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Trust and Curtis R. Smith in his capacity
as the Liquidating Trustee*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

**BGI, INC., f/k/a Borders Group, Inc.,

Debtor.**

Chapter 11

Case No. 11-10614 (MG)

Substantively Consolidated

**OBJECTION OF THE BGI CREDITORS' LIQUIDATING TRUST AND LIQUIDATING
TRUSTEE TO THE MOTION FOR ENTRY OF AN ORDER (I) PURSUANT TO RULE
9014(c) MAKING RULE 7023 APPLICABLE TO THE ALLOWANCE AND PRIORITY
OF THE CLASS PROOF OF CLAIM (II) CERTIFYING THE CLASS OF ALL
HOLDERS AND PURCHASERS OF GIFT CARDS (III) ALLOWING THE CLASS
CLAIM AND (IV) GRANTING THE CLASS CLAIM PRIORITY STATUS**

The BGI Creditors' Liquidating Trust (the "Trust"), as successor to the debtors and debtors-in-possession (collectively, the "Debtors" or "Borders"), and Curtis R. Smith, the Liquidating Trustee (the "Trustee"), submit this objection (the "Certification Objection") to the *Motion for the Entry of an Order (i) Pursuant to Rule 9014(c) Making Rule 7023 Applicable to the Allowance and Priority of the Class Proof of Claim (ii) Certifying the Class of All Holders and Purchasers of Gift Cards (iii) Allowing the Class Claim and (iv) Granting the Class Claim*

Priority Status [Docket No. 2450] (the “Certification Motion”), and respectfully state as follows:

PRELIMINARY STATEMENT

1. On January 9, 2012, after the Debtors’ Plan (defined below) had been confirmed, Eric Beeman, Jane Freij, and Robert Traktman (collectively, the “Gift Card Holders”) filed the Certification Motion, by which they seek certification of a class comprised of all holders and purchasers of the Debtors’ gift cards (the “Proposed Class”), pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). The Gift Card Holders also seek allowance of an alleged class claim on behalf of the Proposed Class. Amazingly, the Gift Card Holders seek this relief even though they filed individual proofs of claim *eight* months after the General Bar Date¹ passed (which have never been authorized by this Court) and have never filed a class proof of claim on behalf of the Proposed Class. The Gift Card Holders further assert that the phantom class claim is entitled to priority treatment under section 507(a)(7) of the Bankruptcy Code.

2. As a threshold matter, the Trust submits that the Court must deny the Certification Motion because the Gift Card Holders have failed to file a class proof of claim either before or after the General Bar Date. The question of whether to apply Federal Rule of Civil Procedure 23 (“FRCP 23”), applicable by Bankruptcy Rule 7023, does not arise and cannot even be addressed without a timely filed class proof of claim.

3. Even if a class proof of claim had been timely filed by the Gift Card Holders, the application of Bankruptcy Rule 7023 to the purported class claim and certification of the Proposed Class would be totally inappropriate in these circumstances under relevant case law. The Gift Card Holders, as unknown creditors of the Debtors’ estates, were provided with

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Trust’s Late Claim Objection (defined below).

constructive notice of the General Bar Date (June 1, 2011), yet waited to file their individual proofs of claim until over eight months after the General Bar Date had passed. Allowing the proofs of claim of the Gift Card Holders and a yet unfiled class claim would extend the General Bar Date not only for the Gift Card Holders, but also for the alleged members of the Proposed Class (potentially tens of thousands of individual claimants) at the extreme prejudice of the Debtors' creditors who timely filed proofs of claim and voted to confirm a Plan that did not and could not have contemplated the phantom class proof of claim that the attorneys for the Proposed Class seek to foist upon this estate for their own pecuniary purposes.

4. Moreover, the Court must deny the Certification Motion because allowing a class claim would severely hamper and delay the administration of the case given that the Plan has been confirmed by the Court, went effective, and has been substantially consummated. The Gift Card Holders have not demonstrated that a class action proceeding is in any way superior, or necessary and beneficial, to the bankruptcy claims resolution process, which is an efficient process designed to reconcile large numbers of claims. The late filed individual claims of the Gift Card Holders can and should be adjudicated within the context of the bankruptcy claims reconciliation process and the Gift Card Holders have not established any basis for this Court to adjudicate a class claim that does not exist and was never filed as a proof of claim or in the context of an adversary proceeding. Moreover, the Gift Card Holders' request for allowance of the non-existent class proof of claim in the context of the Certification Motion is premature. The merits of any purported class claim should only be addressed if the Gift Card Holders escape the threshold infirmities that preclude this Court from ever considering class certification and applying Bankruptcy Rule 7023.

5. Finally, and though the Court need not ever reach the issue, the Gift Card Holders cannot establish the requisite elements of FRCP 23. The Gift Card Holders have not demonstrated commonality among putative members of the Proposed Class as required under FRCP 23. Whether the Gift Card Holders and members of the Proposed Class can demonstrate that every single holder of a Borders gift card is entitled to priority claim status under section 507(a)(7) of the Bankruptcy Code is a fact-specific inquiry that must be determined on an individual, case-by-case basis. In addition, the Gift Card Holders are not adequate class representatives since they did not even file timely individual claims in this case. For all of these reasons, the Certification Motion must be denied.

BACKGROUND

6. In order to avoid unnecessary duplication, the Trust incorporates herein the entirety of the facts and law as fully described by the Trust in the *Objection of the BGI Creditors' Liquidating Trust and Liquidating Trustee to the Motion to Allow and Deem Timely Filed Gift Card Claims* (the "Late Claim Objection") and the Declarations of Kate Matson and James Toner.

7. On January 9, 2012, over *eleven* months after the Petition Date, over *seven* months after the General Bar Date (June 1, 2011), nearly *two* months after the Court entered the Disclosure Statement Order, and almost *three* weeks after the Court entered the Confirmation Order² confirming the Plan, the Gift Card Holders filed the Certification Motion, seeking: (i) a determination that Bankruptcy Rule 7023 is applicable to the purported "class claim"; (ii) certification of the Proposed Class; (iii) allowance of the purported "class claim" pursuant to

² Given that counsel for the Gift Card Holders was first retained on December 5, 2011 (Certification Motion, ¶ 17), one questions why they filed no objection to confirmation of the Plan raising these issues. The confirmation hearing was held on December 21, 2011.

section 502 of the Bankruptcy Code; and (iv) a determination that the alleged claims of the Proposed Class are entitled to priority treatment under section 507(a)(7) of the Bankruptcy Code.

8. Mr. Beeman holds a gift card in the amount of \$100.00, Ms. Freij holds a gift card in the amount of \$25.00, and Mr. Traktman holds a gift card in the amount of \$100.00. *See* Toner Decl. ¶¶ 17, 19. All three Gift Card Holders filed their individual proofs of claim on February 4, 2012 – over *eight* months after the General Bar Date had passed. Mr. Traktman has not sought leave to file a late claim.³ The Gift Card Holders have not filed a class proof of claim.

OBJECTION

I. Bankruptcy Rule 7023 Cannot Apply Because the Gift Card Holders Have Failed to File a Class Proof of Claim.

9. After the Seventh Circuit’s decision in *American Reserve Corp.*, 840 F.2d 487, 494 (7th Cir. 1988), class proofs of claim have, for the most part, been permitted in bankruptcy proceedings under limited circumstances. *See In re Ephedra Products Liability Litigation*, 329 B.R. 1, 5 (S.D.N.Y. 2005) (“*Ephedra*”); *In re Chateaugay Corp.*, 104 B.R. 626 (S.D.N.Y. 1989), *appeal dismissed*, 903 F.2d 245 (2d Cir. 1991); *In re Musicland Holding Corp.*, 362 B.R. 644, 650 (Bankr. S.D.N.Y. 2007) (“*Musicland*”); *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997) (“*Woodward*”); *In re Thomson McKinnon Securities, Inc.*, 133 B.R. 39 (Bankr. S.D.N.Y. 1991), *aff’d*, *In re Thomson McKinnon Securities, Inc.*, 141 B.R. 31 (S.D.N.Y. 1992). However, applying Bankruptcy Rule 7023 to a class proof of claim and certification of a class for purposes of allowance of a class proof of claim are matters for the discretion of the Bankruptcy Court and are subject to certain facts and circumstances unique to bankruptcy proceedings. As a threshold matter, and fundamental to a determination regarding the applicability of Bankruptcy Rule 7023, is the existence of a timely filed class proof of claim.

³ A copy of Mr. Traktman’s late filed proof of claim is annexed hereto as Exhibit A.

The Trust is aware of no published case in which the applicability of Bankruptcy Rule 7023 was even considered without such a timely filed class proof of claim or an adversary proceeding commenced before the bar date.

10. The Certification Motion is styled as a request for an order “making Rule 7023 applicable to the allowance and priority of the *class proof of claim*”, “allowing the *Proposed Class’s proof of claim*”, and “granting the *Class Claim* priority status...” See Certification Motion, p. 2 (emphasis added). The Gift Card Holders repeatedly make mention of a purported “class claim” throughout the Certification Motion. However, the late filed proof of claim of Mr. Traktman, attached to the Certification Motion as “Exhibit C”, is for Mr. Traktman only and not in his capacity as a representative of a purported class of gift card holders. Furthermore, the late filed proofs of claim for Mr. Beeman and Ms. Freij, attached to the Late Claim Motion as “Exhibit A”, are also solely on behalf of Mr. Beeman and Ms. Freij in their respective individual capacities and make no mention of a putative class of gift card holders. A review of the claims registry reveals that these three proofs of claim are the only proofs of claim that the Gift Card Holders or their class action attorneys have filed in this matter. No class proof of claim has been filed on behalf of the Proposed Class. Therefore, the “class claim” purportedly serving as the basis of the Gift Card Holders’ request for allowance and class certification simply does not exist. Bankruptcy Rule 7023 does not apply to proofs of claim of individuals. Thus, because there is no class proof of claim upon which to base the relief requested in the Certification Motion, the Gift Card Holders’ request to apply Bankruptcy Rule 7023 and certify a putative class of gift card holders must be denied. There should be no further inquiry.

II. Even if a Class Proof of Claim Had Been Filed, the Court Should Deny the Certification Motion.

11. While it is clear that the absence of any class proof of claim, let alone a timely filed class proof of claim, is fundamentally fatal to the Certification Motion, even if the Gift Card Holders timely filed a class proof of claim, the Court should nevertheless refuse to apply Bankruptcy Rule 7023.

12. The right to file a class proof of claim in bankruptcy is not absolute. *Ephedra*, 329 B.R. at 4; *In re Motors Liquidation Co.*, 447 B.R. 150, 156 (Bankr. S.D.N.Y. 2011) (“*Motors Liquidation*”); *In re Bally Total Fitness of Greater New York, Inc.*, 402 B.R. 616, 619 (Bankr. S.D.N.Y. 2009) (“*Bally*”), *aff’d*, *In re Bally Total Fitness of Greater New York, Inc.*, 411 B.R. 142 (S.D.N.Y. 2009); *Musicland*, 362 B.R. at 650 (“while class proofs of claim in bankruptcy are not prohibited, the right to file one is not absolute.”); *see also In re Sacred Heart Hospital of Norristown*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995) (noting that the class action device may be utilized in appropriate contexts, but should be used sparingly).

13. Though Bankruptcy Rule 9014 directs that certain rules apply to contested matters, Bankruptcy Rule 7023 is not one of those rules. Instead, Bankruptcy Rule 9014 states that “[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.” Fed. R. Bankr. P. 9014(c); *see also Musicland*, 362 B.R. at 650 (“[FRCP 23] does not apply automatically to contested matters.”). Thus, the decision to extend the application of Bankruptcy Rule 7023 and, therefore, FRCP 23, is within the Court’s discretion. *Motors Liquidation*, 447 B.R. at 157; *Bally*, 402 B.R. at 619-20; *Musicland*, 362 B.R. at 650; *accord Ephedra*, 329 B.R. at 4-5; *In re Blockbuster, Inc.*, 441 B.R. 239, 240 (Bankr. S.D.N.Y. 2011) (“*Blockbuster*”); *accord In re Thomson McKinnon Sec. Inc.*, 133 B.R. at 40. *See also Certified Class in Charter Sec. Litig. v. Charter Co.*, 876 F.2d 866, 876 (11th Cir. 1989)

(“Under the bankruptcy posture of this case Bankruptcy Rule 7023 and class action procedures are applied at the discretion of the bankruptcy judge.”); *In re Am. Reserve Corp.*, 840 F.2d at 494 (holding that “the bankruptcy judge did not recognize that he has discretion under [Bankruptcy] Rule 9014 not to apply [Bankruptcy] Rule 7023 -- and therefore not to apply [FRCP] 23 -- in this ‘contested matter’”); *Woodward*, 205 B.R. at 371 (“it would be an abuse of discretion to permit [claimant] to first invoke the applicability of the class action rules to his claim at this late date.”).

14. In determining whether to exercise its discretion, a court primarily considers (i) whether the proponent of a class claim made a motion to extend the application of FRCP 23 to its proof of claim; (ii) whether the class claim satisfies the requirements of FRCP 23; and (iii) whether the benefits of the use of the class claim are consistent with the needs, concerns, and goals of bankruptcy. *Motors Liquidation*, 477 B.R. at 157; *Blockbuster*, 441 B.R. at 240; *Bally*, 402 B.R. at 620; *Musicland*, 362 B.R. at 651; *Woodward*, 205 B.R. at 365. Again, these cases presuppose that a class proof of claim or an adversary proceeding has been timely filed. Here, no such class claim or adversary proceeding was filed, even though it is now almost one year after the General Bar Date and four and one half months after the Effective Date of the Plan.

15. With respect to the question of whether the application of Bankruptcy Rule 7023 to a class claim is consistent with the goals of bankruptcy, several factors inform a court’s decision including: (i) whether the class was certified prepetition (in this matter, it is beyond dispute that no class was certified prepetition and, indeed, no class proof of claim or class action complaint has ever been filed); (ii) whether the putative members of the class received actual or constructive notice of the bar date, and (iii) whether class certification will adversely affect the administration of the case. *Musicland*, 362 B.R. at 654. In determining whether class certification will adversely affect the administration of the case, a court will consider (a) the

timing of the motion for certification and (b) whether a plan has been negotiated, voted upon, or confirmed. *Id.* A review of these factors in the context of the Debtors' bankruptcy case mandates the denial of the Certification Motion.

A. The Phantom Class Claim is Inconsistent with the Goals of Bankruptcy.

(i) The Gift Card Holders and Putative Members of the Proposed Class Received Constructive Notice of the General Bar Date.

16. A court need not exercise its discretion to certify a class when the putative unnamed class members have "clearly received actual or constructive notice of the bankruptcy case and the bar date" as the granting of a class certification motion would have the effect of expanding "the bar date for notified creditors" *In re Sacred Heart Hospital of Norristown*, 177 B.R. at 22-23; *see also Blockbuster*, 441 B.R. at 242 (refusing to certify a class because the debtors provided adequate notice to the members of the putative class by publication notice of the chapter 11 cases, 341 meeting, and bar date); *Motors Liquidation*, 447 B.R. at 168 (noting that "no class has ever been certified in bankruptcy court by reason of deficiencies in notice to prospective members of a putative class" and refusing to certify a class because even though publication notice of the bar date was "not ideal" to reach putative class members living in South Africa, publication notice was not deficient).

17. The Trust incorporates the entirety of its Late Claim Objection as if it were fully set forth herein. The Late Claim Objection demonstrates that holders of Borders gift cards (and specifically, the individual movants) were unknown creditors and the notice by publication of the General Bar Date in *The New York Times* was adequate and complied with due process.⁴ Moreover, the Gift Card Holders have failed to demonstrate excusable neglect for their failure to

⁴ In addition, the Bar Date Notice was available on the www.bordersreorganization.com website as of April 22, 2011. *See Matson Decl.*, 17. Thus, the Debtors gave constructive notice of the General Bar Date in another medium besides *The New York Times*.

timely file their proofs of claim (note that only Beeman and Freij, but not Traktman, have sought leave to file a late claim). The Debtors' bankruptcy case was extensively covered by the media, numerous press releases were issued in conjunction with the bankruptcy case and the full-chain liquidation of the Debtors' stores, and the retail locations liquidated by the Debtors had store closing sales that displayed large banners stating that the Debtors were in bankruptcy and going out of business. *See* Matson Decl., ¶¶ 15, 19-20.

18. The Gift Card Holders clearly had actual knowledge of the Debtors' bankruptcy from the beginning as conceded in the Certification Motion (¶¶ 29, 31), yet the Gift Card Holders took no action for nearly *eleven* months after the Petition Date.⁵ Despite having contacted their seasoned class action attorneys as early as December 5, 2011 (*see* Certification Motion ¶ 17), the Gift Card Holders still waited over a month to file the Certification Motion. They then waited approximately one more month, until February 4, 2012, to file their individual proofs of claim with GCC, the Debtors' claims agent. Despite counsel being contacted on December 5, 2011 and thereafter "immediately began analyzing the bankruptcy docket" (Certification Motion, ¶ 17), no objection to confirmation of the Plan was filed by the Gift Card Holders, even though the confirmation hearing was several weeks later on December 21, 2011.

19. The Gift Card Holders and Proposed Class received constructive notice of the General Bar Date and did not file timely proofs of claim, or in the case of the Gift Card Holders, filed untimely proofs of claim over *eight* months after the General Bar Date had passed. Consequently, the Gift Card Holders and the members of the Proposed Class are barred from asserting claims against the Debtors after the expiration of the General Bar Date. *See Musicland*, 362 B.R. at 650 (refusing to certify a class because members of the putative class received either

⁵ It is interesting to note that the Gift Card Holders could have used their gift cards at any of the store closing sales or on the Borders Website through September 2011, but apparently failed to do so.

actual or constructive notice of the bar date, “and granting the motion would effectively extend the bar date for creditors who sat on their rights.”).

20. In *Bailey v. Jamesway Corp.* (“*Jamesway*”), 1997 WL 327105 (Bankr. S.D.N.Y. 1997), the Court also denied class certification. There, a number of the debtor’s former employees commenced an adversary proceeding prior to the claims bar date seeking to pursue WARN Act claims. *Id.* at *1. After the bar date had passed, the class amended their complaint to add a number of additional plaintiffs and requested that the Court certify a proposed class under FRCP 23. *Id.* at *4. The debtor opposed class certification, arguing, among other things, that a number of the additional plaintiffs did not file individual proofs of claim by the bar date and that the request for class certification was made after the bar date had passed. *Id.* at *3-4. In its opinion, the Court found that the debtor “had acted reasonably in selecting means likely to inform persons affected by the Bar Date”. *Id.* at *8. Thus, the Court refused to certify the class because class certification would “effectively extend the bar date to those employees who have not timely filed WARN Act claims herein, or moved to extend their time to file them, without a showing of excusable neglect”). *Id.* at *10. In reaching its conclusion, the Court stated:

In this case, the balance tips decidedly in favor of denying class claim status to the Complaint. *Jamesway* gave adequate notice of these chapter 11 proceedings and the Bar Date. No class was pre-certified such that the purported class members who did not choose to file a proof of claim should or could have had any reasonable expectation that they need not comply with the Bar Date Order. As such, this is not a case justifying an exception to the enforcement of the Bar Date Order in accordance with its express and unequivocal terms. To do so would be unwarranted, unfair, and possibly violate the due process rights of other creditors.

Id.

21. As in *Jamesway*, the Debtors acted reasonably in providing creditors, both known and unknown, with notice of the General Bar Date. While the Gift Card Holders attempt to rely on the absence of any specific actual notice to them with respect to the General Bar Date and the last date for use of gift cards, they ignore the fact that they were in the unique position (better

than any other unsecured creditors) to mitigate their loss by having months to use their gift cards during the well publicized full-chain liquidation of the Debtors. *See* Matson Decl., ¶ 20. Moreover, the Gift Card Holders and members of the Proposed Class affected by the Bar Date Order should not have had any reasonable expectation that they would not be required to comply with the General Bar Date or at least timely file a class proof of claim. Indeed, in *Jamesway*, an adversary proceeding was filed before the bar date but this Court nevertheless refused to certify a class. The circumstances here are even worse for the Gift Card Holders, having never even filed a class action complaint or a class proof of claim. Therefore, the Certification Motion should be denied because to do otherwise would amount to the extension of the General Bar Date for a group of potentially tens or hundreds of thousands of alleged creditors who had constructive notice of the General Bar Date but “failed to exercise vigilance” in timely filing a proof of claim. *See Sacred Heart Hospital*, 177 B.R. at 24 (class certification denied when former employees had both actual and constructive notice of the bankruptcy case and yet chose not to file proofs of claim); *see also Motors Liquidation*, 447 B.R. at 157 (“[t]he effect of a class claim on other creditors is an important factor in the court’s decision whether to exercise its discretion and grant Rule 23 certification.”) (quoting *In re Northwest Airlines Corp.*, 2007 WL 2815917 at *3 (Bankr. S.D.N.Y. 2007) (denying class certification for that reason and others)).

(ii) Class Certification Will Adversely Affect Administration of the Case.

22. The Certification Motion should be denied because the granting of the Certification Motion and the allowance of the alleged “class claim” would unduly delay the administration of the Debtors’ estates and would prejudice creditors in connection with the confirmed Plan that has also been substantially consummated. In determining whether to apply FRCP 23 to a class claim, “a pervasive theme is avoiding undue delay in the administration of

the case.” *Motors Liquidation*, 447 B.R. at 157 (quoting *Ephedra*, 329 B.R. at 5). A court should refrain from applying FRCP 23 “if doing so would [] ‘gum up the works’ of distributing the estate.” *Ephedra*, 329 B.R. at 5 (quoting *Woodward*, 205 B.R. at 376). In refusing to apply FRCP 23 to the putative class claims in *Ephedra*, the District Court noted that the underlying bankruptcy plan had already been submitted for a vote of the creditors when the certification motion was put before the bankruptcy court and thus it was “simply too late in the administration of this Chapter 11 case to ask the Court to apply Rule 23 to the class proofs of claim.” *Ephedra*, 329 B.R. at 5; *see also Sacred Heart*, 177 B.R. at 24 (denying the motion for class certification because class certification would cause a “very substantial and apparently unwarranted disruption to the administration of the Debtor’s bankruptcy case, in which there is presently a plan before us for imminent confirmation.”).

23. Likewise, in *In re Northwest Airlines Corp.*, the plaintiffs’ request for class certification was denied because, among other things, granting the request would cause an undue delay in the administration of the bankruptcy case. *In re Northwest Airlines Corp.*, 2007 WL 2815917 at *3. There, the plaintiffs sought class certification four months after the debtors confirmed a plan and made an initial distribution. *Id.* at *3. In support of its holding, the Court stated that certifying a class at such a late juncture in the bankruptcy case would cause a delay in a second distribution to legitimate claimholders. *Id.*

24. Again, in these decisions where class certification was denied, the class plaintiffs had filed a timely class proof of claim in the first instance, a prerequisite for consideration of their respective motions for class certification, and a fact conspicuously absent here. Here, in the absence of a class claim, not only has the Plan already been submitted to a vote, but it was also accepted by the Debtors’ creditors and confirmed by the Court *before* the Gift Card Holders even

filed the Certification Motion. The Plan has also gone effective. Pursuant to the Plan, all of the Debtors' property was transferred to the Trust on the Effective Date, and the Trustee, as the Debtors' successor, has been managing the assets and liabilities including claims administration. In addition, the Trustee has begun making distributions to holders of allowed administrative and priority claims pursuant to the Plan. *See* Toner Decl., ¶ 21. To date, the Trust has made distributions to holders of allowed administrative and priority claims totaling at least \$17 million (including the Trust's administrative costs). *Id.* Therefore, the Plan has been substantially consummated. Allowing class certification at this late stage in the bankruptcy proceeding would create further delay in resolving potentially tens or hundreds of thousands of claims of purported gift card holders, would result in costly litigation, and would seriously and negatively impact legitimate creditors' bona fide expectations in voting in favor of the Plan without the spectre of a class proof of claim that still has not been filed. Thus, given the advanced stage of the proceedings, the Court should follow the standard set forth in *Ephedra* and other cases and refrain from applying Bankruptcy Rule 7023 to the purported class claim.

25. Indeed, the Plan was premised on an estimated 4%-10% distribution to holders of allowed general unsecured claims. *See* Disclosure Statement, p. 19 [Docket No. 2110]. If the Certification Motion were granted and a non-existent class proof of claim somehow allowed, the Trust would never have enough cash to cover the alleged priority claims of the Proposed Class, let alone make a distribution of between 4%-10% to holders of allowed general unsecured claims. *See Ephedra*, 329 B.R. at 9 (in denying certification, the court noted that "allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the [timely-filed] claims"). The prejudice to the bona fide general unsecured creditors is manifest.

26. Furthermore, the delay in filing a motion for class certification “may impact on the entire case - not just the affected claim - and provides grounds to refuse to make Rule 23 applicable to the claims process.” *Woodward*, 205 B.R. at 370. In *Woodward*, a creditor filed a prepetition class action in state court asserting that the debtor had made false and misleading statements in connection with the price it charged for product sold in its stores. *Id.* at 368. After the commencement of the bankruptcy case, the creditor filed a timely class proof of claim, but never filed a motion seeking certification of the class. *Id.* at 370. At the time the debtor objected to the class proof of claim, the debtor had sold all its assets, confirmed a liquidating plan, and made a distribution of approximately 70% to unsecured creditors. *Id.* In response to the debtor’s objection to the class claim, the creditor cross-moved, seeking to compel submission of the class claim to a court-ordered alternative dispute resolution procedure. *Id.* at 370-71. The Court found that even if the creditor had filed a timely motion for class certification and FRCP 23 applied, allowing class certification would “gum up” administration of the bankruptcy case by requiring the debtor to “spend the time and money litigating the class certification question and paying a class claim [which could] jeopardize further distributions.” *Woodward*, 205 B.R. at 370, 376; *see also Thomas McKinnon Securities Inc.*, 133 B.R. at 41 (refusing certification because “the costs and delay associated with class actions are not compatible with liquidation cases where the need for expeditious administration of assets is paramount so that all creditors, including those not within the class, may receive a distribution as soon as possible. Creditors who are not involved in the class litigation should not have to wait for the payment of their distributive liquidated share while the class action grinds on”). Here, the Plan was confirmed before the filing of the Certification Motion, and has subsequently gone effective and been

substantially consummated. Aside from all of the other fundamental infirmities, the Certification Motion is too late and must, therefore, be denied.

(iii) The Purported Class Claim is Not Superior to the Bankruptcy Claims Process.

27. The bankruptcy claims process is in many respects superior to class action procedures. *See Bally*, 402 B.R. at 621-22 (“Though class treatment may be beneficial with other civil actions in consolidating the adjudication of common issues, this advantage disappears in the context of a bankruptcy.”). Because the bankruptcy process employed in this case already provided a forum for claimants such as the Gift Card Holders and members of the Proposed Class, no justification exists to burden the estate with the costs and delay associated with the prosecution of a class action lawsuit. *See Am. Reserve Corp.*, 840 F.2d at 489 (“The bankruptcy forum, as a mandatory collective proceeding, serves th[e purpose of concentrating litigation in a single forum] without the overlay of a class action.”); *Woodward*, 205 B.R. at 376 (“a bankruptcy proceeding offers the same procedural advantages as the class action because it concentrates all the disputes in one forum.”). The Debtors have been liquidated and the Plan has been confirmed. The costs and delay associated with defending a class claim would not only interfere with the expeditious administration of the estate, but would drain the assets leaving no recovery to unsecured creditors who timely filed proofs of claim. Accordingly, the Court should decline to exercise its discretion to apply Bankruptcy Rule 7023. *See, e.g., Am. Reserve Corp.*, 840 F.2d at 492 (noting that “[t]he systematic costs of class litigation should not be borne lightly” and that courts should decline to exercise their discretion to allow class proofs of claim to proceed where there is little prospect of compensation to the class); *see also Ephedra*, 321 B.R. at 10 (“allowing the consumer class actions would unreasonably waste an estate that was

already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim.”).

28. In addition, the average amount of a gift card claim of a member of the Proposed Class is less than \$12.00. *See* Toner Decl., ¶ 7; Matson Decl., ¶12. Assuming, *arguendo*, that the gift card claims of members of the Proposed Class are entitled to priority status under section 507(a)(7) of the Bankruptcy Code (which the Trust disputes), a 100% distribution on gift card claims would be less than \$12.00 on average. Assuming gift card claims are simply general unsecured claims, a 4%-10% distribution on gift card claims would be about \$1.20. In either case, the distribution to each individual member of the Proposed Class would be *de minimis* and prohibited by the Plan. *See* Plan, Art. VI, G., p.25 (allowed claims under \$50.00 are not entitled to any distribution). Therefore, class certification would not even benefit the members of the Proposed Class under the terms of the Plan, which is the subject of a final, non-appealable confirmation order. The only apparent benefit of class certification would be to the Gift Card Holders’ attorneys.⁶ However, the United States District Court for the Southern District of New York has denied class certification when it has found that the class action attorneys were the only parties to derive a benefit from the class action. *See Ephedra*, 329 B.R. at 9-10 (Given that “[c]laims of class members would likely be few and small,” and that “[t]he only real beneficiaries of applying Rule 23 would be the lawyers representing the class,” the court exercised its discretion under Bankruptcy Rule 9014 and did not apply FRCP 23); *see also Woodward*, 205 B.R. at 376.

⁶ The Court should note that in *In re TSIC, Inc. f/k/a Sharper Image Corporation* (“TSIC”), Case No. 08-10322(KG) (Bankr. D. Del. 2008), Judge Gross reduced the fees of counsel for gift card holders – the same class action counsel for the Gift Card Holders here – because “[i]t would be inequitable to award the requested fees which would equate to 75% of the recovery...an award of the lodestar amount (\$317,000) on a recovery of \$410,000 is unacceptable and unreasonable”. [TSIC, Docket No. 2381]. Counsel for the gift card holders filed a motion for reconsideration of the order calculating attorneys’ fees [TSIC, Docket No. 2387], but the court recently entered an order dated May 3, 2012 denying the motion for reconsideration the day before the hearing on the matter. [TSIC, Docket No. 2426]. Copies of the TSIC orders are annexed hereto as Exhibit B.

B. Class Certification Should Be Denied Because the Gift Card Holders Cannot Satisfy Rule 23.

29. The Trust does not believe that the Court need ever consider the FRCP 23 requirements given the fact that no class proof of claim has ever been filed by the Gift Card Holders and that relevant case law makes clear that from a bankruptcy perspective, Bankruptcy Rule 7023 should not apply in any event under these circumstances. Be that as it may, the Trust believes it incumbent upon the Trust and Trustee to address, to a limited extent, the FRCP 23 requirements.⁷

30. To qualify for class certification under FRCP 23, a plaintiff must first satisfy all four elements of FRCP 23(a): numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a); *see also In re Partsearch Technologies, Inc.*, 453 B.R. 84, 93 (Bankr. S.D.N.Y. 2011). The Gift Card Holders cannot satisfy this burden.

(i) Commonality is Not Satisfied.

31. The Gift Card Holders assert that all gift card holders present a single question of law, which is the Proposed Class's entitlement to a priority claim under section 507(a)(7) of the Bankruptcy Code, and that only "minor" factual differences exist for the Proposed Class (i.e., differing levels of damages). *See* Certification Motion, ¶¶ 53-54. The Gift Card Holders' assessment of the commonality requirement and the priority entitlement of the Gift Card Holders and Proposed Class is incorrect.

32. Fundamental bankruptcy law provides that statutory priorities should be narrowly construed. *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100-01 (2d Cir. 1986) ("Because the presumption in bankruptcy cases is that the debtor's limited resources will

⁷ If the Court ever reaches the issue of whether the Gift Card Holders satisfy the requirements of FRCP 23, the Trust reserves the right to take discovery as to the appropriateness of the Gift Card Holders as representative claimants and the appropriateness of their law firm as class counsel.

be equally distributed among his creditors, statutory priorities are narrowly construed ... If one claimant is to be preferred over others, the purpose should be clear from the statute.”) (citations omitted). *See also In re Terra Distributing, Inc.*, 148 B.R. 598, 599 (D. Idaho 1992) (“There is a preference in bankruptcy law that the limited estate of a debtor will be equally distributed among all creditors; consequently, statutory priorities are construed narrowly.”); *In re Heritage Village Church and Missionary Fellowship, Inc.*, 137 B.R. 888, 892 (Bankr. D. S.C. 1991) (“An underlying presumption in the administration of bankruptcy cases is that a debtor’s limited resources will be equally distributed among creditors, and, consequently, statutory priorities must be narrowly construed . . . Accordingly, the provisions of 11 U.S.C. § 507(a)(6) must be narrowly construed in making a determination concerning the Plaintiffs’ entitlement to priority status thereunder.”).

33. Thus, because priority entitlement contravenes the fundamental bankruptcy principle of equality of distribution among creditors, it is generally accepted that “the claimant bears the burden of proving its entitlement to priority.” *In re Boston Regional Medical Center*, 264 B.R. 222, 226 (Bankr. D. Mass. 2001); *See also Terra Distributing*, 148 B.R. at 599 (“The burden to demonstrate the elements required for priority status lies upon the claimant.”) (consumer deposits); *Heritage Village*, 137 B.R. at 892 (“Further, the burden to demonstrate that the requisite elements for a priority status are met rests upon the claimants”) (dealing with consumer deposits). The Court, therefore, cannot certify the Proposed Class since it must determine, on a case-by-case basis, that priority claim status under section 507(a)(7) is warranted.⁸ As discussed below, the Trust does not believe that the Court can reach such a conclusion in view of the diverse body of claims and fact-intensive nature of the priority at issue.

⁸ Even though the Debtors indicated in the Customer Programs Motion that holders of prepetition gift card claims may be entitled to priority treatment under section 507(a)(7) of the Bankruptcy Code, the priority status of

34. Section 507(a)(7) of the Bankruptcy Code grants a priority to:

unsecured claims of individuals, to the extent of \$2,425 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

11 U.S.C. §507(a)(7).

35. The Trust respectfully submits that holders of Borders' gift cards are not entitled to priority claim status under section 507(a)(7) of the Bankruptcy Code. Section 507(a)(7) only applies to an individual, not a corporation or other entity that may hold a Borders gift card. Thus, to the extent that any gift card claims are filed by entities other than individuals, such claims are clearly not entitled to priority claim status.

36. Further, priority status is only afforded to a claim arising from the "deposit...of money in connection with the purchase, lease, or rental of property, or for the purchase of services, for personal...use of such individuals...." *See id.* Each individual gift card holder must demonstrate that they actually made the deposit under this provision. Given that the vast majority of Borders' gift cards were purchased by one person and then "gifted" to another person, individuals who received a Borders gift card would not be the individual that made the deposit. By the use of the term "individual" two times in this specific subdivision of the Bankruptcy Code, the Trust submits section 507(a)(7) refers to the party that made the deposit,

prepetition gift card claims under section 507(a)(7) was never adjudicated and accepted by the Court nor did the Customer Program Motion constitute a determination by the Court of any individual gift card holders' priority status. Thus, the Trust is not bound by the Debtors' prior statement set forth in the Customer Programs Motion and is free to dispute a gift card holder's alleged priority status. *See Bates v. Long Island Railroad Co.*, 997 F.2d 1028, 1037-38 (2d Cir. 1993), *cert. denied*, 510 U.S. 992 (1993), *superseded by statute as stated in Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994) ("judicial estoppel prevents a party from asserting a *factual* position in a legal proceeding that is contrary to a position previously taken...in a prior legal proceeding") (emphasis added). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 114 (2d Cir. 1990) (judicial estoppel . . . "applies only if the party against whom the estoppel is claimed actually obtained a judgment as a result of the inconsistent position.").

not another individual who received the transfer. In this case, each of the three Gift Card Holders conceded that they received their Borders gift cards as a gift.

37. In addition, the United States Supreme Court has consistently instructed that bankruptcy courts should interpret the Bankruptcy Code according to its “plain meaning.” *See, e.g., Hartford Underwriters Insurance Co. v. Union Planters Bank N.A.*, 50 U.S. 1, 6 (2000) (in interpreting section 506(c) of the Bankruptcy Code, we begin with the understanding that Congress says in a statute what it means and means in a statute what it says there...when the statute’s language is plain, the sole function of the court – at least where the disposition required by the text is not absurd – is to enforce it according to its terms) (citations and quotations omitted). Merriam-Webster’s online dictionary defines the term “deposit” as “to place especially for safe keeping or as a pledge; *especially*: to put in a bank”, “to lay down.”⁹ Thus, a “deposit” refers to a situation in which an individual consumer would put a deposit on a particular item and ask a store to hold the item which they would pick up and pay for at a later date. Conversely, given that a person who purchased a Borders gift card could use that gift card either at a Borders retail store or the Borders Website to purchase any merchandise up to the value remaining on the gift card, a gift card cannot be considered a deposit. The customer can apply his gift card to any merchandise sold. The Court should note that there is no legislative history concerning the meaning of “deposit” under section 507(a)(7) of the Bankruptcy Code.

38. The Trust has located only one decision that actually addresses whether the term “deposit” in section 507(a)(7) of the Bankruptcy Code could include gift cards. In *In re Woodworkers Warehouse, Inc.*, 313 B.R. 588 (Bankr. D. Del. 2004) (“*Woodworkers*”), the court dealt with the issue of whether prepetition gift certificates were entitled to priority status over

⁹ *See* <http://www.merriam-webster.com/dictionary/deposit> as of May 23, 2012.

general unsecured claims pursuant to section 507(a)(6) of the Bankruptcy Code.¹⁰ In *Woodworkers*, the debtor objected to gift certificate proofs of claim asserting priority status and proposed a plan of reorganization that classified all holders of gift certificate claims as general unsecured creditors. The U.S. Trustee objected to confirmation of the debtor's plan on several grounds, including that such claims were entitled to priority claim status. In response to the U.S. Trustee's objection, the debtor modified its plan to provide that gift certificate claims would be treated as priority claims pursuant to section 507(a)(6) of the Bankruptcy Code to the extent the court so ordered after hearing.

39. The *Woodworkers* court noted that the issue before it was gift certificates, and not gift cards, but did note in *dicta* that the *Woodworkers* court believed gift cards would likewise be entitled to priority claim status. *Id.* at 595. The Trust respectfully submits that the *Woodworkers*' decision is of limited application to this case because the *Woodworkers* court did not address certain critical elements of section 507(a)(7), such as (i) whether the individual who made the "deposit" had to also be the party asserting the claim or could be a different individual, (ii) whether the deposit was made for the individual's "personal, family or household use," and (iii) whether use of a gift card for the purchase of goods or services constitute goods that were "delivered or provided" to individuals by Borders.

40. The blanket ruling sought by the Gift Card Holders that all holders of Borders' gift cards are entitled to priority status under section 507(a)(7) of the Bankruptcy Code is wholly inappropriate and premature because the Court must first determine the applicability of Bankruptcy Rule 7023 and then, if applicable, whether the claim was made by an individual; whether the party asserting such claim must be the party that made the "deposit," or whether the claim could be held by a separate individual; whether the "deposit" was made for "personal,

¹⁰ Pub. L. No. 109-8 (2005) redesignated section 507(a)(6) of the Bankruptcy Code as section 507(a)(7).

family or household use” (as opposed to, for example, a medical or professional firm’s purchase of a gift card to buy magazines for use in their business, such as in a waiting room); and whether by use of the gift card, purchased goods or services were “delivered or provided” to the individual by Borders. Thus, the commonality requirement under FRCP 23 cannot be met when dealing with gift cards in the factual context of this case and further demonstrates that the use of a class claim as a vehicle for such a determination should be rejected. Because determining the priority status of claims under section 507(a)(7) of the Bankruptcy Code is a fact-intensive inquiry that must be performed on an individual, case-by-case basis, the alleged “class claim” is not amenable to a consolidated priority adjudication process. Thus, the Court must deny the Certification Motion on that basis.

(ii) The Gift Card Holders are Not Adequate Class Representatives.

41. The adequacy of representation requirement of FRCP 23(a)(4) encompasses two separate inquiries. First, the Court must determine whether the named class representatives do not have a conflict of interest with the class they seek to represent. Second, the class must be represented by qualified counsel. *Partsearch*, 453 B.R. at 95 (citations omitted). Here, the Gift Card Holders cannot meet the first requirement. The Trust takes no position on the second requirement at this time but reserves its right to do so should it become relevant.

42. The Gift Card Holders assert that adequacy is satisfied because “[t]he Gift Card Holders have suffered the same loss of the value of their gift card(s), and the named Gift Card Holders seek relief consistent with, and not antagonistic to, the interests of the other class members.” *See* Certification Motion, ¶ 63. At this time, the Gift Card Holders’ counsel represents no claimants other than the three Gift Card Holders who hold three late filed proofs of claim totaling \$225.00. Given the limited breadth of its current representation, the Gift Card

Holders' counsel's assertion that no material conflict exists between the three Gift Card Holders and the potentially tens or hundreds of thousands of alleged holders of gift cards who make up the Proposed Class is disingenuous. In fact, the Gift Card Holders fail to recognize that their gift card claims might be denied priority treatment (and should be denied leave to file late claims for the reasons stated in the Late Claim Objection). Therefore, the near certainty of a conflict of interest between the Gift Card Holders and other members of the putative class renders the Gift Card Holders inadequate class representatives.

43. All the above factors demonstrate that the Gift Card Holders cannot satisfy the FRCP 23 requirements even if the Court were to somehow reach that issue.

CONCLUSION

44. For all the foregoing reasons, the Trust submits that the Gift Card Holders cannot meet their burden of establishing that the Court should apply Bankruptcy Rule 7023 to the purported class claim. Accordingly, the Certification Motion must be denied in all respects.

[Signature page to follow.]

WHEREFORE, the Trust respectfully requests that the Court deny the Certification Motion and grant the Trust such other and further relief as the Court deems just and proper.

Dated: May 25, 2012

LOWENSTEIN SANDLER PC

By: /s/ Bruce Buechler

Bruce Buechler, Esq.

Bruce S. Nathan, Esq.

Timothy R. Wheeler, Esq.

Beth L. Williams, Esq.

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-- and --

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*Counsel to the BGI Creditors' Liquidating
Trust and Curtis R. Smith in his capacity
as the Liquidating Trustee*

EXHIBIT A



7391588



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

Name of Debtor (Please select the appropriate Debtor from the list of Debtors set forth in the Definitions section on the reverse side of this form and insert that Debtor's name here - choose only one) **BORDERS, INC 11-10615**

NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case, but may be used for purposes of asserting a claim under 11 U.S.C. § 503(b)(9) (see item # 6) All other requests for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503

Your Claim is Scheduled As Follows:

Name of Creditor (the person or other entity to whom the debtor owes money or property)
ROBERT TRAKTMAN

Check this box to indicate that this claim amends a previously filed claim



Name and address where notices should be sent
ROBERT TRAKTMAN

820 CONEY ISLAND AVENUE
BROOKLYN, NY 11218

OFFICE (718) 941-7600
MOBILE: (347) 446-9135
Telephone number
Email Address: **robert@metropolitanheat.com**

Court Claim Number: _____
(if known)

Filed on _____

Name and address where payment should be sent (if different from above)
FILED - 04666
SDNY
BORDERS GROUP, INC., ETAL
11-10614(MG)

Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
 Check this box if you are the debtor or trustee in this case

If an amount is identified above, you have a claim scheduled by one of the Debtors as shown. (This scheduled amount of your claim may be an amendment to a previously scheduled amount.) If you agree with the amount and priority of your claim as scheduled by the Debtor and you have no other claim against the Debtor, you do not need to file this proof of claim form, EXCEPT AS FOLLOWS: If the amount shown is listed as any of DISPUTED, UNLIQUIDATED, or CONTINGENT, a proof of claim MUST be filed in order to receive any distribution in respect of your claim. If you have already filed a proof of claim in accordance with the attached instructions, you need not file again.

IMPORTANT: Please list the store number and address of any lease related to your claim (if applicable)
Store Number: _____ Store Address: _____

1. Amount of Claim as of Date Case Filed: **\$ 50-100**
If all or part of your claim is secured, complete item 4 below, however, if all of your claim is unsecured, do not complete item 4.
If all or part of your claim is entitled to priority, complete item 5.
 Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507(a)
If any portion of your claim falls in one of the following categories, check the box and state the amount

2. Basis for Claim: **unsecured**
(See instruction #2 on reverse side)

Specify the priority of the claim

3. Last four digits of any number by which creditor identifies debtor: _____
3a. Debtor may have scheduled account no: _____
(See instruction #3a on reverse side)

- Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B)
- Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4)
- Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(5)
- Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7)
- Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8)
- Other - Specify applicable paragraph of 11 U.S.C. § 507(a) _____

4. Secured Claim (See instruction #4 on reverse side)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.
Nature of property or right of setoff: Real Estate Motor Vehicle Equipment Other
Describe:
Value of Property: \$ _____ Annual Interest Rate: %
Amount of principal and other charges as of time case filed included in secured claim,
If any: \$ _____ Basis for perfection: _____
Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____

6. Claim Pursuant to 11 U.S.C. § 503(b)(9)
Indicate the amount of your claim arising from the value of any goods received by the Debtor within 20 days before February 16, 2011, the date of commencement of the above cases, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.
\$ _____

7. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.
8. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction # 8 and definition of "redacted" on reverse side)
DO NOT SEND ORIGINAL DOCUMENTS ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING
If the documents are not available, please explain in an attachment.

Amount entitled to priority:
\$ 50-100

*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

Date: **1/1/12** Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.
Robert Traktman by Christina Kristof, attorney

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571
Modified B10 (GCG)



3843309227

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules. The attorneys for the Debtors and their court-appointed notice and claims agent, The Garden City Group, Inc. are not authorized to provide you with any legal advice.

PLEASE SEND YOUR ORIGINAL, COMPLETED CLAIM FORM AS FOLLOWS IF BY MAIL: THE GARDEN CITY GROUP, INC., ATTN: BORDERS GROUP, INC., P.O. BOX 9690, DUBLIN, OHIO 43017-4990; IF BY HAND OR OVERNIGHT COURIER: THE GARDEN CITY GROUP, INC., ATTN: BORDERS GROUP, INC., 5151 BLAZER PARKWAY, SUITE A, DUBLIN, OHIO 43017. ANY PROOF OF CLAIM SUBMITTED BY FACSIMILE OR E-MAIL WILL NOT BE ACCEPTED.

THE GENERAL BAR DATE IN THESE CHAPTER 11 CASES IS JUNE 1, 2011 AT 5:00 P.M. (PREVAILING EASTERN TIME)
THE GOVERNMENTAL BAR DATE IN THESE CHAPTER 11 CASES IS AUGUST 15, 2011 AT 5:00 P.M. (PREVAILING EASTERN TIME)

Court, Name of Debtor, and Case Number:

These chapter 11 cases were commenced in the United States Bankruptcy Court for the Southern District of New York. You should select the Debtor against which you are asserting your claim. A SEPARATE PROOF OF CLAIM FORM MUST BE FILED AGAINST EACH DEBTOR.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. Please provide us with a valid email address. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if the debtor, trustee or another party in interest files an objection to your claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. Secured Claim:

Check the appropriate box and provide the requested information if the claim is fully

or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien documentation, and state annual interest rate and the amount paid due on the claim as of the date of the bankruptcy filing.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507(a):

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Claim Pursuant to 11 U.S.C. § 503(b)(9):

Check this box if you have a claim arising from the value of any goods received by the Debtor within 20 days before February 16, 2011, the date of commencement of the above cases, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. (See DEFINITIONS, below.)

7. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

8. Documents:

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary FRBP 3001(c) and (d). If the claim is based on the delivery of health care goods or services, see instruction 2. Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature:

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of

DEFINITIONS

Debtor

A debtor is the person, corporation, or other entity that has filed a bankruptcy case. The debtors in these cases are:

Borders Group, Inc.	11-10614
Borders, Inc.	11-10615
Borders International Services, Inc.	11-10616
Borders Direct, LLC	11-10617
Borders Properties, Inc.	11-10618
Borders Online, Inc.	11-10619
Borders Online, LLC	11-10620
RGP (UK), Limited	11-10621

Creditor

A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing. See 11 U.S.C. § 101(10).

Claim

A claim is the creditor's right to receive payment on a debt owed by the debtor that arose on the date of the bankruptcy filing. See 11 U.S.C. § 101(5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with The Garden City Group, Inc. as described in the instructions above.

Secured Claim Under 11 U.S.C. § 506(a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507(a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Section 503(b)(9) Claim

A Section 503(b)(9) claim is a claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of a bankruptcy case in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection

Evidence of perfection may include a mortgage lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

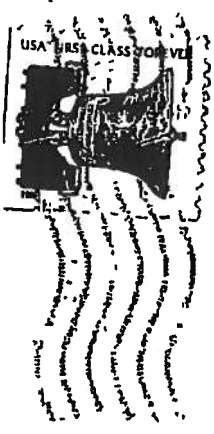
INFORMATION

Acknowledgment of Filing of Claim

To receive acknowledgment of your filing, please provide a stamped self-addressed envelope and a copy of this proof of claim when you file the original claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.), and any applicable orders of the bankruptcy court.



NEW YORK NY 100
NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

The Garden City Group, Inc.
Attn. Borders Group, Inc.
P.O. Box 9690
Dublin, OH 43017-4990

43017499090 

EXHIBIT B

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
TSIC, Inc., f/k/a Sharper Image Corporation,)	Case No. 08-10322(KG)
)	
Debtor.)	
_____)	Re Dkt No. 2296

MEMORANDUM ORDER

1. The Court has under consideration a request for an award of attorneys' fees to class counsel ("Counsel"). Counsel represented the class of gift card holders (the "Class") of debtor Sharper Image (now known as "TSIC"). The Class representative, Frederic Prohov ("Mr. Prohov") has also requested an incentive award.

2. In the settlement the Class received refunds of purchases of gift cards and priority status for distribution. The issue is the value of the recovery fund, what fees are reasonable and the source of payment.

3. Counsel is requesting \$317,000 based on what they claim was a total recovery of \$815,500. The total recovery of the Class was, in reality, \$410,000. Counsel is including in its stated recovery (i) \$200,000 in noticing costs and (ii) \$20,500 in fees for TSIC's claims and noticing agent's claims processing costs – both paid or to be paid by TSIC. Counsel is not entitled to include such costs as a benefit to the Class¹. Also, TSIC points out that \$250,000 in allowable claims were filed before and without Counsel's action, thereby reducing the recovery upon which any fees are based to \$410,000.

¹ See Procedures Order and *In re American Family Enterprises*, 256 B.R. 377, 387 (D.N.J. 2000).



4. It would be inequitable to award the requested fees which would equate to 75% of the recovery. Here, an award of the lodestar amount (\$317,000) on a recovery of \$410,000 is unacceptable and unreasonable. Moreover, Counsel's effort to take credit for the priority status afforded the Class ignores an important consideration: this is a bankruptcy case and the status of claims is determined by the Bankruptcy Code, not settlement terms.

5. Since Counsel's lodestar does not apply under these circumstances, the Court will award fees based on 30% of the Class recovery, or \$123,000, plus expenses of \$6,430.95. The award is to be paid from the recovery fund. Procedures Order; *In re Rent-Way Securities Litigation*, 305 F.Supp. 2d 491, 521 (W.D.Pa. 2003).

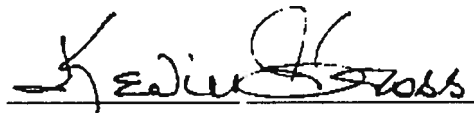
6. The Court will not grant Mr. Prohov an incentive fee. There is no evidence in the record that he did any work or made any contribution beyond serving as plaintiff. Nor is there evidence Mr. Prohov suffered any adverse consequences from his serving as plaintiff. *In re Plastic Tableware Antitrust Litig.*, 1995 WL 723175 at * 2 (E.D.Pa. Dec. 4, 1995).

For the foregoing reasons the Court orders that:

A. Counsel shall be paid from the recovery fund the sum of \$123,000.00 in fees and \$6,430.95 in expenses.

B. Mr. Prohov shall not receive an incentive award.

Dated: March 9, 2012



KEVIN GROSS, U.S.B.J.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:) Chapter 11
)
TSIC, INC., f/k/a Sharper Image Corporation,) Case No. 08-10322 (KG)
) (Jointly Administered)
)

Debtor.) **Re Dkt No. 2381, 2387 & 2419**

ORDER DENYING MOTION FOR RECONSIDERATION

The Court has carefully considered the Gift Card Class Counsel's Motion for Reconsideration of the March 9, 2012 Order for Calculation of Attorneys Fees, Incentive Award, and Clarification (D.I. 2387) (the "Reconsideration Motion") and Debtors' objection to the Reconsideration Motion (D.I. 2419). The Reconsideration Motion does not raise or address any matters which the Court did not consider in its Memorandum Order, dated March 9, 2012 (D.I. 2381). The issues raised in the Reconsideration Motion do not satisfy the standards of Bankruptcy Rule 9023. *See In re Tribune Co.*, 464 B.R. 208, 213 (Bankr. D. Del. 2011). Accordingly, the Reconsideration Motion is denied.

Dated: May 3, 2012



KEVIN CROSS, U.S.B.J.