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

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| In re | : | Chapter No. |
| | : | |
| BORDERS GROUP, INC., <i>et al.</i> , ¹ , | : | |
| | : | |
| Debtors. | : | Case No.: 11-10614 (MG) |
| | : | (Jointly Administered) |
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**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**

Eric Beeman, Jane Freij and Robert Traktman, three holders of the Debtors' consumer gift cards (the "Gift Cards" and collectively, Mr. Beeman, Ms. Freij and Mr. Traktman, the "Gift

¹ The Debtors in these cases, along 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.

Card Holder(s)") respectfully file this motion with the Court (the "Motion") (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 unredeemed Borders Gift Cards (the "Proposed Class"), (III) allowing the Proposed Class's proof of claim (the "Class Claim"), pursuant to 11 U.S.C. § 502, and (IV) granting the Class Claim priority status, pursuant to 11 U.S.C. § 507(a)(7).

PRELIMINARY STATEMENT

1. Unfortunately, the Gift Card Holders must seek relief during the bankruptcy cases' last stages.² The Bar Date passed and a liquidation plan was confirmed (although it appears to have not yet been consummated). The Gift Card Holders and the Proposed Class's late filing should be excused because the Debtors repeatedly reassured them that all Gift Cards would be honored— making it appear that the Proposed Class need not take action in these cases. The Debtors reassured them by (i) issuing several press releases (before and after the Bar Date) and (ii) seeking a Court order allowing them to honor the Gift Cards in part because they are entitled to priority status under 11 U.S.C. § 507(a)(7). In fact, the Debtors did honor all Gift Cards from the Petition Date, up to and long after the June 1, 2011 Bar Date, and through late September 2011. The only Bar Date notice given to the consumer Gift Card Holders and Proposed Class was done via a one time publication in the New York Times³, and at no point did the Debtors communicate to the Gift Card Holders or the Proposed Class that their rights under

² Gift Card Holders filed a Motion to Allow and Deem Timely Filed Gift Card Claims on January 4, 2012 [Docket No. 2415].

³It does not appear that the Gift Card Holders or members of the Proposed Class were listed on the Debtors' schedules. If they had been listed on the Debtors' schedules then they would have been entitled to Bar Date Notice via regular mail. See Bar Date Order (stating that Bar Date Notice is adequate and sufficient if served via first class mail on "all known creditors and other known holders of claims as of the date of this Order, including all persons or entities listed in the Schedules as holding claims for which the Debtors have addresses . . . ;"). It is not clear if the Debtors considered them to be unknown creditors, or whether they decided it would be cost prohibitive to schedule the Gift Card holders/purchasers. It is not clear whether the Debtors sought Court guidance in failing to schedule the members of the Proposed Class.

the Gift Cards were affected by the Bar Date even while they were being honored. Indeed, the Debtors gave no notice before unilaterally cancelling \$156 million in unredeemed Gift Cards in late September 2011. The Gift Card Holders had no indication that their Gift Cards were no longer valid until this holiday season; in fact, Gift Card Holder Ms. Freij only discovered that her Gift Card was invalid on December 22nd while she was shopping for Christmas gifts. Meanwhile, Gift Card Holder Mr. Beeman called the phone number provided by the Debtors in order to validate the balance on his card in September 2011. The Debtors' automated response validated his balance but gave no warning that his Gift Card was subject to an impending cancellation. He became aware of the cancellation only in late November, while holiday shopping. Since then, the Gift Card Holders were diligent and contacted counsel in an effort to press their rights, and counsel now diligently seeks the relief sought herein.

2. The Gift Card Holders and the Proposed Class are entitled to class certification for the following reasons:

3. First, it is appropriate under the Court's Rule 9014(c) authority to apply Rule 7023 to this proof of claim. Particularly, as described in case law, because doing so will not adversely affect the administration of the bankruptcy cases where the Proposed Class did not receive actual Bar Date Notice, and because it will foster important bankruptcy goals. Unlike many class action cases, the legal and factual issues raised here can be dealt with quickly and uniformly, such that the administration of these cases will not be adversely affected by significant litigation delays. The only effect on allowing the Class Claim to proceed under Rule 7023, will be to alter distribution amounts to the unsecured non-priority creditor class and depending on the number of claims filed the alteration may be *de minimus*. Determining the allowability and priority status of these claims in a single proceeding yields significant benefits over the alternative of handling

numerous claims through the normal claims allowance process, particularly when each claim and objection would raise identical issues. The delay in bringing this Motion are due solely to the improper notice and information provided to the Proposed Class in these cases.

4. Allowing the class to proceed and pursue rights granted by the Bankruptcy Code is consistent with and will foster certain bankruptcy goals. An overarching bankruptcy goal is to afford creditors with notice and an opportunity to be heard, and provide consumer creditors priority treatment in certain circumstances. Importantly, Congress specifically granted consumers special protection under 11 U.S.C. § 507(a)(7), which dictates that consumer claims arising from deposits for consumer goods—such as those of the Proposed Class—are to be given priority status. This protection is being threatened because the Proposed Class never had a meaningful opportunity to assert their priority claims because customers were repeatedly reassured that Gift Cards would be honored and they never received actual Bar Date notice. Even if they had been properly noticed of the Bar Date, the Debtors' reassurances that the Gift Cards would be honored (through press releases, a first day motion and order, and honoring Gift Cards) gave the Gift Card Holders no reason to think that they needed to file proofs of claim. It was only after the Debtors pulled the plug on the Gift Cards, and only after the Gift Card Holders attempted to use their cards during the holiday season and learned that their gift cards were no longer being accepted, did the Proposed Class need to file proof of claims. Additionally, the number of claimants comprising the Proposed Class is numerous; therefore, proceeding in a singular fashion rather than through the normal claims allowance process will be beneficial to all the stakeholders in these bankruptcy cases.

5. Second, the Proposed Class satisfies the Rule 23(a)'s criteria because (i) the Proposed Class is so numerous that joinder is impractical because there are thousands of Gift

Card holders; (ii) each claimant shares common questions of law and fact as the sole issue raised is whether Gift Card holders are entitled to an allowed unsecured priority claim; (iii) each named representative (the Gift Card Holders) asserts claims that are typical (in fact identical—aside from the specific dollar amount) of the entire class; and (iv) the Gift Card Holders adequately represent the interests of the entire class because they share the exact same interest—to have their claims allowed and granted priority treatment, and present adequate experienced counsel to assist and protect the class's interests. Furthermore, the Proposed Class appropriately fits within the (b)(2) and (b)(3) categories thereby meeting the maintainability requirements set forth in Rule 23(b).

JURISDICTION AND VENUE

6. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334(b). The matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (B).

7. The case is pending in this District, therefore, it is the appropriate venue for this Motion pursuant to 28 U.S.C. § 1409(a).

BACKGROUND

The Bankruptcy Case

8. On February 16, 2011 (the "Petition Date"), the above captioned debtors (the "Debtors") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

9. On the Petition Date, the Debtors filed a first day motion seeking authority to honor, among other things, the Gift Cards (the "Customer Motion"). The Customer Motion provides that the Debtors should be allowed to honor the prepetition debts arising under the Gift Cards in part because the Gift Card claimants are entitled to priority under Bankruptcy Code

§ 507(a)(7), and therefore are entitled to payment in full in any event. The Court entered an order approving the Customer Motion. See Docket No. 63.

10. Subsequent to the Petition Date, the Debtors continued to honor Gift Cards until liquidation in late September 2011. The liquidation entailed closing its retail outlets; the process began in July 2011, and ended on or about September 22, 2011 (the "Liquidation Process"). Prior to beginning the Liquidation Process, this Court entered an order on April 8, 2011 (the "Bar Date Order") setting the bar date for filing proofs of claims for June 1, 2011 (the "Bar Date"). The Bar Date Order required the Debtors to give notice via publication in the national edition of the New York Times (and at the discretion of the Debtors, publication in various other periodicals) at least 28 days prior to the Bar Date. Notice was published only in the New York Times on April 25, 2011. See Affidavit of Publication of the Notice of Deadlines for Filing Proofs of Claim in the New York Times [Docket No. 715].

11. The Debtors continued honoring Gift Cards well past the June 1 Bar Date and only stopped honoring them in late September 2011.

12. On October 3, 2011 the Debtors and the official committee of unsecured creditors (the "Creditors' Committee") filed a Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan") that provides for full payment of priority claims, but it does not recognize any claims for Gift Cards. The Plan was confirmed by order entered December 21, 2011, as of this filing, however, it appears the Plan has not been consummated.

The Gift Card Holders

13. The Gift Card Holders were not served with notice of the Bar Date; neither were the other members of the Proposed Class.

14. Mr. Beeman holds a Gift Card he received as a gift prior to the Petition Date. The gift card number is 6024 7184 7085 2500 (see Ex. A).

15. Ms. Freij holds a Gift Card she received as a gift prior to the Petition Date. The gift card number is 6064 7357 6852 2419 (a copy is attached as Ex. B).

16. Mr. Traktman holds a Gift Card he received as a gift prior to the Petition Date. The gift card number is 6042 1738 9771 6658 (see Ex. C).

17. After realizing that their Gift Cards were no longer being honored, the Gift Card Holders contacted the undersigned counsel, Krislov, on December 5, 7 and 22 after reading reports of priority treatment obtained for gift card holders in the Sharper Image bankruptcy by Krislov. Counsel immediately began analyzing the bankruptcy docket (which includes over 2000 docket entries), and found that there was indeed some \$156 million in unredeemed Gift Cards that had been converted as write-on revenue by the Debtors without notice in September 2011. Counsel learned that the Plan had been submitted for vote, without notice to the Gift Card holders.

**The Failure to Notice Gift Card Holders
(or the Purchaser of the Gift Cards) of the Bar Date**

18. The Bar Date notice given to Gift Card Holders and the Proposed Class was insufficient for several reasons. First, the Proposed Class never received direct notice of the Bar Date. Rather, the typical small touchstone notice was published only once in the New York Times. The Debtors did not issue press releases, send emails, send first-class mail, publish on their website, or alert customers in any way that the Bar Date affected their rights arising through ownership or purchase of the Gift Cards.⁴ Correspondingly, unlike typical commercial creditors in a bankruptcy case who are put on notice that they must act because the Debtors are not making good on their agreements with them, here the Gift Card Holders and Proposed Class are typical consumers, who indeed were assured that their Gift Cards would be honored, and, in fact, the

⁴ In contrast, the Sharper Image notice eventually given to gift card holders by internet and print generated more than a thousand bona fide and eventually approved claims now awaiting final distribution.

Debtors were honoring their Gift Card debts online and in stores, with approval from this Court. Gift Card Holder Ms. Freij was not aware of the Bar Date and only became aware that she needed to take actions in these cases after she attempted, to no avail, to use her Gift Card during this past Christmas season.

19. In these cases, there are certainly tens, perhaps hundreds of thousands of potential Gift Card claims. On information and belief, the vast majority of these claims are for \$100 or less, for consumers who typically are not experienced with the process of filing bankruptcy claims, let alone hiring counsel for such claims.

20. The Debtors did not provide any appropriate notice to the Gift Card Holders or the members of the Proposed Class that their rights were being affected by the Bar Date, whether by email, website postings, social media updates or flyers in their stores. Nor did they sufficiently warn the Gift Card Holders or the Proposed Class that the Gift Cards would be subject to an impending cancellation in late September 2001—only delaying the Gift Card Holders' efforts to establish their rights in these bankruptcy cases.

The Gift Cards Entitle the Members of the Proposed Class to Allowed Claims and Treatment as Priority Claim Holders

21. Holders of Gift Cards have claims against the Debtors and their estates. See 11 U.S.C. § 502. The Bankruptcy Code defines "claim" to mean a "right of payment." 11 U.S.C. § 101(5)(A). Here, the Gift Cards confer a right to payment from the Debtors' estates because the Gift Cards entitle holders to purchase items from the Debtors' stores using the amounts deposited on the Gift Cards.

22. In turn, the Gift Card based claims are entitled to priority. 11 U.S.C. § 507(a)(7) provides for priority treatment of claims, "to the extent of \$2,600, for each such individual, arising from the deposit, before the commencement of case, of money in connection with the

purchase, lease, or rental of property . . . for the personal, family, or household use of such individuals, that were not delivered or provided."

23. The Gift Card Holders and members of the Proposed Class are entitled to a priority unsecured claim in these bankruptcy cases. See 11 U.S.C. § 507(a)(7); In re WW Warehouse, 313 B.R. 588 (Bankr. D. Del. 2004) (holding that gift cards as entitled priority); In re TSIC., f/k/a Sharper Image Corporation, 08-10322, (J. Gross) (Orders entered that (1)certified a gift card class; (2); recognized its priority classification, and (3) approved consumer appropriate noticing, claims and distributions procedures). A copy of each of these orders is annexed hereto as Ex. D.

24. Claims arising from the Gift Cards fall squarely within the language of 11 U.S.C. § 507(a)(7). Gift Card purchasers deposited money with the Debtors before the Petition Date in order to purchase property for personal or family use. Clearly the property was never delivered or provided. For these reasons, the Proposed Class is entitled to have the monies deposited and accounted for on the gift card treated as a priority claim. Apparently, the Debtors agree that Gift Card holders are entitled to priority claims, as they cited WW Warehouse Inc., in support of their Customer Motion seeking Court approval to continue honoring Gift Cards.

The Conflict Between the Bar Date Notice and the Customer Motion

25. On February 16, 2011, the Debtors filed the previously mentioned Customer Motion. See Docket No. 18.

26. The Customer Motion requested authority, among other things, to continue the Gift Card program. See Customer Motion at ¶ 7. The Debtors sought to provide customers confidence the Gift Cards would be honored.

(a) The Customer Motion states that "[t]he Debtors believe they must quickly assure customers that goods and services they have come to expect under the Customer Programs

will not be interrupted or otherwise changed as a result of the Debtors' restructuring efforts." Id.
at ¶ 8.

(b) The Customer Motion explicitly states that if the Gift Cards are not honored, they will likely be paid anyway as priority claims in accordance with 11 U.S.C. § 507(a)(7) and in accordance with the treatment afforded to Gift Card holders in In re WW Warehouse, 313 B.R. 588 (Bankr. D. Del. 2004). Customer Motion ¶ 30.

(c) The Customer Motion states it only affects the timing of the Debtors' performance of their obligations to honor Gift Cards (as payment through the claims administration process would simply delay the inevitable payment) and will not prejudice the rights of general unsecured creditors or other parties in interest. Id.

27. The Gift Card Holders and the Proposed Class submit the Debtors must abide by the promises made in their filings.

The Debtors Publicize That Gift Cards Will Be Honored

28. Not only did the Debtors fail to notice the Gift Card Holders and Proposed Class that they would be required to file proofs of claim, the Debtors actively issued press releases indicating that it was business as usual and the Gift Cards were valid.

29. On February 16, 2011, the Debtors issued a press release, annexed as Ex. E, announcing that the Debtors would "Continue to Conduct Business in the Ordinary Course." The press release quotes Mike Edward, the Debtors' Group President, stating that the Debtors were reorganizing and repositioning themselves for the "long term."

30. The press release emphasizes that, even after the bankruptcy filing, the Debtors were implementing a strategy to be a "vibrant national retailer." It goes on to state that the business will continue in the "normal course, including honoring its Borders Reward program, gift cards and other customer programs." (Emphasis added).

31. After this Court's First Day Hearing, on February 16, 2011, the Debtors issued another press release which highlights the Court's approval of the Debtors "First Day Motions" and that "ongoing business will not be disrupted" because the Court approved, among other things, honoring the Gift Cards. See Ex. F.

32. This assurance continued beyond the Bar Date. On June 30, 2011, one month after the Bar Date, the Debtors issued a press release stating that they were continuing to honor Gift Cards and that "[d]uring the sale process, Borders is continuing to conduct business and serve customers in the ordinary course, including honoring its Borders rewards program, gift cards and other customer programs." Emphasis Added. See Ex. G.

33. These press releases had the desired effect and resulted in furthering Gift Card Holders' impressions that their Gift Cards were valid and there was no action that needed to be taken on their part. Moreover, the press releases echo the sentiments of the Gift Card Motion, i.e., one way or the other the Gift Card Holders will not be left behind. Unfortunately, the Gift Card Holders have not received any notice or payment. This Motion seeks to remedy that and make the Gift Card Holders whole.

The Debtors' Cancellation of Unredeemed Gift Cards Without Notice

34. On September 23, 2011, that Debtors, without notice to the Gift Card Holders or the Proposed Class, essentially converted the \$156.2 million outstanding unredeemed Gift Cards for its own benefit as "[o]ther revenue", which included the "write-on of all unredeemed gift cards issued prior to" the company's Chapter 11 bankruptcy filing in February. See Monthly Operating Report for the Period from August 28, 2011 to September 24, 2011 (Docket No. 1975 October 19, 2011) (a copy is attached as Ex. H).

35. The Debtors essentially pulled the carpet from underneath the Gift Card Holders and the Proposed Class, in contrast with the prior early and continuous assurances from the

Petition Date through September, 2011. They represented to the Court that in order to maximize value they needed to honor the Gift Cards, and represented that it was likely that the amounts owed under the Gift Cards were entitled to priority treatment. See Customer Motion. On several occasions they communicated to Gift Card holders that they would honor their obligations, through the issuance of press releases. They honored their gift card obligations through the Bar Date and for several months after the Bar Date. The only notice of the Bar Date to the Proposed Class was through a one time publication in the New York Times—but long after that the Debtors without sufficient notice, stopped honoring the Gift Cards and declared them converted from a liability to an asset of the Debtors. The Gift Card holders became aware that the Gift Cards were cancelled only several months later. At that point, they acted quickly to locate appropriate counsel, and counsel has moved quickly to press the Gift Card Holders (and Proposed Class's) rights. In such a situation, a class action is necessary and appropriate, and furthers the purposes of the Bankruptcy Code, especially Congress' expressed interest in protecting unfulfilled consumer deposits.

ARGUMENT FOR RELIEF

36. The Gift Card Holders move this Court, (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 unredeemed Borders Gift Cards (III) allowing the Proposed Class's proof of claim pursuant to 11 U.S.C. § 502, and (IV) granting the Class Claim priority status, pursuant to 11 U.S.C. § 507(a)(7).

I. A CLASS CLAIM IS APPROPRIATE

A. Bankruptcy Case Law Supports Certifying a Class Claim

37. Under similar circumstances, now Chief Bankruptcy Judge Gross for the District of Delaware, certified a gift card class, recognized its priority classification, and approved

consumer appropriate noticing, claims and distributions procedures. In re TSIC, f/k/a The Sharper Image Co. A copy of each of these orders is annexed hereto as Ex. D.

38. The overwhelming weight of decisions favor permitting a class claim to be filed in bankruptcy court. See In re Ephedra Products Liability Litigation, 329 B.R. 1 (S.D.N.Y. 2005). A few, early decisions concluded that class claims were not permissible in bankruptcy. See In re Standard Meals Corp., 817 F.2d 625 (10th Cir. 1987). However, in Matter of American Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988), the Seventh Circuit ruled that class claims in bankruptcy are permissible. Subsequent courts have followed suit and allowed class claims. See, e.g., In re The Charter Co., 876 F.2d 866 (11th Cir. 1989); Reid v. White Motor Corp., 886 F.2d 1462 (6th Cir. 1989); Validity of class proofs of claim under Bankruptcy Code of 1978, 99 ALR Fed 858, §4.

39. Courts in this district have followed the trend, stating that class claims are appropriate in bankruptcy cases. See, e.g. In re Chateaugay Corp., 104 B.R. 626 (S.D.N.Y. 1989)(overturning a bankruptcy court decision that expunged a class claim, holding that a class proof of claim is permissible because Rule 9014 gives it discretion to apply Rule 7023 to proofs of claim).

40. Since Chateaugay, the decisions in this district uniformly accept the notion that class claims may proceed, albeit subject to standards that are satisfied here. Several courts within this district have followed the Chateaugay lead acknowledging that class claims are appropriate if the class claim proponents meet the standard.

41. The standard that the proponent of a class claim must meet are: (1) make a motion to extend the application of Rule 23 to a proof of claim (or contested matter), (2) satisfy the requirements of Rule 23, and (3) show that the benefits derived from the use of the class claim

device are consistent with the goals of bankruptcy. See, e.g. In re Musicland Holding Corp., 362 B.R. 644, 651 (Bankr. S.D.N.Y. 2007)(summarizing the standard); In re Motors Liquidation Co., 447 B.R. 150, 157 (Bankr. S.D.N.Y. 2011)(following the standard set forth in Musicland).

It is Appropriate to apply Rule 7023 pursuant to Rule 9014 to the Proof of Claim (or Contested Matter)

42. As a preliminary matter, Rule 7023 does not automatically apply to a proof of claim; however, courts have authority to extend the application of Rule 7023 to a proof of claim or (or a contested matter) pursuant to 9014(c). 11 U.S.C. § 9014(c) (granting discretion to courts by providing that "[e]xcept as otherwise provided in this rule, and unless the court directs otherwise"); see, e.g. In re Motors Liquidation Co., 447 B.R. at 156.

43. In determining whether to extend Rule 7023 to a proof of claim, courts look to several factors including: (1) whether the class was certified pre-petition; (2) whether the proposed class members received notice of the bar date; and (3) whether class certification is consistent with bankruptcy goals and whether it will adversely affect the administration of the case. See, e.g., Musicland Holding Corp., 362 B.R. at 654.

44. Under the first factor, naturally the Proposed Class was not certified pre-petition as they had suffered no injury until they discovered their Gift cards were cancelled by the Debtors in late September 2011, many months after the Petition Date and the Bar Date. This factor is inapplicable.

45. The second factor inquires whether the class members received notice of the Bar Date. As described earlier, they did not. The Debtors published (just once) the Bar Date Notice in the New York Times. They did not serve the Bar Date Notice on members of the Proposed Class via regular mail; they did not publish notice that gift cards would no longer be accepted; they did not alert Gift Card holders through email or social media that there was a Bar Date

and/or that it affected them. Moreover, the members of the Proposed Class were repeatedly assured that their Gift Cards would be honored. Given these factors, even if they had read the New York Times the day the Bar Date was published, the consumer Gift Card holders would have little reason to think that it needed to take action. For these reasons, the Proposed Class did not receive proper Bar date Notice.

46. The third factor examines whether class certification is consistent with bankruptcy goals and whether it will adversely affect the administration of the bankruptcy cases. The proposed class certification has no adverse affect on the cases; rather it brings positive affects. While it is true that the Plan has been confirmed recently, it is also true that this is merely a liquidating plan. A class claim will merely affect distribution. The costs in allowing the class claim to proceed are negligible, as the issues raised are very simple – determining the allowability and priority status of Gift Card claims. Other costs include providing appropriate notice to members of the Proposed Class, but these costs are negligible, and necessary. The legal issues and related factual basis underlying the Proposed Class claims are simple. Every single factual issue underlying the claims of the Proposed Class is identical (besides dollar amount). The only legal issue to be determined is whether the members of the Proposed Class are entitled to an allowed unsecured claim that is granted priority under 11 U.S.C. § 507(a)(7). The resolution of that issue does not appear to be complex either. The Debtors themselves represented that the Gift Card claims were entitled to priority. See Customer Motion. Adjudicating the issues surrounding the Debtors' treatment of the Proposed Class in a global and singular fashion will benefit the administration of these bankruptcy cases, as it provides the quickest and most efficient mechanism to address the issues raised herein.

47. It is appropriate to use the authority granted by Rule 9014(c) to apply Rule 7023 to the class claim. As discussed throughout, the Proposed Class received poor notice, and allowing the class to proceed will benefit the administration of the estate. It benefits the estate because it yields the quickest resolution, and its impact on plan issues is minimal as it only effects the precise amount of a future distribution of claims to non-priority unsecured creditors. The existence of the Gift Card claimants was known to all from the Petition Date onwards. There is no unfair prejudice to any party in interest providing the Proposed Class with the treatment that Congress mandated they receive pursuant to 11 U.S.C. § 507(a)(7)..

The Proposed Class Satisfies Rule 23

48. The proponents of the class are in compliance with Rule 23. Rule 23 requires that each factor under Rule 23(a) is met and that one of the class types under Rule 23(b) applies. See, e.g., Johnston v. HBO Film Mgmt., 265 F.3d 178, 183 ((3d Cir. 2001); Partsearch, 453 B.R. at 93-94)(J. Glenn). The Proposed Class and Gift Card Holders satisfy all of the Fed. R. Civ. P. Rule 23(a) prerequisites and is maintainable under both 23(b)(2) for a declaratory judgment and (b)(3) for separate monetary recoveries.

49. The proposed class is defined as all holders/purchasers of Gift Cards, as of the Petition Date.

50. The class seeks equitable relief: a declaration that these Gift Card holders are entitled to priority unsecured claims under §507(a)(7), as well as monetary relief in satisfaction of the amounts on the Gift Cards. The legal question applicable to all class members is a determination of allowance of an unsecured priority claim. The allowance and priority given to the Gift Cards holders is a question that should be answered uniformly for one and all members of the class.

Rule 23(a)

51. Pursuant to Fed. R. Civ. P. 23 in ordering class certification, the Court first consider Rule 23(a)'s four preliminary prerequisites: numerosity, commonality, typicality, and adequacy of representation; or more specifically: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the class representatives are typical of the claims or defenses of the other class members, and (4) the class representatives are able to protect the interests of the class fairly and adequately. Fed. R. Civ. P. 23(a)

Rule 23(a)'s Prerequisites Are Satisfied.

a. Numerosity Is Satisfied.

52. Under Rule 23(a)(1), a class must be so numerous that joinder is impracticable. Fed. R. Civ. P. 23(a)(1). The Proposed Class includes thousands of card holders and individuals, who are readily identifiable in Debtors' computer records. In any event, the Gift Card Holders need not specify the exact size of the class. In re Partsearch Technologies, Inc., 453 B.R. 84, 93-4 (2011)(J. Glenn)(stating "[n]or must class actions plaintiffs specify the exact size of the class as a prerequisite to satisfy the numerosity requirement."). Furthermore, "[i]n the Second Circuit, courts presume that joinder is impracticable when the prospective class consists of forty or more members." Id. at 94 (citing authority). Here, the Proposed Class certainly numbers in the thousands. Therefore, the Proposed Class is so numerous that joinder of all class members is impracticable.

b. Commonality Is Met.

53. Under Rule 23(a)(2) there must be questions of law or fact that are common to the class. Here, all gift card holders present a single question of law – gift card holders' entitlement to a priority claim under 11 U.S.C. §507(a)(7), the only individual issues are the fact of each

card's remaining amount. A common nuclei of fact or law is present here where the Debtors issued numerous identical gift cards—differentiated only in the dollar amount allocated to each gift card. Each Proposed Class member also faced the same facts regarding the Debtors actions in these bankruptcy cases, whether it be related to the Customer Motion, the Bar Date Notice, the Press Releases, the cancellation of Gift Cards without sufficient notice. Similarly, the questions of law raised by each member of the Proposed Class are identical—namely whether they are entitled to an unsecured priority claim pursuant to 11 U.S.C. § 507 at this juncture of these cases. As a result, the Proposed Class satisfies the critical inquiry in evaluating whether Rule 23(a)(2) is satisfied; the "critical inquiry is whether common questions are at the core of the cause of action alleged." Partsearch, 453 B.R. at 94. In addition, the claims of each member of the Proposed Class, would be subject to the same common objections to be raised by the Debtors. Id. (stating, in support of its holding that there existed 23(a)(2) commonality, that "the claims of each Class Member would be subject to the same affirmative defenses raised by the Debtors").

54. The only potential commonality objection arising from the current context are factual. Courts recognize that "[m]inor factual differences will not preclude class certification if there is a common issue of law." Id. (citations omitted). Here there are only minor factual differences – namely that Proposed Class members suffered different levels of damages. Differing damages is no impediment to finding that commonality exists under Rule 23(a)(2). Id. (stating that "courts have recognized that the fact that class members suffered different damages is no bar to class certification")(citations omitted).

c. **The Named Plaintiffs' (Gift Card Holders) Claims are Typical of the Class.**

55. Under the typicality requirement, a plaintiff must show that the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed.R.Civ.P. 23(a)(3).

56. Typicality is met here because the bases of the claim and relief which the plaintiffs or Gift Card Holders seek arises from the same events or practices or course of conduct that gives rise to the claims of other class members and their claims are based on the same legal theory. Not only are the claims typical—they are identical.

57. As this Court explained, "the Second Circuit has held 'Rule 23(a)(3) is satisfied when each class member's claim arises from the same course of events, and each class member makes the same legal arguments to prove the defendants liability'". Partsearch, 453 B.R. at 95 (citing In re Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 291 (2d Cir. 1992)).

58. Here, each member's claim arises from the same course of events; the members purchased or received standardized Gift Cards prior to the Petition Date, the members had ample reason to believe they would be honored— from the Debtors' debtors conduct during these bankruptcy cases, the Bar Date Notice via publication was insufficient, the Debtors failed to supplement the Bar Date Notice with notification that Proposed Class members' rights arising under their Gift Cards were affected by the Bar Date, the Debtors cancelled the Gift Cards, and the Debtors failed to provide sufficient notice that the Gift Cards were to be cancelled.

59. These events give rise to common legal grounds for establishing the Debtors' liability on each claim asserted by the Proposed Class. The common legal grounds are that each member of the Proposed Class has an allowed unsecured claim, and each of those unsecured claims is entitled to priority under 11 U.S.C. § 507(a)(7).

60. The Gift Card Holders have typical claims because, to pursue their own self-interest in the litigation, they will advance the interests of the class members, because they are aligned with those of the representatives. In other words, the Gift Card Holders meet Rule 23(a)(3)'s typicality requirement because they "suffered the same type of injury as the rest of the class." Id. at 95 (citations omitted).

61. The Gift Card Holders' claims are identical to the rest of the class, seeking the same type of relief— a declaration that they hold unsecured priority claims in full value of the Gift Card (subject to the monetary limits set forth in § 507(a)(7)).

d. Adequacy of Representation Is Also Met.

62. Rule 23(a)(4)'s adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. The adequacy test has two parts: first ascertaining that the interests of the representative party will not conflict with the interests of any of the class members; second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation.

63. Adequacy is fully satisfied in this case. The 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. In fact, the relief sought by the Gift Card Holders is exactly the same as sought by the members of the Proposed Class.

64. The class representatives have protected the class's interests because they, like the putative class members, seek declaratory relief that is to their common benefit.

65. The Gift Card Holders' counsel is also qualified to adequately represent the class. For their part, they are experienced class action attorneys, litigation attorneys and have associated with experienced bankruptcy attorneys. The Gift Card Holders' counsel is well

experienced in class litigation and indeed, the Krislov firm has uniquely appropriate experience in successfully pursuing these types of consumer claims in Bankruptcy. Under similar circumstances in the Delaware Bankruptcy court, Krislov represented and certified a class of gift card holders and then established that the class's claims were entitled to priority in *In Re TSCI f/k/a The Sharper Image Corporation*. Ex. D.

Rule 23(b)(2) – Declaratory Judgment Class.

66. After considering and satisfying Rule 23(a)'s prerequisites, the Court must determine if the claim comes within one or more of Rule 23(b)'s three subsections. The class claim here falls within 23(b)(2) and 23(b)(3).

67. Rule 23(b)(2) states that a class may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relieve or corresponding declaratory relief is appropriate respected the class as a whole"

68. Rule 23(b)(2) "is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Rule 23, Committee Notes Subdivision (b)(2).

69. The case fits into the Rule 23(b)(2) category because the party opposing the class (the Debtors) acted and/or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory relief with respect to the class as a whole.

70. The Proposed Class and the Gift Card Holders' demand for relief declaring that their claims are deemed allowed and entitled to priority treatment will provide class-wide relief.

Rule 23(b)(3) Monetary Claims of Differing Dollar Amounts.

71. The (b)(3) category generally covers separate but identical monetary claims differing only in their amounts. This is where consumer and securities claims typically reside. In considering whether Rule 23(b)(3) applies, courts must consider "two requirements beyond the Rule 23(a) prerequisites: Common questions must predominate over any questions affecting only individual members; and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615 (1997).

72. Here, no individual issues exist that would predominate over class issues, class treatment is superior, and the claims are best managed by a class action.

73. Here the Proposed Class seeks relief wherein common questions predominate over any individual questions. Partsearch 453 B.R. at 96 ("class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.")(citations omitted). As discussed throughout, the Proposed Class seeks relief based on common facts and under the common legal theories.

74. Class resolution is superior to any other method of adjudicating this dispute. Id. (describing that "the 'predominance' and 'superiority' requirements ensure that a class will only be certified when it would achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." (citing Amchem 521 U.S. at 615)(internal quotations omitted). Here a class resolution is superior to other methods of resolving the issued raised for two primary reasons (1) it is impracticable to individually adjudicate the number of

claims objections that might be required and (2) it is impracticable for these claimants to pursue their claims individually because they are relatively small claims. Id.

75. There are likely thousands of Gift Card claims and it is likely most of these claims are for \$100 or less. Addressing the allowance and priority of each claim separately would be "impracticable and consume significant judicial resources." Id. (citations omitted). The alternative to allowing a class claim to proceed would be for individuals to each file a proof of claim. The volume of such claims would be overwhelming. Presumably, the Debtors would object to each claim, triggering each claimant to respond or appear individually to press their claims. In order to streamline that process and protect the Proposed Class's rights, these claims should be adjudicated in a single proceeding to enable enforcement of the claim allowance and priority on a globally level. The Gift Card claims share common facts and legal issues such that these claims will rise and fall together. Indeed, the only significant issues presented are whether the Proposed Class are entitled to an allowed claim that is given priority treatment under 11 U.S.C. § 507(a)(7). Proceeding as a class is superior to proceeding through an individualized claims allowance process.

76. A class claim is superior here because it is impracticable for claim holders to proceed individually when they each hold small claims, and where many claimants are likely unaware of the existence of a claim. Id. ("Moreover, proceeding individually would likely be impracticable for individual members because each holds a relatively small claim. In such circumstances, as with those before the Court, 'the class action device is frequently superior to individual actions.'") (citing Seijas v. Republic of Argentina, 606 F.3d 53, 58 (2d Cir. 2010); In re United Companies Financial Corp., 276 B.R. 368, 376 (Bankr. D. Del. 2002)(J. Walrath)(holding that a class action was superior because : (1) "it is probable that most

members of the proposed class are unaware of their rights" and (2) "the amount of damages to be recovered by each class member is relatively small, especially in light of the likely recovery for creditors under the confirmed bankruptcy plan, thereby rendering prosecution of an individual claim cost-prohibitive."). Class certification provides a mechanism to notify the Proposed Class members of their rights. For example, in In Re TSCI f/k/a The Sharper Image Corporation, the bankruptcy court for the District of Delaware set the budget for notice at about \$200,000 to effect wide public notice, including publication notice in two national magazines (Sports Illustrated and People) as well as national internet banner teaser adds, including on Facebook with an estimated 11 million views or hits.

The Benefits of Certifying a Class Claim are Consistent with Bankruptcy Goals

77. As mention previously, a class proponent must show that the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy. See, e.g. In re Motors Liquidation Co., 447 B.R. at 157.

78. The bankruptcy code provides creditors with numerous safeguards. One safeguard is that creditors are to receive proper notice so that they are afforded with an opportunity to be heard. As stated throughout this Motion, the Gift Card Holders and Proposed Class were not provided with sufficient notice. They were not properly noticed with the Bar Date. The only notice to them was through a one time publication in the New York Times, but that was while the Debtors were still accepting Gift Cards and assuring Gift Card Holders that they were fully protected. As discussed previously, even if the Proposed Class read the Bar Date Notice, it would still be unclear that they needed to take action in order to preserve their rights. It would be unclear because the Debtors continually reassured them that the Gift Cards would be honored. The benefits of allowing a class claim to proceed will promote bankruptcy goals,

namely that creditors be provided with proper information and notice when their rights are affected.

79. Another bankruptcy goal furthered by allowing a class claim to proceed is that it will ensure that consumers are protected in the way that Congress mandated. 11 U.S.C. § 507(a)(7) protects consumers from the harshness that arises from the placement of deposits in connection for the purchase of consumer goods and services, that are not honored due to bankruptcy filings. Rather than recovering only cents on a dollar, 11 U.S.C. § 507(a)(7) provides for full recovery before any unsecured non-priority claim can be paid. In this case, the Gift Card Holders and members of the Proposed Class have been stripped of this congressional mandated bankruptcy right and goal. Importantly, these claimants acted properly, and are only in this position because of the Debtors actions and inactions.

80. Importantly, the consumer protection afforded under the priority scheme also protect businesses that accept consumer deposits. Section 507(a)(7) provides consumers with confidence that a struggling company will not be able to avoid its obligation arising under deposits (like Gift Cards), should it file bankruptcy. As a result, consumers are less likely to refrain from purchasing from companies that are struggling.

81. In sum, it is appropriate to apply rule 7023 to the Class Claim. The Class Claim satisfies Rule 23 class action requirements. Allowing the Class Claim to go forward is consistent with bankruptcy goals.

NOTICE

This Motion has been served upon the parties on the attached service list.

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Via the Court's Electronic Filing System

All parties who receive notice through the
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