

Paul H. Zumbro
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700
pzumbro@cravath.com

Attorneys for Barnes & Noble, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

BORDERS GROUP, INC., et al.,¹

Debtors.

Chapter 11

Case No. 11-10614 (MG)

Jointly Administered

**STATEMENT OF BARNES & NOBLE, INC. IN RESPONSE TO THE REPORT OF
MICHAEL ST. PATRICK BAXTER, CONSUMER PRIVACY OMBUDSMAN**

Barnes & Noble, Inc. (“Barnes & Noble”), as a Winning Bidder² in the Auction to sell certain of the Debtors’ IP Assets, respectfully states, by and through its undersigned counsel, as follows:

1. Given the identity of the Winning Bidder (Barnes & Noble, a highly reputable company in the same line of business as Borders), its strong privacy policy (which provides substantially similar and in certain respects greater protections than Borders’ privacy

¹ The debtors in these cases (collectively, the “Debtors”), together with the last four digits of each Debtor’s federal tax identification number, are: Borders Group, Inc. (4588); Borders International Services, Inc. (5075); Borders, Inc. (4285); Borders Direct, LLC (0084); Borders Properties, Inc. (7978); Borders Online, Inc. (8425); Borders Online, LLC (8996); and BGP (UK) Limited.

² Any capitalized term used in this Response, but not otherwise defined herein, shall have the meaning ascribed to it in the *Debtors’ Motion for Orders Pursuant to Sections 332, 363, 365 and 105 of the Bankruptcy Code and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure*, [Docket. No. 1401] (the “Sale Motion”).

policy), its commitment to protecting consumer privacy,³ and that the structure of the transaction is now known, it is clear that the transaction before the Court conforms to all applicable Bankruptcy Code requirements, privacy laws, public policy, and the best interest of customers. The transaction for which approval of the Court is being sought does not entail the sale of the Borders customer information as a standalone asset, but rather the customer information is to be sold as a larger group of assets, including trademarks and online content. Having these assets sold to a highly reputable U.S. company engaged in the same line of business as Borders and with a comparable privacy policy should provide a high degree of comfort to the Court, applicable regulatory authorities and customers, both in its own right and when contrasted to other potential U.S. or overseas purchasers not engaged in the same line of business and that may not have the same high degree of commitment to privacy as Barnes & Noble. Accordingly, and in light of the additional reasons specified below, Barnes & Noble submits that the transaction should be approved by the Court with only the appropriately narrowed subset of the restrictive conditions recommended in the Consumer Privacy Ombudsman's Report ("CPO Report") outlined below.

2. Barnes & Noble was not informed of any privacy issues or concerns, beyond those specified in the auction form Purchase Agreement (which were acceptable to Barnes & Noble), until immediately after the subject auction, although they were known to the Debtors.⁴ It is Barnes & Noble's position that the withholding of that information was not appropriate, significantly altered bid dynamics, and that the proposed restrictions would

³ See Barnes & Noble Privacy Policy (effective as of April 18, 2011; attached hereto as Exhibit A), ¶ 1 ("Protecting the privacy and security of your personal information is a priority at Barnes & Noble").

⁴ Specifically, information about the restrictions the Consumer Privacy Ombudsman ("CPO") planned to recommend and correspondence from FTC and state Attorneys General, which any bidder would find material, were withheld until after the auction.

materially reduce the value of the customer list. While Barnes & Noble is enthusiastic about purchasing the assets it was led to believe it was bidding on at the auction, the Debtors' withholding of critical information and the CPO's overreaching and unnecessary recommendations put this transaction—which would result in significant value to the Debtors' estates—at risk.

3. While it is understandable that the Debtors, out of an abundance of caution, sought the appointment of an ombudsman before the identity of the buyer or the exact contours of the structure of the transaction were known, Barnes & Noble respectfully submits that due to the above factors, it is now clear that the request to appoint a CPO may have been unnecessary at best, and counterproductive at worst. In fact, the very reason that the Debtors sought the appointment of the CPO, because the IP Assets are being sold outside of a going concern sale, *see* Sale Motion at 10, is expressly refuted by the CPO himself in the CPO Report. He specifically finds that the terms of the Debtor's privacy policy permit the sale of personally identifiable information (as such term is defined in the Bankruptcy Code, "PII") included in the IP Assets in a range of sale-related scenarios, including a liquidation sale such as the proposed transaction. CPO Report ¶¶ 56-57. Thus, the only question remaining under the Bankruptcy Code is, "Is the sale consistent with the Debtors' privacy policy as in effect on the date of commencement of the case?"⁵ Barnes & Noble believes the answer to this question is clearly and unequivocally, "yes".

4. While Barnes & Noble—a company for which the protection of privacy and security of personal data is an important priority—has no interest in having a dispute with the CPO over privacy issues, the reality of the situation is that implementing all of the

⁵ 11 U.S.C. § 363(b)(1)(A).

recommendations contained in the CPO Report would destroy the value of the transaction from Barnes & Noble's perspective. This would be a very unfortunate outcome both for Barnes & Noble, which would not be able to purchase assets it is interested in acquiring, but also for the Debtors' estates, which would lose a significant transaction with a highly reputable purchaser. Even worse, this would be all for naught as the Borders customers would be more than adequately protected under the terms of the Barnes & Noble privacy policy and the other specific privacy provisions of the auction form Purchase Agreement. Accordingly, Barnes & Noble respectfully contends that, under the present circumstances, even if the Court considers the CPO Report, the Court should ascribe significantly less weight to its recommendations than it might otherwise in circumstances that actually pose the type of risk the PII provisions of the Bankruptcy Code were designed to protect against.

5. With respect to the CPO Report and recommendations in paragraphs (a) through (d) contained on pages 1 and 2 thereof, Barnes & Noble is willing to proceed with the proposed purchase if the Court were to approve the sale along the following lines, which are acceptable to Barnes & Noble:

- (a) Barnes & Noble accepts the recommendations in paragraph (a) to adhere to the terms of Barnes & Noble's privacy policy, which Barnes & Noble believes contains terms that are at least as protective of consumer privacy as those contained in the Debtors' commencement date privacy policy (the "Applicable Borders Policy"), to honor opt-out requests (subject to the limitation described below in this paragraph), to safeguard data and to destroy PII for which it determines it has or may have no reasonable business need. However, for the reasons stated in paragraph 6 below, Barnes & Noble does not believe the recommended May 27, 2008 cut-off date is necessary or appropriate. Also, with respect to the recommendation regarding opt-out requirements in paragraph (a)(ii), Barnes & Noble notes that approximately 31% of Borders customers are already Barnes & Noble customers, and that many of them have not opted out of receiving marketing messages from Barnes & Noble. Accordingly, Barnes & Noble believes that (a)(ii) should not apply to such shared customers who have not opted out of Barnes & Noble marketing.
- (b) Barnes & Noble cannot accept recommendation paragraph (b). Requiring Borders to obtain an opt-in consent for transfer of pre-May 27, 2008 information is not consistent

with the requirements of the Applicable Borders Policy and effectively means the information would not be transferred to Barnes & Noble (as it is completely unrealistic to expect customers to affirmatively respond to a request from Borders, a company that has gone out of business). With respect to (b)(ii), Barnes & Noble respectfully submits that this recommendation is not commercially practical because the maintenance of multiple privacy policies applicable at the individual transaction level⁶ would be administratively difficult, if not impossible, and would likely have the perverse effect of harming consumers through confusion and lack of a straightforward method for them to understand how their information is being used. This confusion would be heightened for the approximately 31% of Borders customers who are also Barnes & Noble customers. Indeed, such a requirement would fly directly in the face of one of Barnes & Noble's privacy principles: "that a single, comprehensive privacy policy that is straightforward and clear is in the best interests of the customers and our businesses". Ex. A. Moreover, under this part of the recommendation Barnes & Noble is confronted with a Hobson's choice:

- (1) either it would be forced to maintain multiple policies and unnaturally restrict the evolution of the marketplace and its business by maintaining a dysfunctional schema that may be harmful to consumers; or
 - (2) it would be forced to give an opt-in right to consumers where a number of them might not opt-in, merely because of the nature of an opt-in mechanism, thereby materially reducing the value of the acquisition.
- (c) Barnes & Noble accepts that it not be provided the titles of videos. However, Barnes & Noble cannot accept the recommended exclusion of genre information and other details,⁷ which it needs so that it may best serve the needs of its customers. Neither Borders nor Barnes & Noble have sold videos in genres which may be considered pornographic or particularly sensitive. Barnes & Noble believes that the transfer of genre information and other (non-title) information in this context is fully consistent with the applicable law and the privacy interests of consumers, and Barnes & Noble has historically taken great efforts to comply with these laws with respect to video privacy.
- (d) Barnes & Noble accepts this recommendation.

6. Barnes & Noble believes the selection of a May 27, 2008 cut-off date for the treatment of data one way or the other is not consistent with either the Bankruptcy Code

⁶ The CPO recommendation is that Barnes & Noble maintain information pursuant to the terms of whichever of Borders' multiple versions of its privacy policy was *in effect at the time the information was collected*. CPO Report 2.

⁷ The CPO recommends that exclusion of "other details about specific audiovisual materials." CPO Report 2. It is not clear what this exclusion is meant to cover or why the CPO recommends that this other information be excluded.

(which looks at the privacy policy in effect on the date of the commencement of the bankruptcy case)⁸ or the expectation of consumers who transacted with Borders following the May 27, 2008 effective date of the change to the Borders privacy policy that permits the sale of customer data in connection with an asset sale transaction. Accordingly, Barnes & Noble's position is that all information collected either after May 27, 2008 or prior to May 27, 2008 in respect of any customer who effected any form of transaction with Borders post-May 27, 2008 (thereby consenting to the applicable privacy policy change) should be treated the same, and should be subject solely to the other recommendations outlined in paragraph 5(a) above. With respect to pre-May 27, 2008 data for customers who did not transact with Borders after that date, Barnes & Noble believes that, for the approximately 69% of Borders customers who are not also Barnes & Noble customers, an opt-out opportunity is sufficiently protective and would accept such a requirement. However, Barnes & Noble believes that such opt-out opportunity should not be required for the approximately 31% of Borders customers who have already accepted Barnes & Noble's privacy policy.

7. Barnes & Noble has a strong commitment to privacy and intends to treat the former Borders customers with the same high degree of protection that it treats its own current customers. Accordingly, Barnes & Noble respectfully submits that the limited restrictions outlined herein are appropriate under the circumstances, notwithstanding the more restrictive conditions recommended by the CPO.

⁸ 11 U.S.C. § 363(b)(1).

Dated: New York, New York
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/s/ Paul H. Zumbro

Paul H. Zumbro
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700
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