

consumer PII would never be sold and yet, through the Motion, the Debtors seek to do the exact opposite of what they promised. The State of Texas respectfully asserts that pursuant to 11 U.S.C. § 363(b)(1)(B)(ii), such sale is impermissible because it violates applicable non-bankruptcy law – namely, the Texas Deceptive Trade Practices Act and, on information and belief, consumer protection laws in other jurisdictions. In support of this limited objection, the State of Texas would respectfully show as follows:

I. DISCUSSION

1. The Motion seeks to sell numerous assets as detailed more specifically in the Asset Purchase Agreement (“APA”) and the schedules purportedly included therewith.

2. Section 2.1 of the APA outlines the assets being sold. Subsection (h) provides that all “Documents” are being sold. In turn, Section 1.1 defines “Documents” to include, *inter alia*, “customer lists and other customer-related information”.

3. In communications, with Debtors’ counsel, Debtors’ counsel has explained that the consumer information contemplated by Subsection (h) includes consumer names, phone numbers, mailing addresses, e-mail addresses, and, where allowed, activity data.

4. Earlier today, March 20, 2015 the State of Texas took the 30(b)(6) deposition of two witnesses of the Debtors. The deposition was attended by the undersigned as well as the Consumer Privacy Ombudsman.

5. While the witnesses were amicable and cooperative, they was unable to answer many of the questions related to the acquisition and retention of PII. Through the deposition, the State of Texas did learn that the Debtors intend to sell the PII of 117 million consumers.

6. The Debtors currently maintain separate privacy policies for their web-platform and their in-store locations. All versions of their privacy policy contain an unequivocal provision that consumer PII will not be sold.

7. First, the Debtors' online privacy, which was in effect on the petition date, prohibited the selling of PII by providing in pertinent part:

We will not sell or rent your personally identifiable information to anyone at any time.

See Affidavit of Elizabeth A. Martin, attached as Exhibit A (emphasis added).

8. Additionally, the online privacy policy gives further assurances that:

- Information about you specifically will not be used for any purpose other than to carry out the services you requested from RadioShack and its affiliates. All of our affiliates have agreed to maintain the security and confidentiality of the information we provide to them.

...

- We will not use any personal information beyond what is necessary to assist us in delivering to you the services you have requested.

*Id.*⁵

9. The State of Texas has been provided through discovery two versions of the relevant in-store placard/signage. One version provides in pertinent part:

**Protecting Customer Information
At RadioShack, we respect your privacy. We do not sell our mailing list.**

The information you give us is treated with discretion and respect. We pride ourselves on not selling our private mailing list. From time to time, we may send you information from our company or from

⁵ Any argument that the subsequent provisions of the web-platform privacy policy permit a sale should be rejected. This privacy policy permits the Debtors to send information in certain circumstances unless the consumers opt-out. Even if such provisions could be read to permit a sale, the State of Texas asserts that such provisions create an ambiguity in the interpretation of the privacy policy. Pursuant to established principles, any ambiguity should be construed against the party that drafted the privacy policy – in case the Debtors. *See, e.g.*, Kaiser Aluminum Corp. v. Matheson, 681 A. 2d 392, 398 (Del. 1996) (citing RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981)); *see also* ARTHUR L. CORBIN, ET AL., CORBIN ON CONTRACTS § 559, *supp.* at 337 (1960 & *Supp.* 1996) (“imposed as a matter of public policy as a penalty for bad draftsmanship”).

select, responsible companies that have joined with RadioShack to bring you special offers.

If you no longer wish to receive offers and information, please call us at 1-800-843-7422 or visit us at www.RadioShack.com.

See Copy of In-Store Placard attached hereto as Exhibit B (emphasis in original).

10. The second version, which is substantially identical, provides in pertinent part:

We Respect Your Privacy
We Do Not Sell Our Mailing List

The information you give us is treated with discretion and respect. We pride ourselves on not selling our private mailing list. From time to time, we may send you information from our company or from select, responsible companies that may join with RadioShack to bring you special offers.

See In-Store Signage attached hereto as Exhibit C (emphasis in original).

11. Therefore, the Debtors have affirmatively stated in multiple privacy policies currently in effect that consumer PII will never be sold. Yet the Debtors come before this Court with a Motion which seeks to do precisely that. The State of Texas asserts that such an action is impermissible under 11 U.S.C. § 363(b)(1)(B)(ii) because it violates applicable non-bankruptcy law – namely, the Texas Deceptive Trade Practices Act (TEX. BUS. & COMM. CODE § 17.41 *et seq.*) (“DTPA”).

12. 11 U.S.C. § 363(b)(1) provides:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--
(A) such sale or such lease is consistent with such policy; or
(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

- (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
- (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

11 U.S.C. § 363(b)(1) (2012).

13. Therefore, Section 363(b)(1)(B)(ii) requires that if a proposed sale of PII is not consistent with the Debtors' privacy policy, as is the case here, that before such sale may be permitted, the Court must make a finding that no applicable nonbankruptcy law will be violated by the sale.

14. Section 17.44 of the DTPA provides in pertinent part:

This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

TEX. BUS. & COM. CODE § 17.46 (West 2014).

15. Section 17.46(a) provides: "(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division." *Id.*

16. Further, Section 17.46(b)(5) provides that it is a false, misleading or deceptive act or practices to "represent that goods or services have...characteristics...benefits...which they do not have"

17. Because the Debtors' current privacy policies clearly prohibit the sale of PII, any effort now to sell such PII may only be seen as a "false, misleading, and deceptive business practice" such that it violates applicable nonbankruptcy law in contravention of Section 363(b)(1)(B)(ii).

18. Therefore, the State of Texas respectfully objects to the sale of any of the PII in the Debtors' possession. Further, on information and belief, such sale would similarly violate consumer protection laws in other jurisdictions.

19. The State of Texas also respectfully requests that any buyer be required to allocate a separate price for PII so that in the event the Court should sustain the State of Texas's objection, such ruling would not undermine the sale of the Debtors' other assets.

20. Because this objection is being filed prior to the auction, bidders are now on notice of this challenge to the sale of PII and can and should allocate their purchase price so that the sale of remaining assets is not otherwise impacted.

II. CONCLUSION

21. WHEREFORE, the State of Texas objects to the sale of any PII and further respectfully requests that any buyer be required allocate a separate price for PII. The State of Texas requests such further relief as may be just and equitable.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2015, a true and correct copy of the foregoing was served by the Court's Electronic Filing System on all parties requesting notice in this proceeding. Additionally, service of the foregoing was made on the following parties by Federal Express.

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