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*Counsel to the BGI Creditors' Liquidating
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

**DECLARATION OF JAMES TONER IN SUPPORT OF THE OBJECTION OF THE
BGI CREDITORS' LIQUIDATING TRUST AND LIQUIDATING TRUSTEE TO (A)
MOTION TO ALLOW AND DEEM TIMELY FILED GIFT CARD CLAIMS AND (B)
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**

James Toner, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am the former Senior Associate General Counsel for Borders Group, Inc., *et al.* (the "Debtors" or "Borders").

2. I was employed by Borders commencing in 1997 through December 31, 2011. When the Plan (defined below) went effective on January 12, 2012 (the “Effective Date”) [Docket No. 2465], I then became a consultant for Curtis R. Smith, the Liquidating Trustee (the “Trustee”), and the BGI Creditors’ Liquidating Trust (the “Trust”), successor to the Debtors that was formed in accordance with the BGI Creditors’ Liquidating Trust Agreement and the *First Amended Joint Plan of Liquidation Pursuant to Chapter 11 Proposed by the Debtors and the Official Committee of Unsecured Creditors* dated November 10, 2011 (the “Plan”) [Docket No. 2110], as confirmed by an order of the Bankruptcy Court dated December 20, 2011 [Docket No. 2384].

3. On behalf of the Trust and Trustee, I submit this declaration (the “Declaration”) in support of 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 *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 “Certification Objection”).

4. The facts set forth in this Declaration are based upon my personal knowledge, upon information and belief acquired during the term of my employment, or upon the Debtors’ records kept in the ordinary course of business that were reviewed by me or others employed by the Debtors or by the Trust under my supervision and direction. If called and sworn as a witness, I could and would testify competently to the matters set forth herein.

5. In or about 1998, the Debtors instituted an electronic gift card program (the “Gift Card Program”) under which they sold Borders gift cards (“Gift Cards”) at Borders retail locations, which at one point included over 1000 stores in all 50 of the United States, the District of Columbia, and the Commonwealth of Puerto Rico;¹ third-party retail locations such as Walgreens and Safeway; and, commencing in May 2008, at the Debtors’ e-commerce website, www.borders.com (the “Borders Website”).² Customers could purchase Gift Cards with cash, personal check or credit/debit card at Borders stores and from third-party retailers, or by credit/debit card at the Borders Website. Borders also issued Gift Cards as store credit in certain situations, such as when customers returned merchandise without a receipt. Gift Cards issued to customers as credit historically accounted for 4%-5% of the Debtors’ total outstanding Gift Card liabilities. This Declaration uses the term ‘Gift Card’ to cover both Gift Cards issued to customers for credit and Gift Cards sold to customers.

6. It was Borders’ custom and practice not to attach any personally identifiable information to the Gift Cards. Borders does not maintain and never maintained a list of Gift Card purchasers containing the Gift Card purchasers’ contact information. Borders does not maintain and never maintained a list of Gift Card holders containing the Gift Card holders’ contact information. By definition and design, Gift Cards were typically purchased by one person and then “gifted” to another person, unknown to Borders. Borders marketed Gift Cards

¹ Gift cards purchased in foreign jurisdictions from a licensee of the Borders tradename and trademarks such as Borders Singapore or Borders Australia were not redeemable and could not be used at domestic Borders locations or the Borders Website. The foreign Borders entities were solely licensees of the tradename “Borders” in defined geographic locations.

² From 2000 to May 2008, the Borders Website was operated by Amazon, Inc., which fulfilled all orders and served as the merchant of record for all transactions. Though a customer could purchase a Gift Card from the Borders Website during this time, holders of Gift Cards could not use their Gift Cards on the Borders Website until May 2008. When Borders ended its relationship with Amazon in May 2008 and Borders assumed operational control over the Borders Website, Amazon did not transfer to Borders any customer contact information regarding e-commerce transactions that occurred while Amazon operated the Borders Website.

as products for sale, expected the Gift Cards to be freely transferred once purchased and, accordingly, does not maintain and never did maintain a list of Gift Card purchasers, let alone Gift Card *holders*, by name, street address, or email address.

7. Between inception of the Gift Card Program and June 2011, Borders issued approximately 103 million Gift Cards in an aggregate face amount of approximately \$2.5 billion. As of June 2011, the Debtors' books and records indicated the existence of approximately 17.7 million outstanding Gift Cards with unredeemed balances aggregating approximately \$210.5 million. Accordingly, the average unredeemed balance on any individual Gift Card is approximately \$11.89.

8. Borders engaged First Data Corporation ("First Data"), a third-party database management firm that offers gift card program solutions for merchants worldwide, to monitor and maintain the stored value and redemption history of all Borders Gift Cards in a database on Borders' behalf (the "First Data Database"). The Debtors relied on the First Data Database and considered it the authoritative source of information regarding the activation, balance, and redemption history of Gift Cards dating back to October 1998.

9. The First Data Database does not contain any personally identifiable information regarding the purchaser of a Gift Card or the ultimate holder of a Gift Card used in any given transaction, such as name, street address, email address, telephone number, or credit/debit card information. Rather, the First Data Database contains information solely about Gift Card accounts such as the 16-digit account number associated with each Gift Card, activation date of the Gift Card, individual transaction amounts, location of individual transactions, dates and times of individual transactions, and remaining Gift Card account balance.

10. Borders also maintained point-of-sale data for all retail transactions (the “POS Database”) at the cash registers in all their retail store locations until the last store closed on September 20, 2011. It was Borders’ custom and practice not to include any personally identifiable information within the POS Database, such as a purchaser’s name, street address, email address, or telephone number. The POS Database detail for recorded transactions included the items purchased and method of payment for the transaction (e.g., cash, check, debit/credit or Gift Card), as well as the date, time and location of the transaction. For a credit/debit card transaction, the POS Database stored the type of credit/debit card the purchaser used to make the purchase, but Borders did not store all 16 digits of a purchaser’s credit/debit card number and did not keep a record of the credit/debit card issuer in the POS Database. If a customer purchased or used a Gift Card as part of the transaction, the 16-digit Gift Card number would also be stored in the POS Database. Finally, if a purchaser elected to identify themselves as members of Borders’ “Borders Rewards” (“BR”) customer loyalty program, the purchaser’s 10-digit BR member number would be included in the POS Database as part of the record for that transaction.

11. As part of the enrollment in the BR program, customers provided Borders with a name, email address and a seven-digit phone number (without area code). Very few BR members provided a street address, as this was optional. Borders did not verify the accuracy of the identification information customers provided to enroll in the BR program, and updated email addresses and other BR-member personally identifiable information only if BR members supplied such updated information to Borders.

12. Borders engaged two third-party database management firms, neither of which was First Data, to maintain the BR member information in one or more of their databases on Borders’ behalf (collectively, the “BR Database”). Along with a BR member’s name, email

address and seven-digit phone number (without area code), the BR Database contained a BR member's purchase history (by title and SKU), BR "points" balance, and street address if it was provided by the BR member. This is the only information that the Debtors or their third-party database management firms maintained with regard to BR members in the BR Database.

13. In the ordinary course of its business operations, Borders had no business method of aligning or cross-referencing the First Data Database, POS Database and BR Database, and never attempted such an extensive project. While it might be possible to compare or cross-reference these three databases to yield those Gift Card account balances that are also associated with names, email addresses and/or street addresses for BR members who at one time purchased or used Gift Cards, the process would be very expensive and time-consuming. The Trust has been advised that a cross-referencing project to align all the data in the First Data Database, POS Database and BR Database would require thousands of hours of computer programming time, at a cost of hundreds of thousands of dollars.

14. Customers who made online purchases at the Borders Website were required to pay for their purchases using a credit card, debit card, or Gift Card. From May 2008 (when Borders resumed control over sales on the Borders Website) until the close of the Borders Website in September 2011, Borders maintained transactional data for online purchases at the Borders Website in a data warehouse (the "Data Warehouse"). Online purchases comprised 1.3%, 2.7% and 3.8% of Borders' total net sales in 2008, 2009 and 2010, respectively.

15. Borders stored in the Data Warehouse the customer name, phone number, billing and shipping addresses, and email addresses that were provided by customers on the Borders Website at the time of purchase. For transactions at the Borders Website involving the use of a Gift Card as the method of payment, Borders retained the first six and the last four digits of the

16-digit Gift Card number in the Data Warehouse, but did not store the 16-digit Gift Card account number if a Gift Card was purchased online.

16. On September 27, 2011, the Bankruptcy Court entered an order authorizing the sale of certain of the Debtors' intellectual property assets to Barnes and Noble ("B&N"), including the BR Database. *See* Docket No. 1876. As of September 27, 2011, the Debtors stopped processing or honoring Gift Cards on the Borders Website. Thereafter, the sale of the Debtors' intellectual property assets to B&N was consummated and B&N closed the Borders Website on or about October 14, 2011 when B&N began redirecting visitors to the Borders Website to B&N's website.

17. On January 4, 2012, Eric Beeman and Jane Freij (collectively, the "Gift Card Holders") filed the *Motion to Allow and Deem Timely Filed Gift Card Claims* (the "Late Claim Motion") [Docket No. 2415], seeking entry of an order permitting the Gift Card Holders to file untimely proofs of claim against Borders, Inc. and Borders Properties, Inc., respectively. The Gift Card Holders' proofs of claim were not filed with the claims agent (Garden City Group) until February 4, 2012.³ In the Late Claim Motion, the Gift Card Holders allege that Mr. Beeman holds a Gift Card in the amount of \$100.00 and Ms. Freij holds a Gift Card in the amount of \$25.00. *See* Late Claim Motion, ¶¶ 15-16 and Exhibit A thereto entitled, "Proofs of Claim". Both admit in the Late Claim Motion that they did not purchase their Gift Cards themselves, but received their Gift Cards as gifts before the Petition Date. *Id.* The First Data Database records indicate that the amounts remaining on the Gift Cards of Mr. Beeman and Ms. Freij are \$100.00 and \$25.00, respectively, based on running their 16-digit Gift Card numbers

³ On April 18, 2011, Garden City Group sent actual notice of the Court-approved June 1, 2011 deadline to file proofs of claim to approximately 79,000 people and entities. *See* Affidavit of Service, Docket No. 671. Of these people and entities, I presume, but have no way of knowing, that certain of the individuals who received the bar date notice held Borders Gift Cards.

through the First Data Database. The First Data Database does not have either an email or street address for Mr. Beeman and/or Ms. Freij.

18. On January 9, 2012, the Gift Card Holders, with the addition of Robert Traktman, filed 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 “Certification Motion”) [Docket No. 2450], seeking, among other things, entry of an order certifying the class of all holders and purchasers of Gift Cards and allowance of an alleged “class claim”. No “class claim” has been filed by anyone to date allegedly on behalf of all persons who purchased or hold Borders Gift Cards.

19. The Gift Card Holders alleged that Mr. Traktman holds a Gift Card in the amount of \$100.00. *See* Certification Motion, ¶ 16 and Exhibit C thereto entitled, “Proof of Claim/Gift Card”. The First Data Database records indicate that the amount remaining on the Gift Card of Mr. Traktman is \$100.00 based on running his 16-digit Gift Card number through the First Data Database. GCG only received the proof of claim of Mr. Traktman on February 4, 2012. Mr. Traktman has not sought leave from the Court to file a late proof of claim. The First Data Database does not contain an email address or street address for Mr. Traktman.

20. The Trust currently has approximately \$110 million in cash on hand and, after paying all estimated administrative and priority claims (not including Gift Card claims) and pursuing other avenues to collect additional assets, the Trust does not expect to have more than \$90 million available to pay unsecured creditors (including any Gift Card claims).

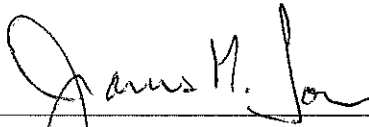
21. Shortly after the Effective Date, the Trust began making distributions to holders of allowed administrative and priority claims pursuant to the Plan. To date, the Trust has made

distributions to holders of allowed administrative and priority claims totaling at least \$17 million
(which amount also includes payments for the administration of the Trust).

[Signature page to follow.]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
is true and correct to the best of my knowledge and belief.

Dated: May 25, 2012



James Toner