

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

In re:

Agent Provocateur, Inc. and Agent
Provocateur, LLC,

Debtors.

Case No. 17-10987 (MEW)

Chapter 11

Jointly administered

Report of the Consumer Privacy Ombudsman

Warren E. Agin, the consumer privacy ombudsman (“CPO”) appointed in these jointly administered Chapter 11 cases, submits the following report pursuant to 11 U.S.C. § 332(b):

Procedural Background to the Report

On April 11, 2017, Agent Provocateur, Inc. and Agent Provocateur, LLC (the “Debtors”) filed their Chapter 11 petitions. The Debtors continue to operate as debtors in possession.

On May 15, 2017, the Debtors filed a “Motion for Order (I) Approving Procedures for Assumption and Assignment of Executory Contracts and Unexpired Leases and Establishment of Cure Amounts and (II) Directing Appointment of Consumer Privacy Ombudsman” (the “Procedures Motion”). On May 19, 2017, the Debtors filed a “Motion for Order (I) Approving the Sale of the Debtors’ Assets; (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief” (the “Sale Motion”). The Sale Motion proposes a private sale of substantially all of the Debtors’ assets to Agent

Provocateur International (US) LLC (the “Buyer”). A hearing on the Sale Motion is scheduled for June 13, 2017.

On May 26, 2017, the Debtors filed a Notice of Presentment of Stipulation and Order Directing Appointment of a Consumer Privacy Ombudsman Pursuant to 11 U.S.C. § 332. On May 31, 2017, pursuant to the Notice of Presentment, the Court entered an order directing the U.S. Trustee to appoint a CPO in the case. On May 31, 2017, the U.S. Trustee appointed Warren E. Agin as CPO.

Summary of the Report

The CPO has reviewed the Debtors’ privacy policy displayed to customers who provide personal information in retail outlets, reviewed online terms of service used by affiliated entities, reviewed selected pleadings filed in the bankruptcy case, and has interviewed the Debtors’ chapter 11 counsel and Mandy Brooks, the Debtors’ former retail sales director. The CPO concludes that the sale might include the transfer of Personally Identifiable Information (“PII”), the Debtors collected that PII subject to a written privacy policy agreeing to restrict transfer of PII, and its customers should be presumed to have relied on that representation when agreeing to provide their information. The proposed transfer is not consistent with the terms of the privacy policy because the Asset Purchase Agreement filed as an exhibit to the Sale Motion places no conditions or restrictions on the Buyer’s use of the PII.

However, the proposed transfer of personal information will be consistent with the terms of the privacy policy, and can be allowed, if the Asset Purchase Agreement

requires the Buyer to continue use of the personal information in accord with existing privacy policies, respect prior requests of customers to opt-out of receipt of marketing messages, and limit its use of the information to retail store operations under the Agent Provocateur brand. The CPO's detailed recommendations regarding appropriate conditions and limitations are stated in part h of the body of the report.

Factual Background to the Report

In preparing this report, the CPO obtained and reviewed key pleadings from the case to identify the different brands used by the Debtors, including a review of websites selling under the Agent Provocateur brands; Agent Provocateur and L'Agent by Agent Provocateur. The CPO reviewed the terms of service for each of the identified sites, including Data Protection Statements. The CPO also reviewed historical versions of the websites' terms of service. The CPO reviewed a paper form used in retail outlets to collect customer information, and the privacy disclosures and promises contained on that form. The CPO conducted on-line searches for privacy related materials using the name "Agent Provocateur" coupled with the terms "privacy," "privacy policy," "data breach," "customer information," "FTC," and "privacy complaint." The CPO also interviewed the Debtor's chapter 11 counsel, and Mandy Brooks, the Debtors' former retail sales manager. The CPO found counsel cooperative and Ms. Brooks familiar with the Debtors' operations as they related to privacy concerns and their collection and use of customer information. The CPO provided Debtors' counsel with an advance copy of the factual background to the

report and an opportunity to comment on its averments.

The Debtors operated as subsidiaries of Agent Provocateur Limited (the “Parent”). Based in the United Kingdom, the Parent sold women’s lingerie through three different websites identified by the CPO; agentprovocateur.com, agentprovocateur.online, and lagentbyap.com (which sells L’Agent products), and retail outlets in nineteen different countries. The Debtors owned and operated the Parents’ retail outlets located in the United States, with Agent Provocateur, LLC operating two stores in Las Vegas and Agent Provocateur, Inc. operating the remainder of the US located retail outlets.

Agent Provocateur is a luxury brand, with US stores in locations like The Forum Shops at Caesars in Law Vegas, Rodeo Drive in Beverly Hills, and Madison Avenue in New York City.

Prior to its insolvency proceedings, the three websites and their operations were owned or controlled by the Parent, not the Debtors. The Debtors’ operations were limited to the retail operations located in the United States.

For at least the past five years, the Debtors would collect information about customers using a paper card. A copy is attached as Exhibit A. The Debtors collected a customer’s name, address, birthdate, telephone number, and e-mail address using this card. The card contained the following disclosures (the “In Store Policy”):

I agree that Agent Provocateur Limited may use my personal details for the purpose of contacting me with information about new merchandise, services and events.

Agent Provocateur respects your privacy and will not disclose

your personal details to third parties. You may request access, amendment or erasure of your personal details by contacting your nearest Agent Provocateur store.

The customer would fill in the information, and a store employee would type it into the retail store's point of sale system. The information was then saved into a centralized CRM¹ system maintained by Agent Provocateur Limited.² The customer information would be associated with the customer's sales history in the retail outlets. Store employees in any retail outlet, including those in other countries, could access the customer's information as needed to assist the customer. The original paper cards are stored in the individual store.

According to Mandy Brooks, the information collected on the cards is not used in connection with the websites. The information is only used to communicate with the customer in providing that customer with services, providing the customer with information about new products and promotions, and by retail outlet staff while serving the customer. Agent Provocateur's customers travel internationally, and the system allows them to receive personalized service anywhere they travel.

According to the Sale Motion, in March 2017 the Parent sold its assets to a newly formed company created by the Four Marketing Group (the "UK Buyer.") The

¹ "Customer Relationship Management."

² Agent Provocateur used a K3 Retail point of sale system and stored its customer information using the Salesforce CRM. Although Mandy Brooks indicated to the CPO that the servers used were located in London, the CPO notes that most Salesforce products are cloud-based, so customer information is actually likely hosted on Salesforce's servers. Salesforce does maintain servers in the United Kingdom.

sale did not include the equity interests in, or assets of, any of the Parent's subsidiaries, including the Debtors. According to Mandy Brooks, the UK Buyer, directly or through affiliates, has also acquired twenty stores outside the United States, which it currently owns and operates. The sale included the customer information in the Parent's control, and the systems used to maintain that customer information in the ordinary course of Agent Provocateur's international store operations. It appears the UK Buyer is operating under the Agent Provocateur Limited name.

Since March 2, 2017, the UK Buyer has operated the central point of sale system and customer management system. As a result of purchasing the Parent's assets, and its operation of the centralized data systems, the UK Buyer already has access to the customer information collected by the Debtors and uses the information to provide services when the customers who provided the information to the Debtors visit international retail outlets.

The names, addresses, e-mail addresses, and non-mobile telephone numbers constitute PII for purposes of 11 U.S.C. § 101(41A), as do the customers' mobile phone numbers, when associated with a user's name, address, or e-mail address.³ The Debtors schedules do not list customer information as an asset.

The CPO identified three websites selling under Agent Provocateur brands.

³ Section 101(41A) explicitly includes an individual's name, address, e-mail address and telephone number in the definition of personally identifiable information, when the individual provided the information to the debtor in connection with obtaining a service from the debtor primarily for personal, family or household reasons.

All three websites collect PII and all three provide on-line shopping. According to Mandy Brooks, these websites are neither owned nor operated by the Debtors, nor is customer information collected through the websites used in retail store operations.

The website at agentprovocateur.com contains a “terms and conditions” page accessible through a link at the bottom of each webpage.⁴ A link to a “Privacy Policy” at the bottom of each webpage also leads to the same terms and conditions. The terms reference Agent Provocateur Limited, and state that they are governed by English law. While the terms do not include a US centric type privacy policy, they contain two data protection statements.⁵ One applies to information collected with respect to gift card programs, and does not explicitly restrict information transfers. The second data protection statement, which either applies generally or to the VIP Card program, specifically states “your personal information will not be passed to any other persons without your permission.”

The website at agentprovocateur.online contains a US centric privacy policy accessible through a link at the bottom of each webpage.⁶ This policy states:

[w]e will not sell (or trade or rent) personally identifiable information to other companies as part of our regular course of business. However it is possible that we might acquire or merge with or be acquired by another company or that we might dispose of some or all of our assets. If that happens, your personal information may be disclosed to another company, but that disclosure will be subject to the Privacy Notice in effect.

⁴ Found at http://www.agentprovocateur.com/us_en/terms-and-conditions

⁵ A data protection statement is the term used to refer to a European Union centric privacy policy.

⁶ Found at <http://www.agentprovocateur.online/privacy.html>

The policy also states that it applies only to personal information collected online through the website, although it does disclose that “we will try to treat offline collection, uses, and disclosures consistently with our relevant online practices.”

The website for L’Agent by Agent Provocateur, found at lagentbyap.com, contains terms and conditions, but contains neither a privacy policy nor a data protection statement.⁷

Finally, a search using Google disclosed what appears to be a default “privacy policy” template, associated with the agentprovocateur.com website.⁸ This form for a US-centric policy does not appear to be accessible through the website itself. While the policy states “[w]e will not sell, distribute or lease your personal information to third parties unless we have your permission or are required by law to do so”, the page appears to be an orphan page within the website, not disclosed to consumers.

Proposed Sale

The Debtors proposed sale contemplates a sale of substantially all assets of the Debtors’ business to Agent Provocateur International (US) LLC, an affiliate of the UK Buyer. Customer lists or customer information are not explicitly identified in the detailed descriptions of the assets being transferred, but because the asset purchase agreement contemplates a transfer of all assets not explicitly excluded, the sale would include a transfer of any of the Debtors’ PII in connection with the sale. Because the Debtors remain in operation, the Buyer will require access to PII to

⁷ <http://www.lagentbyap.com/us/terms-conditions>

⁸ http://www.agentprovocateur.com/us_en/privacy-policy-cookie-restriction-mode

satisfy pending sale orders and satisfy Consumer Liabilities⁹ that it is assuming under the asset purchase agreement. However, the CPO notes that the UK Buyer likely already has possession of that PII as a result of the UK Sale and its operating the centralized CRM system.

The asset purchase agreement the Debtor proposes be used does not provide any protections for PII being sold or transferred, as it contains no specific provisions addressing treatment of customer information. The CPO understands that the Debtor and the Buyer are discussing revisions to the asset purchase agreement to include such provisions.

The Debtor asks the Court to approve the proposed sale without competitive bidding, on the grounds that the UK Buyer's control over both the intellectual property and inventory sourcing make a competitive bidding process pointless and ineffectual.

The CPO has not received any expressions of concern about the handling of PII in connection with the sale. The CPO understands that neither the Debtor, the Parent, nor the Buyer have received any inquiries from government agencies about the storage, transfer or use of consumer information, either in the US or internationally.

⁹ A defined term under the asset purchase agreement.

Substance of the Report

I. The Proposed Asset Sale Should be Conditioned to Protect Customer's Rights in their Information

The CPO notes that it is not entirely clear the Debtor is actually transferring any PII to the Buyer as a result of the pending sale. Language in the In Store Policy discloses that the customer is providing its information to Agent Provocateur Limited (the Parent), and the Parent has already sold its customer information to the UK Buyer. Since that sale, customer information provided in the Debtors' stores has, in the ordinary course, been transferred to the centralized data systems the UK Buyer now operates. Section 363(b)(1) of Title 11, which contains the restrictions on transfer of personal information, does not apply to ordinary course transfers under 11 U.S.C. § 363(c). As a result, the Debtors' pending sale seems unlikely to transfer any customer information not already in the UK Buyer's possession.

Still, conditions should be placed on the Buyer's receipt and use of PII, if any, from the Debtors resulting from the sale because the current privacy policy promises not to transfer customer information to third parties. The buyer should agree to (a) employ appropriate security controls and procedures (technical, operational, and managerial) to PII; (b) abide by all applicable laws and regulations with respect to PII; (c) agree to abide by the Debtor's privacy policies, and privacy related promises made in the Debtor's terms of service, in effect at the Petition Date and governing the specific PII, including the In Store Policy; (d) agree to respect all prior requests by an individual to opt-out from receipt of marketing messages; (e) agree to allow

individuals to access, amend or erase their personal details by request at any Agent Provocateur store operated by Buyer or an affiliate; and (e) limit use of the PII to purposes of continuing business operations under the Agent Provocateur brand at physical retail locations, continuing to provide goods and services to individual customers through physical retail locations, and contacting the individual with information about new merchandise, services and events related to the Agent Provocateur brand. Given the limited scope of section 363(b), the conditions placed on the sale can be limited to the data being transferred under section 363(b). These restrictions need not necessarily affect or limit the Buyer's use of customer information already in its possession.

The report examines the nature of the information collected by the Debtor, the law applicable to the Debtor's use of PII, and the nature of any relevant privacy policy, and concludes that a sale of customer PII to the buyer is not consistent with the relevant privacy policies, but would be consistent if the sale is subject to the stated reasonable conditions. The CPO's detailed recommendations are stated in part h of this report.

The report also contains the information suggested under 11 U.S.C. § 332(b) to assist the Court in its consideration of the facts, circumstances and conditions of the sale.

a. The Personally Identifiable Information Collected by the Debtors

The term "personally identifiable information" is defined for bankruptcy code

purposes at 11 U.S.C. § 101(41A). It includes the consumer's name, address, e-mail address, telephone number dedicated to a physical address, social security number and credit card numbers. It also includes any other information that, if identified in connection with any item in the foregoing list, will result in contacting or identifying the individual physically or electronically, including a mobile telephone number.

The Debtors collected PII from customers in their various retail outlets. This information included names, e-mail addresses, telephone numbers and mailing addresses. The Debtors associated this information with transactional information from their stores, and from other retail outlets owned by Agent Provocateur Limited. There is no indication that the Debtors collected and retained financial information.

Factually, it is unclear the extent to which this PII remains in the Debtors' possession and control. The Debtors operated only a portion of the Agent Provocateur retail business, transmitting the PII collected to computer systems controlled by their parent, Agent Provocateur Limited. The Debtors did retain in the stores the original paper documents containing the PII. However, the paper forms do not reference the Debtors – instead they state that the information is being provided to Agent Provocateur Limited. As a result, there is some question whether the proposed sale truly contemplates a transfer of the PII held by the Debtors, since that information was held by Agent Provocateur Limited and has already been transferred to the UK Buyer.

The customer information should be considered somewhat more sensitive than

typical retail store purchase information. Given the product being sold, and the locations of the stores, it is likely that some customers have purchased items for people other than their spouses, and with locations in Vegas and Beverly Hills, it is also likely that the store has publically known clientele. Particular care is appropriate to ensure that the customer information provided is used solely for the purposes expected by customers.

b. The Law Applicable to the Debtors' use of Personally Identifiable Information

The Debtors' use of PII is governed by the FTC Act and state law little-FTC Acts.

i. The Federal Trade Commission Act

The Debtors' handling of PII is subject to the jurisdiction of the Federal Trade Commission, under the FTC Act. Section 5 of the FTC Act declares unfair or deceptive practices in commerce as unlawful. 15 U.S.C. § 45. In assessing whether a proposed transaction involving personal information is unfair or deceptive, the FTC first identifies what "express claims," and "implied claims," the company has made to the persons providing the personal information.¹⁰ An "express claim" refers to a factual assertion made in an advertisement, promotion, or other publicly available statement such as a corporate policy or privacy policy. An "implied claim" refers to the net impression conveyed by all elements of a company's policies or statements

¹⁰ FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) *available at* <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> (last viewed June 7, 2017).

“including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.”¹¹

A company’s use of customer information violates Section 5 of the FTC Act when an express or implied claim is “likely to affect a consumer’s choice of or conduct regarding a product” and is “likely to mislead reasonable consumers under the circumstances.”¹² The FTC will also consider an act or practice “unfair” if it causes, or is likely to cause, substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.¹³ The FTC applies these policies where a company has collected personal information pursuant to a disclosed privacy policy, or has collected personal information in a manner suggesting that it will treat the information in accordance

¹¹ Id.

¹² Id.

¹³ *See generally* FTC Policy Statement on Unfairness, *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984) *available at* <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> (last viewed June 7, 2017).

with a disclosed privacy policy.¹⁴ In these situations, the FTC treats the privacy policy in effect at the time of data collection as an “express claim,” and expects that the company will treat the personal information in accordance with the claim.

The FTC Act can provide a useful framework for analyzing whether a sale of PII should be allowed under 11 U.S.C. § 363(b). As discussed previously, the FTC examines whether the privacy policy under which the information was collected contains a promise with respect to use of information, and whether the proposed transfer would violate that promise. The FTC has the authority to enjoin unfair or deceptive business acts or practices. 15 U.S.C. § 45(b). The FTC can also seek civil penalties through the Courts. 15 U.S.C. § 45(m). The FTC Act does constrain the FTC’s authority to determine whether a particular act is unfair or deceptive.

“The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In

¹⁴ See, e.g., *In the Matter of Goal Financial, LLC*, Agreement Containing Consent Order (FTC 2007) available at <http://www.ftc.gov/sites/default/files/documents/cases/2008/03/080304agreement.pdf> (last viewed June 7, 2017); *United States of America v. Valueclick, Inc.*, Stipulated Final Judgment and Order (C.D. Cal. 2008) available at <http://www.ftc.gov/sites/default/files/documents/cases/2008/03/080317judgment.pdf> (last viewed June 7, 2017); *United States v. Choicepoint, Inc.*, Stipulated Final Judgment and Order (N.D. Ga. 2006) available at <http://www.ftc.gov/sites/default/files/documents/cases/2006/01/stipfinaljudgement.pdf> (last viewed June 7, 2017); *In the Matter of Vision I Properties*, Agreement Containing Consent Order (FTC 2004) available at <http://www.ftc.gov/sites/default/files/documents/cases/2005/03/050310agree0423068.pdf> (last viewed June 7, 2017).

determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.” 15 U.S.C. § 45(n).

Section 45(n) provides a useful analytical tool in the context of bankruptcy sales. Borrowing from the FTC’s analytical framework, a bankruptcy court can weigh the potential harm to consumers from the broken promise of a sale that is inconsistent with a privacy policy against countervailing considerations. For example, the Court could consider the extent to which the proposed sale provides countervailing benefits to the consumers or to competition. The Court could also consider the presence of mechanisms that allow the consumers a reasonable opportunity to avoid injury. The Court can also consider whether the proposed transfer of PII and its intended future uses are consistent with the customers’ expectations for how their information would be used.

The FTC act does provide for judicial review of FTC determinations. However, a dearth of judicial decisions exist applying the FTC Act to sales of consumer information. In almost all cases in this field, a company targeted for enforcement by the FTC will attempt to resolve the problem by entering into a consent decree with the FTC or by submitting to the FTC’s authority. As a result, the FTC’s consent decrees, settlements, and decisions provide the primary source of law available to determine whether or not a particular action violates Section 5 of the FTC Act.

When a proposed transfer of PII under 11 U.S.C. § 363 would violate Section 5 of the FTC Act, the bankruptcy court should not allow the transfer. First, 28 U.S.C. §

959(b) requires that a trustee shall manage the property of the estate according to the valid laws of the State in which such property is situated.¹⁵ Section 959(b) has been cited as requiring compliance with Federal law, in addition to state law. *Matter of Environmental Waste Control, Inc.*, 125 B.R. 546 (N.D. Ind., 1991). Second, 11 U.S.C. § 363(b)(1)(B)(ii) specifically provides that on a showing that a proposed sale of PII would violate applicable non-bankruptcy law, the Court may not allow the transfer.

Accordingly, when the issue has been raised by a party, the Court should, as a threshold matter, determine whether or not the proposed transfer violates Section 5 of the FTC Act or other applicable law. If the transfer violates the FTC Act or other applicable law, the Court may not allow the transfer. In the present case, no party has asserted that the proposed transfer violates the FTC Act or other applicable law. Further, for the reasons stated below, the CPO does not believe that the proposed transfer will violate the FTC Act or other applicable law, provided that the transfer is made subject to appropriate conditions.

That is not, however, the end of the inquiry. The standard for allowing the sale under Section 363(b)(1) is not whether the proposed transfer would violate Section 5 of the FTC Act, but whether the transfer is consistent with the applicable privacy policy,¹⁶ or the Court, after appointment of the CPO and due consideration of

¹⁵ See, *In re White Crane Trading Co., Inc.*, 170 B.R. 694 (Bankr. E.D. Cal., 1994) (Trustee cannot sell estate assets in violation of state consumer protection laws.)

¹⁶ 11 U.S.C. § 363(b)(1)(A).

the facts, circumstances and conditions of such sale, approves the sale.¹⁷ The statute does not provide the Court with any standard to guide its decision, other than the admonition that the Court give “due consideration” to the “facts, circumstances and conditions.”

Although the statute provides no real standards for the Court to follow, it does give the Court some guidance in the form of end points. If the Court finds that the proposed sale is “consistent” with the privacy policy, the Court should allow the sale. At the other end of the analysis, if the Court finds that the proposed sale violates Section 5 of the FTC Act, the Court may not allow the sale. Thus, 11 U.S.C. § 363(b)(1)(B)(i) applies to those situations where the proposed sale is inconsistent with the privacy policy, but still does not rise to the level of an unfair or deceptive business act or practice.

The FTC’s guidelines provide assistance in this analysis, but the FTC’s decisions must be applied with two caveats in mind. First, the FTC is not concerned with the middle ground of proposed sales that are not consistent with a privacy policy but still do not violate Section 5 of the FTC Act. The FTC only concerns itself with situations where it believes the proposed transaction will violate Section 5 of the FTC Act. And, under Section 363, if a proposed sale would violate Section 5 of the FTC Act, the Court may not allow the sale to go forward.

Second, as a general rule, the FTC considers deceptive any sale of customer

¹⁷ 11 U.S.C. § 363(b)(1)(B).

data that is inconsistent with an applicable privacy policy. The FTC looks at whether a particular claim made by a company is “material”, in that it “is likely to affect the consumer's conduct or decision with regard to a product or service.”¹⁸ The FTC presumes express claims to be material.¹⁹ In other words, if the proposed sale or transfer of customer information violates an express representation made within the privacy policy, it violates Section 5 of the FTC Act.²⁰ The FTC generally will oppose such sales unless the customers are provided additional protection, usually in the form of advance notice of the sale coupled with an opportunity to avoid having their information transferred.

Section 363(b)(1)(B) recognizes that a particular transfer might need to receive different treatment within the bankruptcy context than it would outside of bankruptcy. When the proposed transfer is not consistent with the privacy policy, section 363(b)(1)(B) contemplates that the proposed transfer might still be appropriate given the potential harm to consumers of not allowing the transfer, the potential benefits to consumers of allowing the transfer, and the addition of further protections designed to reduce any harm to consumers of the transaction.

In analyzing the transfer, the Court should look at the nature of the promises,

¹⁸ FTC Policy Statement On Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) *available at* <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> (last viewed June 7, 2017).

¹⁹ *Id.*

²⁰ See, *In the Matter of Vision I Properties, LLC*, complaint (FTC 2005) *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2005/04/050426comp0423068.pdf> (last viewed June 7, 2017) (Respondent accused of sharing customer data with third parties in violation of express statement in privacy policy.)

express and implied, made to the consumers; the nature of the proposed transaction; and the expected use of the transferred information by the transferee. Even where the transfer itself is not consistent with the language of the privacy policy, the transfer should be allowed where the transfer and expected future uses of the PII are consistent with the consumer's prior expectations.

Alternatively, a transfer should be allowed where: (a) prior to the transfer, the consumer is presented with information about the transfer and the transferee's proposed uses for the PII, and either consents or is provided with a meaningful opportunity to opt-out of the transaction; and (b) the potential harm to consumers of the proposed transaction is outweighed by the expected harm to consumers of denying the transaction. Whether the Court requires that a consumer affirmatively express assent to the transfer (called "opt-in"), or not, would depend on the level of perceived harm to the consumers from the transfer, as well as the potential for harm to a consumer that fails to "opt-in" through inattention. For example, where the transfer of PII is essential to the consumer's continued receipt of expected services, "opt-in" might be inappropriate.

Finally, in some cases, restrictions might be placed on the allowed uses of transferred PII as a condition of transfer instead of denying the transfer altogether. For example, where timing issues or the debtor's lack of resources prevent deletion of selective data or obtaining advance consent to a transfer, the transfer could occur subject to the transferee's obligation, perhaps enforced through court order, to delete

the data or obtain advance consent before its use. In order to prevent future harm both to customers and creditors, the Court might allow a transfer of some data to a business successor, subject to restrictions on its use, to allow preservation of data where needed to meet retention requirements.

ii. State Little FTC Acts

All 50 states have their own, similar consumer protection statutes — often referred to as Little FTC Acts — that prohibit unfair and deceptive commercial practices. While there is some variation among the state laws, a significant number of state consumer protection laws are modeled after the FTC Act, and most, if not all, of these state laws prohibit deceptive representations to consumers. Therefore, the analysis under these state consumer protection laws is substantially the same as under the FTC Act.

For example, the New York Little FTC Act,²¹ like the FTC Act, prohibits deceptive acts or practices in commerce. However, subsection (d) of the act provides that:

In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.

Thus, the limitations on transfer created by the New York Little FTC Act will be contained within any limitations on transfer informed by the FTC Act.

²¹ N.Y. GBS Law § 349.

For analysis purposes, the Little FTC Acts can be ignored, although a transfer of information prohibited by the FTC Act might also be prohibited by one or more of the Little FTC Acts.

c. The Debtors' Privacy Policies

i. Formal Policies

The Debtors collected PII under the In Store Policy (Exhibit A), governing the Debtors' use of information. The In Store Policy allows Agent Provocateur Limited to use the information to contact the customer with information about new merchandise, services and events. The In Store Policy also promises not to disclose the information to third parties. Finally, it represents that the customer can request access, amendment or erasure of her or his personal details by contacting an Agent Provocateur store.

While the In Store Policy appears to restrict transfer of the PII as proposed in the sale, its effect needs to be considered in the context of the Debtors acting with their Parent as a concerted business operation, the customers' understandings and expectations, and the Parent's recent transfer of assets to the UK Buyer.

Customers in retail stores likely had neither knowledge nor an understanding that the US retail stores were owned and operated by entities separate from Agent Provocateur Limited. The typical consumer will likely consider any agreement or promise to be made by the Parent, and have an expectation that they are dealing with Agent Provocateur, as opposed to a specific legal entity or group of entities. This belief would be reinforced by the reference on the In Store Policy to Agent

Provocateur Limited as the receiving party. Thus, a consumers' expectation regarding use of the PII would extend to use by the entire collection of entities operating under the Agent Provocateur brand name. The In Store Policy specifically allows use of the PII by Agent Provocateur Limited, and a typical consumer would not likely consider a transfer of the information to other Agent Provocateur retail outlets a disclosure to a third party.

In this case, Agent Provocateur Limited, which previously held the PII in its CRM system, has already transferred that PII to the UK Buyer. That sale occurred in the context of a foreign administration and, of course, 11 U.S.C. § 363(b)'s restrictions on the sale of PII did not apply. As the Debtors and the UK Buyer continued to operate in the ordinary course of business, it appears that PII the Debtors collected post-sale was shared with the UK Buyer and its affiliates owning and operating Agent Provocateur retail stores outside the United States. This sharing, and the use of PII by the UK Buyer and affiliates, appeared to follow Agent Provocateur Limited's prior practices for the handling and use of customer information, and appears consistent with customers' expectations. These transfers, which either occurred pre-petition or pursuant to 11 U.S.C. § 363(c), are also not subject to 11 U.S.C. § 363(b)'s restrictions on transfer.

ii. Effect of Policies Contained on the Websites

The various online policies are not presented by the Debtors, and information provided in the stores is not used in conjunction with the online services. However, a customer of the Agent Provocateur brand might well fail to understand the

distinction and differentiate between the policies presented online and the treatment of information provided in a retail store. In this case, the online policies are less restrictive than the In Store Policy. As a result, their existence does not change the analysis of this report, or the CPO's conclusions or recommendations.

d. Allowance of Sale under 11 U.S.C. § 363(b)(1)(A)

Section 363(b)(1)(A) allows the sale of PII when consistent with a debtor's privacy policy. Here the In Store Policy created an expectation of use by Agent Provocateur Limited, as opposed to just the Debtors. The expectation by customers would be that Agent Provocateur Limited would use the customer information to provide services in its various stores, use the information to contact the customer with information about new merchandise, services, and events, and allow the customer to request access, amendment or erasure of the information at any Agent Provocateur store. The proposed sale is not consistent with those expectations because the In Store Policy flatly states that the Debtor will not transfer customer information to third parties and the Asset Purchase Agreement contains no restrictions on the Buyer's use of the information.

However, if appropriate restrictions were added to the Asset Purchase Agreement, any transfer of PII would be consistent with the In Store Policy, and the transfer could be approved pursuant to 11 U.S.C. § 363(b)(1)(A).

e. Allowance of Sale under 11 U.S.C. § 363(b)(1)(B)

Section 363(b)(1)(B) allows the sale of PII even when inconsistent with the

Debtors' privacy policies. It allows the Court to approve the sale after the appointment of a CPO, and after notice and hearing, provided the Court (a) gives due consideration to the facts, circumstances, and conditions of the sale, and (b) finds that no showing was made that such sale or lease would violate applicable non-bankruptcy law.

In this case, the proposed transfer of PII to the Buyer in conjunction with other business assets is appropriate if the sale is conditioned to ensure that both the transfer and expected future uses of the PII are consistent with the consumers' prior expectations. Past and current customers of the Agent Provocateur brand have, through the voluntary provision of PII to the Debtors', indicated intent to do business with them. PII transfers of current and recent customers are needed to allow the Buyer to continue to handle pending purchases and shipments, and handle returns and complaints. PII provided by former customers is necessary to allow the Buyer to continue to provide personalized services to those customers if they return to make further purchases.

The CPO's recommendations regarding such conditions are described specifically in part h of this report. The CPO understands that the Debtor and the Buyer are considering revisions to the Asset Purchase Agreement as a result of the CPO's recommendations.

Providing the transfer does not violate the FTC Act itself, or other applicable state or Federal law, the Court may still approve the sale after giving "due

consideration to the facts, circumstances, and conditions of the sale.” The remainder of this report provides information to assist the Court in this determination.

f. The Potential Losses or Gains of Privacy to Consumers

The Debtors’ customers currently have an expectation that the use and transfer of their information will be limited in a number of ways. First, they will associate their relationship as being with the Agent Provocateur brands. A use of PII to market or advertise other brands would not be in line with expectations. Customers will also expect to receive the protections provided to them under the existing In Store Policy, and if they have opted-out from marketing messages, they expect that they will not receive those types of messages going forward.

An unrestricted transfer of information could subject customers to unwanted marketing and advertisement messages, perhaps for other clothing brands, or even for goods and services outside of the clothing business. Customers might also lose the ability to view and modify some of their PII or opt-out from commercial marketing messages. So, the proposed sale does create a potential loss of privacy, although that risk of loss is reduced by conditioning the transfer of information.

The conditions suggested by the CPO in part h, effectively eliminate the risk of loss from any transfer. They require the buyer to maintain appropriate security protections, continue to maintain and use PII according to the expectations set by the existing privacy policies, respect prior and future requests to opt-out from receiving marketing messages, and use of information only for purposes of

continuing business operations under the Agent Provocateur brand at physical retail locations. The conditions also require the buyer to continue to maintain and use PII in compliance with applicable non-bankruptcy laws.

No privacy gains are expected as a result of the proposed sale, although it is possible that the buyer will employ more secure methods of collecting, storing and using PII than are currently in effect.

g. The Potential Costs or Benefits to Consumers

Prohibiting a transfer of PII in connection with a transfer of other business assets can harm customers, particularly if the buyer plans to continue to operate the existing businesses. Customers are unlikely to view their relationship with Agent Provocateur as being with a firm, but instead view it as being with a brand. Customers providing information in the Debtors' stores, are unlikely to know, or even care, what the form of corporate entity is that technically holds the information.

In this case, current customers will be harmed if the buyer is unable to satisfy pending orders, process returns, or respond to consumer complaints because of a lack of access to the necessary PII. To a lesser degree, customers may encounter further inconvenience if PII is not transferred because it may affect the buyer's ability to smoothly continue to provide services to customers in the future. Customers may have to re-enter information in connection with future orders, slowing the purchase process, and may find the Buyer and UK Buyer unable to provide the levels of personal service the customer expects.

With the recommended conditions in place, any transfer of PII to the Buyer should not result in additional costs to consumers.

h. Potential Alternatives to Mitigate Potential Costs or Losses.

The CPO's recommends that the transfer of PII to the buyer be conditioned as follows:

1. The buyer acknowledge that the purchased assets might include "personally identifiable information" within the meaning of the section 363(b) of the Bankruptcy Code, along with associated information about Debtors' customers.
2. The buyer agree to: (A) employ appropriate security controls and procedures (technical, operational, and managerial) to protect PII (B) abide by all applicable laws and regulations with respect to PII; and (C) take such additional reasonable actions as may be agreed in writing between the Debtors and buyer.
3. The buyer agree to abide by the Debtors' privacy policies, and privacy related promises made in the Debtors' terms of service, in effect at the Petition Date and governing the specific PII, including the Debtors' "In Store Policy."
4. The buyer agree to respect all prior requests by an individual to opt-out from receipt of marketing messages. Buyer agrees to allow individuals to access, amend or erase their personal details by request at any Agent

Provocateur store operated by Buyer or an affiliate.

The CPO also recommends that the buyer's use of any PII transferred under the section 363(b) be limited.

1. Buyer should agree to use the transferred PII only for purposes of continuing business operations under the Agent Provocateur brand at physical retail locations, and continuing to provide goods and services to individual customers through physical retail locations. Such use may include contacting the individual with information about new merchandise, services and events related to the Agent Provocateur brand.

These conditions and limitations are designed to ensure that the Buyer continues to treat PII received under a section 363(b) sale in the same manner, and with respect to the same business, as disclosed to customers by the Debtor.

Customers will continue to have the ability to opt-out of marketing messages, using the existing mechanisms.

Other options exist, but in the CPO's opinion these would either increase costs to customers, or unduly burden the sale and transfer process without sufficient gains to customers to justify the cost.

One option, typical in cases like this outside of the bankruptcy process, is to provide customers with notice of the intended transfer thirty days prior to the transfer, and provide them with an opportunity to opt-out of having their PII

transferred to the buyer. Employing this process would unduly delay the sale process, and cause the estate to incur substantial additional expenses building online mechanisms to accommodate any opt-out requests, and provide effective notice to all current and former customers who's PII exists in the databases.

Publication notice would be required. In this case, the CPO does not believe that this mechanism is practicable, due to financial pressure on the Debtors, and the relatively low sales price.

i. Potential Violations of Applicable Non-Bankruptcy Law

11 U.S.C. § 363(b)(1)(B)(ii) provides that on a showing that a proposed sale of PII would violate applicable non-bankruptcy law, the Court may not allow the transfer. It is important to note the language does not require a showing that the sale complies with applicable non-bankruptcy law – the provision only applies when a party in interest asserts and establishes a violation of law. In this case, no such showing exists, nor has any party in interest asserted that the proposed transfer violates applicable non-bankruptcy law.

The CPO's recommendations include a requirement that the buyer agree to abide by all applicable laws and regulations with respect to PII. This is intended to require the buyer to take appropriate action to delete PII received in the event it determines that the PII had been improperly collected, in addition to maintaining continued compliance.

Conclusion

The CPO believes that any transfer of PII by the Debtors in conjunction with the 363(b) sale is not consistent with the Debtors' existing privacy policies, but would be consistent if performed subject to appropriate conditions.

Dated at Boston, Massachusetts, June 10, 2017.

Warren E. Agin, Consumer Privacy
Ombudsman

/s/Warren E. Agin
50 Milk Street, Sixteenth Floor
Boston, MA 02109
(617) 517-3203
agin@analyticlaw.com

Exhibit A

Agent Provocateur
Welcome to the Club

TITLE FIRST NAME SURNAME
ADDRESS CITY
COUNTY / STATE POST / ZIP CODE COUNTRY
BIRTHDAY TELEPHONE
EMAIL

For store use only

BRA SIZE DRESS SIZE SHOE SIZE
SIGNATURE
NOTES

I agree that Agent Provocateur Limited may use my personal details for the purpose of contacting me with information about new merchandise, services and events.

Agent Provocateur respects your privacy and will not disclose your personal details to third parties. You may request access, amendment or erasure of your personal details by contacting your nearest Agent Provocateur store.