUPTCY JUDGE

23

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1 Hearing re: (CC: Doc no. 2667) Nineteenth Omnibus Objection
2 to the Allowance of Certain Claims: (I) Duplicate Claims,
3 (II) Guaranty Claims, (III) Late Filed Claims, (IV) No
4 Liability Claims, (V) Reclassified Claims, (VI) Amended
5 Clams, (VII) Reclassified Claims That Also Contradict the
6 Debtors Books and Records, (VIII) Satisfied Claims, and (IX)
7 Reclassified No Liability Claim filed by Timothy Raymond
8 Wheeler on behalf of BGI Creditors' Liquidating Trust and
9 Curtis R. Smith. marked Up documents: 2667, 2667, 2684,
10 2686, 2689, 2692, 2694, 2965, 2704, 2711

11

12 Hearing re: (Doc no. 2415) Status Conference RE: Motion to
13 Allow and Deem Timely Filed Gift Card Claims filed by
14 Jeffrey D. Vanacore on behalf of Jane Freij, Eric Beeman.
15 Marked Up Documents: 2415, 2515, 2693, 2699, 2700, 2701

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25 Transcribed by: Dawn South

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18 ALSO APPEARING TELEPHONICALLY:

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20 BRUCE NATHAN, ESQ.

21 CURTIS R. SMITH

22 MARK VON WAHLDE, ESQ.

23 BETH WILLIAMS, ESQ.

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P R O C E E D I N G S

THE COURT: Please be seated. We're here on Borders Group, number 11-10614. I have the list of appearances in front of me, who's going to begin?

MR. WHEELER: Good morning, Your Honor, Timothy Wheeler, Lowenstein Sandler on behalf of the trust.

THE COURT: Yeah, I have the appearances, so whoever's going start go ahead.

MR. WHEELER: Oh, okay, thank you. Good morning, Your Honor.

I believe that according to the agenda that we submitted there are two items going forward at this morning's hearing. The first is the trust's nineteenth omnibus objection to claims, and the second is a status conference in connection with the gift card motions.

With Your Honor's permission we'd like to proceed in the order listed on the agenda and present the objections to claims first.

THE COURT: Fine.

MR. WHEELER: As a preliminary matter we'd like to update the Court on the status of claim number 4677 of Cottonwood.

As the Court will recall this particular claim was included on the trust's eighteenth omnibus objection to claims. At the time of the April 26th hearing no response

1 to the objection had been filed, and I think that was noted
2 on the record, and the objection was sustained.

3 Shortly thereafter counsel for Cottonwood reached
4 out to the trust and eventually filed to response to the
5 eighteenth objection. That can be found at docket number
6 2677, that was on May 4th.

7 The trust and the claimant subsequently engaged in
8 some negotiations and entered into a settlement agreement
9 that resolved the claim.

10 THE COURT: Okay. Good, thank you.

11 MR. WHEELER: On to the nineteenth.

12 On May 1st, 2012 the trust filed the nineteenth
13 omnibus objection to claims. That can be found at docket
14 2667.

15 Simultaneously we filed the supporting declaration
16 of Curtis R. Smith. Mr. Smith is the -- oh, by the way
17 that's at docket 2668. Mr. Smith is the liquidating
18 trustee, and in that capacity oversaw the claims
19 reconciliation process.

20 In connection with this objection Mr. Smith is
21 dialed in on CourtCall and is available to answer any
22 questions that the Court or anyone else may have in
23 connection with the claims reconciliation.

24 We directed service of the nineteenth objection
25 with exhibits, including Mr. Smith's declaration, on all

1 claimants that were affected by the objection as noted by
2 the affidavit of service that can be found at 2672 -- docket
3 2672, and that was entered by Garden City Group -- filed by
4 Garden City Group.

5 The nineteenth omnibus objection seeks to disallow
6 and expunge on procedural and non-substantive basis omitted,
7 superseded, duplicate, and late filed claims, seeks to
8 expunge on substantive basis claims that have been satisfied
9 during these cases and claims for which the trust believes
10 the debtors have no liability. Seeks to reduce claims that
11 contradict our books and records and/or to reclassify claims
12 that improperly assert priority status as set forth in
13 greater detail in the objection itself --

14 THE COURT: Mr. Wheeler let me see if I can --

15 MR. WHEELER: Sorry?

16 THE COURT: -- let me see if I can cut through
17 some of this.

18 MR. WHEELER: Of course.

19 THE COURT: As I understand it all of the
20 objections are being adjourned expect for two Adachi (ph)
21 Family LP and OT Laurel Texas LP, et cetera.

22 MR. WHEELER: That is correct. Adachi is --
23 actually Adachi we're going forward with.

24 THE COURT: Yes.

25 MR. WHEELER: Yes, as you mentioned.

1 THE COURT: No, all but -- all but the two, Adachi
2 and OT Laurel Texas.

3 MR. WHEELER: Well, Preston was actually
4 withdrawn, so yes, we're going forward with that. You are
5 correct, Your Honor, yes.

6 THE COURT: Okay. So let's just talk about two,
7 okay?

8 As to Adachi this is ECF docket 2684, relates to
9 claim 1974, Adachi Family LP. It seems to me, Mr. Wheeler,
10 that there is disputed issue of fact.

11 The debtors assert that the administrative portion
12 of the Adachi proof of claim in the sum of \$31,297.77 has
13 been fully satisfied, leaving only the general unsecured
14 claim of \$275,664.52. Adachi responded and claims that it
15 received only one check in the sum of \$20,285.77, which is
16 attached to its response as Exhibit A.

17 Additionally, Adachi said that the Office of the
18 County Treasurer of Clark County Nevada advised Adachi that
19 it received a check for \$1,739.20.

20 So am I missing something? It seems to me that
21 there's a factual dispute whether the full amount of the
22 administrative portion of Adachi's claim has been paid in
23 full as the debtor contends, or only a portion of it as
24 Adachi contends.

25 MR. WHEELER: You are correct, Your Honor, and if

1 I might --

2 THE COURT: So you can't resolve this issue?

3 MR. WHEELER: -- offer on explanation.

4 THE COURT: Well, explanation or not, I mean you
5 haven't been able to resolve the issue with them?

6 MR. WHEELER: Well, I believe we have.

7 THE COURT: Okay.

8 MR. WHEELER: We'd had -- we entered into
9 discussions with the claimant and provided them with
10 additional information, including the basis upon which we
11 paid the amount we paid, which was this particular lease was
12 rejected in the middle of the month and therefore the
13 payment for that month's rent was prorated.

14 The notations that are on the check that was
15 submitted along with the response are actually incorrect,
16 they note water and tax payments, this was actually a rent
17 payment.

18 We discussed this with the respondent and expected
19 to hear back from them prior to the hearing and hopefully
20 have them withdraw the objection -- or the response rather,
21 but we have not heard back from them.

22 THE COURT: Okay. So it seems to me hopefully
23 you'll resolve the issue.

24 MR. WHEELER: We expect that we will, yes, Your
25 Honor.

1 THE COURT: Okay. Otherwise I need to set an
2 evidentiary hearing and -- because they've come forward with
3 evidence, you may --

4 MR. WHEELER: Uh-huh.

5 THE COURT: -- there may be an explanation that
6 you've provide --

7 MR. WHEELER: Uh-huh.

8 THE COURT: -- but there's a -- you know, you say
9 that their administrative portion of the claim in the amount
10 of 31,000 and change was paid or satisfied and they say they
11 only got the check for 20,000.

12 MR. WHEELER: Well, with Your Honor's indulgence
13 perhaps we could adjourn this one to the -- I believe it's
14 July 12th omnibus date?

15 THE COURT: Well, here is what needs to happen.

16 MR. WHEELER: Okay.

17 THE COURT: Okay. We either get it resolved or
18 I'm going set it for an evidentiary hearing. Hopefully
19 you'll be able to get it resolved.

20 If it's going go forward as an evidentiary hearing
21 I'm going to enter a case management order and require
22 filing of, you know, evidence, declarations, and exhibits in
23 advance of a hearing with declarants available for cross-
24 examination.

25 What I would like for you to do is by the end of

1 next week contact chambers and let us know the status. If
2 it's not resolved we're going to enter a case management
3 order and set it down. So it's -- I don't want to just kick
4 it to July 12th and then come and find out well, there are
5 still issues or whatever.

6 MR. WHEELER: Understood.

7 THE COURT: So I'll provide deadlines for
8 submitting evidence, et cetera. Hopefully -- it sounds like
9 you'll be able to resolve this.

10 MR. WHEELER: We hope so.

11 THE COURT: Okay.

12 MR. WHEELER: And if not we'll be in touch with
13 chambers by the end of next week --

14 THE COURT: Okay.

15 MR. WHEELER: -- to set an evidentiary hearing
16 date.

17 THE COURT: All right.

18 So let's talk about the next one is OT Laurel
19 Texas et al., it's E CF docket number 2695. What's --
20 what's the story here?

21 MR. WHEELER: Similarly with Adachi we reached out
22 to the counsel who submitted this response, and we pointed
23 out to Mr. Navatni (ph) that noted in his exhibit --

24 THE COURT: This relates to claim 2555, right?

25 MR. WHEELER: That's correct. Claim 4120.

1 THE COURT: Well, their administrative claim I
2 thought was 2555. Am I wrong on that?

3 MR. WHEELER: I have it noted as 4120, but I could
4 be -- I could be wrong.

5 At any rate, their contention is and the objection
6 seeks to --

7 THE COURT: You're trying to expunge the
8 administrative portion -- administrative expense portion of
9 the claim. The claimant says that between the petition date
10 and the rejection date the debtor failed to pay certain
11 amounts due under the lease pursuant to 365(d)(3) and
12 503(b)(1)(a), which they say should be treated as
13 administrative expense claim.

14 MR. WHEELER: As with the Adachi claim, Your
15 Honor, we reached out to counsel, provided additional
16 information, and hoped to have this resolved prior to the
17 hearing today.

18 THE COURT: Okay.

19 MR. WHEELER: Unfortunately --

20 THE COURT: Same answer from me --

21 MR. WHEELER: Exactly.

22 THE COURT: -- on this one.

23 MR. WHEELER: Understood.

24 THE COURT: So if it's not -- if you don't have it
25 resolved notify chambers by the end of next week.

1 MR. WHEELER: Uh-huh.

2 THE COURT: And I'll move it to July, but I'm
3 going to set down dates for each side to come forward with
4 their evidence before that hearing.

5 MR. WHEELER: Uh-huh.

6 THE COURT: If we have to go forward with an
7 evidentiary hearing we will.

8 MR. WHEELER: Okay. Very good, Your Honor.

9 THE COURT: Okay?

10 MR. WHEELER: Appreciate it.

11 THE COURT: All right, I think -- is that --
12 that's all from omnibus 19, right?

13 MR. WHEELER: That is correct. We had some
14 informal responses, but those have all been dealt with as
15 well.

16 THE COURT: Okay. Thank you, Mr. Wheeler.

17 MR. WHEELER: Thank you.

18 THE COURT: Mr. --

19 MR. WHEELER: I believe that the next item that
20 was on the agenda was River Park.

21 Just to give the Court a two second update we've
22 reached a tentative with regard to that matter. We're in
23 the process of papering it and therefore have adjourned it.

24 THE COURT: Okay.

25 MR. WHEELER: I guess that brings us to the status

1 conference, and I will cede the podium to my colleague.

2 THE COURT: Thank you, Mr. Wheeler.

3 Mr. Buechler?

4 MR. WHEELER: I'm sorry, Your Honor, one other
5 comment with respect to the nineteenth. The order that we
6 submitted yesterday will need to be revised. We learned
7 late yesterday that one of the claimants had changed their
8 address and possibly did not --

9 THE COURT: Okay.

10 MR. WHEELER: -- was not properly served. So out
11 of an abundance of caution we've removed that claimant.

12 THE COURT: All right, thank you very much.

13 MR. WHEELER: Thank you.

14 THE COURT: Thank you, Mr. Wheeler.

15 Mr. Buechler?

16 MR. BUECHLER: Thank you, Your Honor. Bruce
17 Buechler from Lowenstein Sandler on behalf of the trust.

18 Your Honor, we're here today in connection with
19 two motions filed by what we card the gift card claimants,
20 which are a total of three individuals. Two individuals
21 filed one motion, three are filing the other.

22 There was a request approximately a week or so ago
23 by their counsel for mediation by letter, we sent the letter
24 to Your Honor opposing the request for mediation.

25 Since then there have been issues with regard to

1 the date the movant's response is due to our objection to
2 those motions. We filed our objections to those motions
3 last week on Friday, and there is an issue with regard to
4 discovery, which we filed late last night.

5 Discovery motions (indiscernible - 00:12:06) to
6 lay it out because of what was involved in this matter in
7 that fashion. And I don't know if Your Honor wishes to
8 address the discovery issues this morning or at a subsequent
9 time.

10 THE COURT: Well, I do. And first, Mr. Buechler,
11 you've been in this case from the start.

12 MR. BUECHLER: Correct.

13 THE COURT: And you have to know my procedures,
14 which is no discovery motions. When there's a discovery
15 dispute counsel who needs the assistance of the Court, if
16 they can't resolve it among the parties, which they have to
17 try first, they call Court, arrange a telephone conference,
18 I want some papers, and I invariably resolve the discovery
19 dispute in a phone call. So instead I've read a pile of
20 papers.

21 MR. BUECHLER: Understood, Your Honor. This we
22 felt was a little different since the --

23 THE COURT: Well, why? Why is it different? You
24 could have called chambers yesterday, you would have had a
25 call probably the end of the day yesterday, I would have

1 said, okay, you come in today we'll deal with it this
2 morning and there wouldn't have been the necessity of
3 preparing papers, and I would deal with it.

4 So that's -- that's how I operate, and you ought
5 to know that.

6 MR. BUECHLER: Understood. Understood.

7 With regard to -- and I don't know which order
8 Your Honor wishes to take the issues. If you want to deal
9 with the mediation issue first or some of the other issues
10 first. I'll leave that to Your Honor's discretion.

11 THE COURT: Well --

12 MR. BUECHLER: I mean I can address the mediation
13 first if you'd like.

14 THE COURT: No, why don't you -- I've read the
15 papers, but why don't you give me a little bit of the
16 background and what the debtor's -- I think I know what the
17 debtor's position is. You believe that -- now I guess what
18 it's on for June --

19 MR. BUECHLER: June 13th.

20 THE COURT: -- 13th?

21 MR. BUECHLER: Correct.

22 THE COURT: A motion to allow late claims. At
23 least as to two of the people. The third one has not been
24 -- no motion to permit a late claim has been filed as to the
25 third --

1 MR. BUECHLER: Correct.

2 THE COURT: -- individual?

3 MR. BUECHLER: Correct.

4 THE COURT: Why -- why don't you just lay out --
5 give me your explanation then I'll give the other side a
6 chance.

7 MR. BUECHLER: Your Honor, very briefly then.

8 Two motions were filed. One by Mr. Beeman and
9 Ms. Freij to file late claims. They assert that they have
10 claims for \$100 and \$25 respectfully -- respectively with
11 regard to holding Borders gift cards.

12 The other motion is a motion filed by Mr. Beeman,
13 Ms. Freij, and a third individual, Mr. Trackman (ph),
14 seeking to ask the Court to basically approve a class action
15 claim on behalf of all individual who is held at any point
16 in time or hold today Borders gift cards to allow them to
17 today to assert proofs of claim well after the bar date and
18 to allow them all as administrative party claims under
19 Section 507(a)(7) of the Bankruptcy Code.

20 On behalf of the liquidating trust we have opposed
21 those two motions in a brief because this is not the merits
22 argument with regard to the late claim motion. We
23 respectfully submit that the holders of gift cards were
24 properly given notice of the original bar date. The
25 original general bar date for unsecured creditors was

1 June 1, 2011, that bar date was fixed by the order of the
2 Court which permitted the debtor at the time to provide
3 notice by publication to unknown creditors.

4 So realistically the threshold issue on that
5 motion is are the holders of gift cards deemed to be unknown
6 creditors and therefore they're bound by a bar date at that
7 point in time? We believe that they are for the reasons set
8 forth in our objection that was filed last week.

9 And on top of that we go further and say that the
10 movants Bee and Freij have set forth no demonstration of
11 meeting the factors for excusable elect under the Supreme
12 Court's decision in Pioneer, the Second Circuit's decision
13 in (indiscernible - 00:15:53), and the various other cases
14 we've cited in response, and that motion is not supported by
15 any affidavit or declaration setting forth any factual basis
16 for that except to say simply but we weren't noticed.
17 There's nothing in the original bar date notice that said
18 gift card holders were not bound.

19 The fact that the debtor was honoring the gift
20 cards pursuant to the first day order is we submit
21 irrelevant as to whether they're bound by the bar date, and
22 that's why when the Court fixed the administrative bar date
23 at the request of the parties at the time we asked the Court
24 to make sure that was confirmed --

25 THE COURT: Just remind me, because the issue of

1 gift cards came up during the case or before there was a bar
2 date or any of that. Can you refresh my recollection about
3 it? I recall this issue of gift cards arising in the case
4 itself.

5 MR. BUECHLER: I -- to be honest, Your Honor, I
6 don't recall it ever being discussed in court. I know I had
7 discussions with counsel for the debtor way back at the
8 outset in connection. I don't recall, and I can go back and
9 look at the transcripts if you want, that there was a
10 discussion in court on gift cards.

11 The only recollection I recall -- but I don't
12 think it was heard by you, I think it was heard by Judge
13 Gonzalez who held the -- I think it was Judge Gonzalez who
14 held the first day hearing.

15 THE COURT: He did.

16 MR. BUECHLER: Was that because the -- and I may
17 be wrong on the date so I apologize, I'd have to check --
18 the original motion on the -- authorizing the debtor to
19 continue its customer programs, I believe that was approved
20 by Judge Gonzalez and not Your Honor. I don't recall, maybe
21 that was done at the second day hearing then when Your Honor
22 came back from I think it was vacation or you were out of
23 town for some reason, I don't recall, that that may have
24 been the time it was discussed in connection with the
25 customer programs. But after the customer program motion I

1 don't recall that it was discussed in court. It was not
2 discussed in connection at least in court with the bar date
3 as far as I recall, and the bar date motion when it was
4 presented was --

5 THE COURT: Well, I was --

6 MR. BUECHLER: -- not discussed in court because
7 it was done on notice of presentment because there was no
8 objection.

9 THE COURT: That may be correct. I remember a
10 discussion in court, it may have been over the custom
11 programs. I remember a discuss when I was on the bench
12 about gift cards. That's certainly -- the existence of the
13 gift card program was certainly well known. What records
14 did --

15 MR. BUECHLER: The customer just --

16 THE COURT: Go ahead.

17 MR. BUECHLER: -- I actually have the program
18 order here, it was signed by Judge Gonzalez.

19 THE COURT: Yeah.

20 MR. BUECHLER: I don't know if maybe when we came
21 back and had is status conference and filled Your Honor in
22 on what happened, maybe that's when it was discussed.

23 THE COURT: Okay.

24 MR. BUECHLER: So that deals with the late claim
25 motion in a quick synopsis --

1 THE COURT: Uh-huh.

2 MR. BUECHLER: -- of our papers, and you know, for
3 what goes on.

4 With regard to the class certification motion
5 there we have raised a host of preliminary legal issues that
6 would need to be resolved by the Court before we go further.
7 No class claim was ever filed, no adversary proceeding to
8 assert a class was filed either prepetition or to this date
9 as far as I'm aware, unless something has been filed
10 literally in the past hour, asserting an adversary
11 proceeding on behalf of gift card holders. Nothing clearly
12 was filed before the bar date. Nothing was filed prior to
13 confirmation of the plan.

14 Clearly as set forth in the movant's moving
15 papers, Mr. Chrisloff (ph), main counsel to the gift card
16 claims states, I believe it was in paragraph 17 of the class
17 certification motion, that he was retained by one or more of
18 the gift card claimants as early as December 5, which was
19 before the December 1 -- December 21 confirmation hearing.

20 The issue was never raised to counsel for the
21 debtors in advance, because I asked them, and it was never
22 raised and they never filed any objection in connection with
23 confirmation.

24 The plan and disclosure statement clearly set
25 forth how all creditors were being treated in different

1 classes, what the expected distribution would be to
2 unsecured creditors, and this really cuts as well to the
3 late claim motions to the issue of prejudice under the
4 Pioneer standard on that score.

5 THE COURT: Well, tell me this, were any claims
6 filed by gift card holders?

7 MR. BUECHLER: There were some claims filed by
8 gift card holders, under two dozen claims in total to date.
9 So very few claims are filed by gift card holders, despite
10 the widespread publicity of the case both not just from the
11 publication notice and the debtor's press releases, but as
12 we set forth in numerous newspaper articles, there were
13 articles run on TV, numerous blogs, all telling people by in
14 large to use the expression, use it or lose it, and
15 therefore as we set forth --

16 THE COURT: That must be what I remember, because
17 I remember a discussion in court --

18 MR. BUECHLER: Oh.

19 THE COURT: -- about the gift cards and
20 particularly when Borders went from trying to reorganize to
21 liquidating --

22 MR. BUECHLER: Yes.

23 THE COURT: -- and where it was. I distinctly
24 remember a discussion --

25 MR. BUECHLER: We may have discussed it. The

1 debtors did commit, then they put this in one of the press
2 releases to my recollection that they would honor the gift
3 cards through the date of the store closing sales, and that
4 was set forth in the July -- I believe it's July 13th. I
5 could be wrong on the date, I didn't memorize all the dates
6 for today's motion yet -- or today's status conference on
7 that, but the debtors did honor the gift cards through the
8 date of the store closings and through the date the Borders
9 E-Commerce website went down, which was I believe
10 September 27th, 2001 was the last date that the debtors
11 operated and then it was transferred to Barnes & Noble.
12 They kept the site up for a couple weeks, but then traffic
13 was automatically directed to Barnes & Noble, and then some
14 time in early October they literally shut down the site and
15 have now prevented on the internet any access going back to
16 the site based on computer things that I won't profess to
17 fully understand how they do that.

18 So there may have been discussion, but clearly the
19 debtors did commit to continue to honor them through the
20 wind down and through what we'll call the GOB or going out
21 of business sale.

22 THE COURT: That's the what I'm recall -- I do
23 recall a discussion in court, I specifically recall a
24 discussion --

25 MR. BUECHLER: Okay.

1 THE COURT: -- about them continuing to honoring
2 the gift cards.

3 MR. BUECHLER: Yes, and there's no question the
4 debtor honored them through -- and our papers say that they
5 honored them through the cessation of business by Borders.

6 But clearly from our perspective all of these
7 people are unknown creditors, Borders did not maintain a
8 database of gift card holders, because the reality is a gift
9 card was purchased by an individual and they can purchase it
10 in a multitude of ways but to give it away as gift, and
11 people could buy a gift card by going to a Borders store and
12 you can pay cash, use a check, a credit or debit card, you
13 could -- well, you could have bought Borders gift stores --
14 excuse me -- Borders gift cards at other retailers like a
15 Walgreen's, other people sold Borders gift cards that you
16 could use, and starting in May of 2008, which is after the
17 debtor took back the operation of its website from Amazon,
18 prior to that Amazon operated Borders website for it.
19 Borders took it back. Only after Borders took it back did
20 borders then sell gift cards on its E-Commerce website so
21 you could purchase then on the internet and then you'd get a
22 card mailed and then later in time you actually got like an
23 e-ticket type of gift card.

24 Borders did not maintain any type of directory
25 when you got a card. Your card was activated so people

1 would use it depending on whatever the denomination was that
2 was purchased, \$10, \$15, \$20, whatever it was, it was
3 activated, and when it was swiped to utilize, whether it was
4 a store or online a particular data base maintained by First
5 Data, which is a third party provider, not the debtor,
6 maintained a database simply of just that is data.

7 The debtor did not keep a list or ask people when
8 they used the gift card who they were, what their name and
9 address was, and you had (indiscernible - 00:23:00) data all
10 over the place as set forth in the declarations of
11 Mr. --

12 THE COURT: And if I had a gift card that had some
13 money left on it I could give it to somebody else to use the
14 balance.

15 MR. BUECHLER: You could if -- absolutely. A gift
16 card is almost like a bearer bond, it's fully fungible, it
17 can be transmitted to anybody, and because state law
18 changes, primarily driven by California state law, there is
19 no expiration date today on a gift card, so therefore gift
20 cards don't expire like they used to.

21 So if you look at a gift card from Borders from
22 2000 they actually had printed expiration dates on it, more
23 current gift cards simply did not because there is no --

24 THE COURT: Let me -- let me shift gears.

25 MR. BUECHLER: -- gift cards. So that's where

1 we're at. We did try very rigorously between the party's
2 counsel to try and resolve this, which leads us to the
3 mediation issue. And the motion was --

4 THE COURT: That's what I want to --

5 MR. BUECHLER: -- the motion was adjourned for a
6 number of times when it was originally scheduled for to
7 attempt to resolve that, and we met in person for I don't
8 know two, three hours, I don't remember exactly how long at
9 the Perkins Coie's office in Manhattan to discuss
10 settlement. We've had a number of group telephone calls
11 with a number of people on the calls. There's been a lot of
12 what I'll call one on one phone calls with myself and either
13 Mr. Vanacore or his co-counsel, Mr. Chrisloff, to discuss
14 settlement. There have been e-mails back and forth, and
15 unfortunately instead of getting, from our perspective as
16 the trust, closer to a deal on the big issues we've gone
17 further apart.

18 We provided them with a very detailed and granular
19 written settlement proposal back in early April, I don't
20 recall the date of that e-mail, maybe early April, maybe a
21 little earlier of a very detailed specific settlement
22 proposal. We never really received a full response to that,
23 and the substantive conversations on what we viewed as
24 certain crucial issues from the estate's perspective have
25 only shown that instead of getting closer, where maybe

1 mediation could help, the gap between the parties have
2 become more like the Pacific Ocean in dollars and other
3 issue --

4 THE COURT: Stop.

5 MR. BUECHLER: -- and we --

6 THE COURT: Stop. The late claim motion was
7 originally scheduled today.

8 MR. BUECHLER: Yes, and they asked us to adjourn
9 that for further discussions, which we did, and then we've
10 since gotten a lot of discovery requests.

11 THE COURT: So -- yeah, that's what I wanted to
12 focus on. They asked you if you would agree to adjourn the
13 hearing for today, and they got it adjourned from today
14 until June.

15 MR. BUECHLER: Correct.

16 THE COURT: And after you agreed to adjourn it
17 they then served a bunch of discovery.

18 MR. BUECHLER: And with the one discovery request
19 that we had received beforehand, which is the one dated
20 May 11th, I had asked them to toll that for the period of
21 the adjournment and was subsequently told no.

22 THE COURT: And they wouldn't -- okay. Let me
23 hear from the other side.

24 MR. BUECHLER: Thank you, Judge.

25 THE COURT: Thank you, Mr. Buechler.

1 MR. CARROLL: Good morning, Your Honor, Schuyler
2 Carroll of Perkins Coie on behalf of the gift card
3 claimants. Your Honor --

4 THE COURT: Gift card late claimants.

5 MR. CARROLL: Absolutely, Your Honor.

6 I'll start, Your Honor, if it pleases the Court
7 with the mediation request.

8 THE COURT: No. Actually what game were you
9 playing when you asked to adjourn the motions from today and
10 then serve discovery, including a deposition notice for
11 tomorrow and wouldn't agree to adjournment?

12 MR. CARROLL: Your Honor, we were not playing any
13 games, and that is not what happened.

14 THE COURT: Well, it sure seems to me like that.

15 MR. CARROLL: Of course, Your Honor, because all
16 you've heard is Mr. Buechler's side, because he's filed his
17 motion this morning. You haven't heard our side, Your
18 Honor.

19 Our side, Your Honor, is that we had filed the
20 discovery -- excuse me -- we served the discovery the very
21 day after they withdrew settlement discussions, and they
22 sent this very clear e-mail that said, all offers are
23 withdrawn, we're not having any further settlement
24 discussions. So we immediately served our discovery.

25 Some time after that, approximately two weeks

1 later, we had further discussions, and it seemed like it was
2 appropriate to have a settlement discussion.

3 We then said, we'll be happy to have a settlement
4 discussion, but we have a hearing coming up, it seems like
5 we should adjourn that. We all agreed on that.

6 During the settlement discussion Mr. Buechler
7 said, well, let's just agree on one thing, all of the
8 discovery is tolled, correct? And we said, we're here for a
9 settlement discussion, why don't we talk about the
10 settlement discussion? It may be that we can agree on
11 tolling the discovery, but it may be completely unnecessary.
12 Unfortunately the parties never got past that and never had
13 a further discussion on the discovery.

14 And Your Honor, if we had an appropriate meet and
15 confer as the rules require rather than the filing of a
16 motion perhaps we would have resolved those issues.
17 Unfortunately we didn't. We were --

18 THE COURT: Tell me what -- go ahead, Mr. Carroll.

19 MR. CARROLL: Unfortunately, Your Honor, we
20 didn't. We then were served with their papers last Friday
21 night. And included in those papers, Your Honor, was --
22 were two declarations. We believe it's appropriate to take
23 depositions of those parties. Frankly, Your Honor, those
24 depositions may be a half an hour each. We don't think
25 these --

1 THE COURT: Why do you need to take those
2 depositions?

3 MR. CARROLL: There are two important points, Your
4 Honor.

5 Assuming, which we disagree with, everything Mr.
6 Buechler say is correct, and there are two important points.
7 Those are they have said that they did everything they could
8 to attempt to give notice. We don't believe, Your Honor, in
9 fact that they did anything to attempt to give notice.

10 For example, Your Honor, may recall that in
11 September there was a hearing at which the debtor was
12 talking about the opt in, opt out privacy issues for
13 transferring the e-mails to Borders -- excuse me -- to
14 Barnes & Noble, and there was a specific discussion at that
15 hearing where Mr. Glenn said, Your Honor, we have 45 million
16 e-mail addresses, and there was discussion at that time
17 about whether it would be appropriate to send e-mails to
18 those parties about the privacy issues.

19 Your Honor, they never even sent an e-mail with
20 the bar date notice as an attempt to give notice to the gift
21 card holders. There are undoubtedly a number of --

22 THE COURT: Do you have any cases that say they
23 had to?

24 MR. CARROLL: Your Honor, we certainly have cases
25 that say you are required to give reasonably effective

1 notice -- excuse me -- reasonable notice calculated to reach
2 the purported parties.

3 Here it certainly would have been very simple to
4 do an e-mail, could have been very simple like is done in
5 class actions where it's two lines that says, there are --
6 there are deadlines that are approaching and you must act or
7 your rights will be affected. They didn't do anything like
8 that, Your Honor, and that's our need for discovery. Again,
9 it is --

10 THE COURT: You didn't file any affidavits or
11 declarations in support of the motion to permit a late
12 claim; is that correct?

13 MR. CARROLL: That is correct, Your Honor.

14 THE COURT: All right. Here's what we're going to
15 do. Well --

16 MR. CARROLL: Your Honor, may I address the
17 mediation?

18 THE COURT: Yeah, but I'll tell you, Mr. Carroll,
19 where parties have -- where a party has been unwilling to
20 submit to mediation I have -- I have not compelled the
21 parties to mediate.

22 This is the case with a sophisticated set of
23 lawyers, and if and when I rule on the pending motions if
24 there's anything left, I can decide then whether mediation
25 is appropriate.

1 But it seems to me in the first instance if your
2 clients are not permitted to do proceed with their late
3 claims you don't have a basis for proceeding with a class
4 action.

5 MR. CARROLL: We certainly understood that, Your
6 Honor. We --

7 THE COURT: And so I'll rule -- I'll hear the
8 motions in June and rule on them. If late claims are
9 allowed I'll consider then whether to -- we'll revisit the
10 issue of mediation at that point.

11 MR. CARROLL: If I may just briefly address the
12 issue, Your Honor.

13 I do believe that this is a case that frankly
14 cries out for the parties to go to mediation now, and I'll
15 just take a moment to explain why.

16 Mr. Buechler believes that we're going the wrong
17 way. Frankly, Your Honor, we think that's incorrect, and we
18 think that's incorrect, and the reason it's incorrect --

19 THE COURT: I guess we'll find out when the motion
20 is argued before me, right?

21 MR. CARROLL: I'm sorry, Mr. Buechler was talking
22 about the settlement discussions that we were going the
23 wrong way.

24 THE COURT: Well, you don't have anything to
25 settle if your clients aren't permitted to file late claims.

1 MR. CARROLL: Of course, Your Honor, but that's
2 the case in any dispute.

3 THE COURT: No, it's not. You're seeking to
4 resolve a class claim when you don't know you can bring a
5 class claim.

6 MR. CARROLL: Certainly, Your Honor. But again,
7 that is the case in any class claim context. Your Honor --

8 THE COURT: No, it is not, Mr. Carroll. It simply
9 is not. Once the bar date has passed if no proof of claim
10 is filed, if you're not permit to do file a late claim you
11 don't have any basis to proceed.

12 MR. CARROLL: Certainly, Your Honor. We don't
13 believe that Your Honor after seeing all of the reality of
14 what happened here and what didn't happened --

15 THE COURT: Seeing the reality of what happened,
16 you haven't filed any evidence. A motion to file a late
17 claim, you filed it, you didn't support it, I'll deal with
18 it on the basis of the papers that have been filed. I'm not
19 going take anymore paper from you, Mr. Carroll. I'll deal
20 with it on the basis that you took your best shot, they
21 filed their objection, they've responded now, I'll hear it
22 in June. It would have been heard today but for the fact
23 that you requested it be put off it's been put off.

24 MR. CARROLL: Thank you, Your Honor, I understand.

25 As to the mediation let me just briefly say one

1 thing.

2 MR. CHRISLOFF: Can I interrupt one second. Cliff
3 Chrisloff. We're supposed to have a reply on either the 5th
4 or the 6th before the hearing. So we'd appreciate the
5 opportunity to file a reply.

6 THE COURT: Well, if the reply is specifically
7 responsive to papers that the trust has filed I'll consider
8 them. If -- if it's not I won't. It's as simple as that.

9 MR. CHRISLOFF: It will be, Your Honor.

10 THE COURT: Go ahead, Mr. Carroll.

11 MR. CARROLL: Thank you, Your Honor.

12 As to the mediation, as I said, Your Honor,
13 Mr. Buechler believes that our parties in settlement
14 discussions have gone farther apart, and the reason he
15 believes that, Your Honor, is exactly why mediation is
16 appropriate here.

17 There are two types of issues in most
18 negotiations. There's economics and non-economics. The
19 problem here is that the non-economics, which are primarily
20 procedural issues in our discussions, the parties ultimately
21 should have the same goals. which are if we reach a
22 settlement it should be approved by the Court on proper
23 notice so that it can't be undone or there aren't other
24 claimants who come out later and say the settlement wasn't
25 appropriate.

1 But for whatever reason despite, as you said,
2 sophisticated counsel, we haven't been able to get together
3 on those non-economic issues, Your Honor.

4 And I truly feel that this is a situation where
5 having an independent third party will be able to persuade
6 the parties to reach agreement on those non-economic issues,
7 and if we do I don't really feel that we are so far apart on
8 our economics, and I think that those will fall in line.

9 I know that Mr. Buechler has talked about or in
10 his papers talked about mediation is an attempt to delay or
11 play games, Your Honor. I want Your Honor to understand
12 that that is totally not true. We're happy to start the
13 mediation immediately. We're happy to choose a mediator
14 today and literally go into a conference room and stay there
15 until we either are told by the mediator we haven't reached
16 an agreement or have reached an agreement, Your Honor.

17 This is not on attempt to play games, this is not
18 an attempt to gain an advantage, this is not an attempt to
19 delay.

20 And one more thing, Your Honor. Mr. Buechler has
21 eluded to that we haven't been negotiating in good faith. I
22 think --

23 THE COURT: I don't want to know about the
24 negotiations.

25 MR. CARROLL: No, I'm not going to tell you

1 anything about the negotiations.

2 THE COURT: I don't want to know about the
3 negotiations.

4 MR. CARROLL: I would never do that, Your Honor.

5 My only point is if that is the case, if we're not
6 proceeding properly, that's exactly a reason for a mediator.
7 A mediator can tell the parties what they're supposed to be
8 doing, and under the mediation rules can report to the Court
9 if a party is not participating in good face -- faith.

10 So for those reason, Your Honor, I think a
11 mediation is appropriate here, can be done much less
12 expensively than anything else that would proceed, and would
13 benefit all the parties, Your Honor.

14 I would add one other thing, Your Honor, I've only
15 been involved -- only seen one case in my career, I'm sure
16 lots of other people have seen a lot more than I have -- but
17 I've only seen one case that hasn't settled in mediation.
18 And the reality about that case was, even though there
19 wasn't a settlement the parties saved a lot of money and
20 time and the Court's time because they realized what the
21 party's true positions were and they didn't engage in a lot
22 of discovery, and there are a bunch of motions that weren't
23 filed because the parties got together during a mediation.

24 For those reasons, Your Honor, we believe it's
25 appropriate to have a mediation here.

1 THE COURT: All right.

2 Mr. Buechler, you want to be heard?

3 MR. BUECHLER: Please, thank you, Judge.

4 THE COURT: Briefly.

5 MR. BUECHLER: Just one quick small on one small
6 merits issue that Mr. Carroll raised, which was the e-mail
7 list. Just for clarification. The list that was sold to
8 Barnes & noble was the Borders reward card members e-mail
9 list. That is not synonymous in any way, shape, or form
10 with holders of Borders gift cards.

11 Briefly on the mediation issues. We are still
12 very, very far apart on the economic issues, and I think the
13 most telling point was the question I asked Mr. Vanacore
14 over the phone over the past weeks, which was simply, if we
15 agree to mediate would you agree to toll all the discovery?
16 And I was told no unless the estate agreed to provide them
17 with what they wanted, an informal discovery.

18 So at this point in time, and I've been very clear
19 to them, the counsel for the gift card -- the late gift card
20 claimants, whatever you want to call them for the purposes
21 of today, that we're not saying we'll never mediate, but at
22 that juncture at this time we've told them we're not close,
23 we're far apart, we're going to file our papers, you file
24 your papers, we'll see where we're at, and that's the way we
25 believe we're proceeding.

1 I have attempted very seriously to try and resolve
2 this. I have been very good over the past 25 years I've
3 been practicing law to try and resolve matters without the
4 need for mediation and that's where we're at.

5 To our view is simply put we would ask the Court
6 in connection with the discovery to simply quash it or
7 provide a protective order so any discovery stand until
8 after the Court rules on the two pending motions in our
9 opposition and fix a firm date as to when the response
10 papers would be due.

11 We had repeatedly told them, and just so the Court
12 is aware, since we starting adjourning this motion -- or
13 these two motions the understanding I've had with
14 Mr. Vanacore, who I've spoken about, this was always that
15 whenever the trust filed its opposition the counsel for the
16 punitive gift card claimants would then file their motion or
17 their reply seven days later. They asked us to relax that
18 due to the holiday weekend last weekend and a vacation
19 schedule so that we could file before the Memorial Day
20 weekend, and we said fine, and please file your papers by
21 June 5, and that's what we said. And we did that. And
22 we're now being told by them that they want to file their
23 papers on June 6.

24 I received an e-mail yesterday from Mr. Vanacore
25 saying, well, if you look back at the old original case

1 management order we should be able to file our reply two
2 days before the hearing, why shouldn't we be able to do
3 that? And my response simply was, because you and I reached
4 an agreement that said to the contrary, and more
5 importantly, and I think this is crucial, both Your Honor
6 needs time to read their papers, more than two days, and
7 respectfully so does my side.

8 So we would ask that the Court direct that their
9 opposition papers be filed by no later than June 5 so that
10 both Your Honor and we have time to read them to be prepared
11 fully for June 13th and to either quash the discovery or
12 issue a protective order holding them all in abeyance until
13 after the Court decides the two pending motions.

14 THE COURT: All right, thank you, Mr. Buechler.

15 MR. CARROLL: Your Honor, if I may, I'll just
16 address very quickly the last comments Mr. Buechler made.

17 As to the timing we'll file the papers any time
18 the Court would like. The 5th, the 6th. The simple fact is
19 there wasn't an agreement, which frankly I think, Your
20 Honor, leads to the point of mediation why --

21 THE COURT: Okay. Mr. -- I don't want to hear
22 anyone about mediation, Mr. Carroll.

23 MR. CARROLL: Absolutely, Your Honor.

24 THE COURT: Mr. Carroll, you can have a seat.

25 Thank you.

1 MR. CARROLL: Thank you.

2 THE COURT: All right. The Court declines to
3 compel mediation at that time. I will hear the motions on
4 June 13th. The reply should be filed by noon on Wednesday,
5 June 6th. All discovery is stayed pending the hearing on
6 June 13th.

7 If I don't resolve the pending motions the 13th,
8 if I take them under submission I probably will continue a
9 stay on discovery until I've ruled on the pending motions.

10 When I've ruled on the pending motions I'll decide
11 what, if any, discovery is appropriate at that time, I'll
12 also consider at that time whether mediation is appropriate
13 if anything remains to be decided by the Court at that time.

14 In the future -- well, there won't be any
15 discovery between now and the hearing on the 13th.

16 In the future, Mr. Buechler, as I made clear, my
17 standing procedures with respect to discovery disputes
18 should be clear to you since you were in the case from the
19 start, I would -- probably would have dealt with it today
20 any way since you were coming in for a hearing rather than
21 by phone last night, but ordinarily I deal with those issues
22 by phone without any papers filed at all.

23 If you want to continue discussing settlement
24 that's certainly appropriate. Settlement is usually in the
25 best interests of all the parties. And so in saying that I

1 won't compel mediation at this time and will go forward with
2 the motions, that shouldn't be taken as an indication that
3 both sides would be better off if they were to continue
4 discussions and attempt to resolve it, and if you can notify
5 the Court in advance.

6 As always, I endeavor to be fully prepared at the
7 time of a hearing, so please keep my chambers advised. The
8 reply will be due on noon on June 6th, and we undoubtedly
9 will be working on everything even before then, but we'll
10 certainly once the reply is in.

11 So if the parties reach an agreement or conclude
12 that -- and I'm not necessarily encouraging this -- but if
13 progress is being made and you conclude that the hearing
14 should be adjourned from the 13th please contact. You can't
15 adjourn anything unilaterally, you have to call chambers.
16 But if you agree on that because you think you're making
17 some progress contact chambers as soon as possible and I'll
18 try and accommodate everybody on that.

19 MR. BUECHLER: Your Honor, is there any need for
20 an order to me moralize this --

21 THE COURT: Well, I'm so ordering the record.

22 MR. BUECHLER: Thank you, that's fine.

23 THE COURT: I think you all understand clearly
24 what I've ordered.

25 MR. BUECHLER: Understood.

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THE COURT: Okay, we're adjourned.

MR. BUECHLER: Thank you, Judge, have a good day.

MR. CARROLL: Thank you, Your Honor.

MR. CHRISLOFF: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 10:43

AM)

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

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

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