

**UNITED STATES BANKRUPTCY COURT  
FOR THE  
NORTHERN DISTRICT OF TEXAS**

In re:

Jo-Jo Holdings, Inc.,  
Backwoods Retail, Inc., and  
Backwoods Adventures, Inc.

Debtors.

Case No. 16-44337-RFN-11

Chapter 11

Procedurally Consolidated

**Report of the Consumer Privacy Ombudsman**

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

**Procedural Background to the Report**

On November 9, 2016, Jo-Jo Holdings, Inc., and the other procedurally consolidated debtors (the “Debtors”), filed their Chapter 11 petitions. The Debtors continue to operate as debtors in possession.

On February 2, 2017, the Debtors filed their emergency motion seeking authority to sell procedurally all estate assets to SMAO, LLC (“SMAO”) (the “Sale Motion”, docket item 151), which proposed a sale of substantially all of the Debtors’ remaining business assets to SMAO. On February 10, 2017, the Court issued an interim order on the Sale Motion (the “Sale Order”). The Sale Order established February 17, 2017, as the deadline for the Debtors and SMAO to complete an Asset Purchase Agreement, and set a bidding deadline of February 23, 2017, for the submission of competing bids, to be followed by an auction on February 27, 2017. A

hearing on the Sale Motion and auction results is scheduled for February 28, 2017.

The Sale Order also directed the U.S. Trustee to appoint a CPO in the case.

On February 14, 2017, the U.S. Trustee appointed Warren E. Agin as CPO.

The Debtors and AOBW, LLC, (“AOBW”), a subsidiary of SMAO, entered into an Asset Purchase Agreement on February 17, 2017. The Debtor received a counter-offer from Backwoods 2.0, LLC (“Backwoods 2”), and conducted an auction on February 27, 2017. A hearing on the sale is scheduled for February 28, 2017.

### **Summary of the Report**

The CPO has reviewed the Debtors’ current websites, reviewed its current terms of service, and current and historical privacy policies, and has interviewed the Debtors’ CEO, who is familiar with the Debtors’ privacy issues and its collection and use of customer information. The CPO concludes that the sale contemplates the transfer of Personally Identifiable Information (“PII”), the Debtors collected that PII subject to written privacy policies agreeing to restrict use of PII, and its customers should be presumed to have relied on those representations when agreeing to provide their information. The proposed transfers are not consistent with the terms of the privacy policies.

However, the proposed transfers of personal information are appropriate because the proposed transfer is conditioned on the buyer’s agreement to, absent a customer’s express consent after adequate notice: 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 use personal information to only market the Debtors existing businesses. Any additional use would require express consent of the customer after appropriate notice. The CPO's detailed recommendations regarding appropriate conditions and limitations are stated in part (h) of the body of the report.

The proposed transfer of PII to the Buyer is consistent with the recommendations of the CPO as outlined in this 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 domain names owned by the Debtors. The CPO reviewed the Debtors' websites for Jo-Jo Holdings, Backwoods Retail, and Backwoods Adventures. The CPO reviewed the terms of service and privacy policies for each of these sites. The CPO conducted on-line searches for privacy related materials using the name "Jo-Jo Holdings" "Backwoods Retail" and "Backwoods Adventures" coupled with the terms "privacy," and "privacy policy." The CPO also spoke with the Debtors' chapter 11 counsel, and Jennifer Mull Neuhaus ("Neuhaus"), the Debtors' CEO. The CPO found counsel cooperative and Ms. Neuhaus familiar with the Debtors' operations as they related to privacy concerns. The CPO provided Debtors' counsel with an advance draft copy of the report and an opportunity to comment on its averments.

The Debtors sold clothing and outdoor adventure equipment in the U.S., both

in retail outlets and through two websites: Backwoods Retail (backwoods.com) and Neptune Mountaineering (neptunemountaineering.com). They marketed outdoor adventure travel through a third website, Backwoods Adventures (backwoodsadventures.com). Finally, the company maintained a website at dynamicearth.net, to support a store called Dynamic Earth in Springfield, Missouri.

***Backwoods Retail and Neptune Mountaineering***

The brands Backwoods Retail and Neptune Mountaineering conducted sales through two webpages on a common website platform. These brands shared similar privacy policies, (the “Backwoods Policy,” attached as Exhibit A), disclosed to consumers through an easily found link at the bottom of the website.

According to Neuhaus, the Neptune Mountaineering brand has already been sold as part of the bankruptcy process, and its assets, including information about its customers, is not intended to be part of the current sale. The Debtors represent that it can track customer information by the store or website of origin, allowing it to extract information related to a specific store or brand. This report, accordingly, does not address Neptune Mountaineering.

The Backwoods Retail website collects a customer’s name, email address, and address. A phone number might also be collected. A customer can create an online account, in which case the website collects a username and a related password. The website will collect historical usage and transaction data for customers who are logged in. This information is collected through the website’s online shopping cart,

called Magento. Payment information, such as credit card information, is not retained. A customer's name, address, and other contact information might also be collected in stores, through the Debtors' RetailPro point of sale systems.

The Magento and RetailPro systems coordinate their data.

The names, addresses, e-mail addresses, and non-mobile telephone numbers constitute PII for purposes of 11 U.S.C. § 101(41A), as is a customers' mobile phone number, username and password, and IP address, when associated with a user's name, address, or e-mail address.<sup>1</sup>

Although the Privacy Policy infers that Backwoods Retail collects payment information, such as credit card numbers, the Debtors represent that payment mechanisms on the websites are operated by third-parties, and the payment information is neither stored nor retained by the Debtors themselves. The Debtors represent that they do not collect social security numbers from customers.

The current Privacy Policy appears to have been in place for an extended period of time. The Privacy Policy discloses that the Debtors collect and store "personal and transactional information in our customer database" but does not explicitly identify what information is stored. "Personal Information" is defined as information about a specific person, including "name, address, telephone number, e-mail address, credit card number, birth date, information about the person's

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<sup>1</sup> 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.

activities and purchases, and, if applicable, member number.” The Debtors disclose the use of cookies, and that the cookies allow it to gather and remember information about preferences.

The Privacy Policy discloses that PII is used “to process your transactions, respond to your requests.” It also discloses that PII may be used to provide “periodic printed or e-mail communications from us about new products and services, discounts, special promotions or upcoming events.”

The Privacy Policy states that “[w]e respect the privacy of our customers” and “[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.” It does state that “[w]e may use your personal information to send you promotional information about third parties which we think you may find interesting if you tell us that you wish this to happen.”

The Privacy Policy allows users to obtain a copy of the information about them, and request corrections.

The Privacy Policy provides explicit directions for opting out from direct marketing communications using the website or by e-mail.

The Privacy Policy was last viewed by the CPO February 15, 2017.

### ***Backwoods Adventures***

The Backwoods Adventures website collects basic contact information through an online forms system called Wufoo, which is a cloud based form builder with a

built in database. The Backwoods Adventures website does not have a privacy policy, and the CPO was not able to identify a former privacy policy in use with the website during the past ten years.

### ***Dynamic Earth***

The Debtors operated a website at dynamicearth.net, which the Debtors represent was just a marketing website for a store in Springfield, Missouri. The Debtors represent that the name and related assets, but not including any customer information, were sold separately as part of the bankruptcy process. The Dynamic Earth website was not active as of February 18, 2017, but did have a privacy policy, attached as Exhibit B. The Debtors represent that no PII was collected through the website, although some PII would be collected in the store through its point of sale system. The Dynamic Earth privacy policy is different from the Privacy Policy, but if Dynamic Earth related customer PII were being transferred to the Buyer, the CPO would reach the same recommendations with respect to such transfer.

### ***Proposed Sale***

The Debtors proposed sale contemplates a sale of the Debtors' business to Buyer or Backwoods 2, and contemplates a transfer of PII in connection with that sale. The Asset Purchase Agreement ("APA") Section 2.1(q) includes proprietary rights in data and customer list in the assets being sold. Because the Debtors' store and website may remain in operation for a period of time, the Buyer will require access to PII to satisfy pending sale orders, and address warranty concerns and

complaints.

APA, section 7.9 provides the following protections for PII being sold:

The Buyer agrees:

- (i) to employ community reasonable security controls and procedures (technical, operational, and managerial) to protect Customer Information;
- (ii) to comply with all applicable laws and regulations with respect to Customer Information;
- (iii) except as otherwise provided in this Agreement, to comply with the terms and conditions of the Sellers' Privacy Policies pertaining to Customer Information; and
- (iv) to honor all requests made post-Closing by a Seller Customer to opt-out from receipt of marketing messages from the Purchaser and to honor all opt-out requests made pre-Closing by a Seller Customer of which the Purchaser has actual knowledge.

These provisions make the Buyer's storage use of PII subject to all of the protections available to customers prior to the sale.

APA section 7.9(b)(i), allows limited uses of PII following the closing. It allows use of the PII for essentially the same uses as prior to the sale: (a) marketing and sale purposes for the Debtors' brands and stores; (b) providing goods and services to customers of the purchased business; (c) for handling warranty and refund claims; and (d) any other commercially reasonable purpose relating to the operation of the brands or stores.

Finally, APA section 7.9(b)(ii) allows expanded uses of the PII only after use of an appropriate "opt-in" process, where the customer is informed of the new use and has assented to that use.

The bid submitted by Backwoods 2 is on a form of APA identical, in all relevant respects, to the APA with the Buyer.

The CPO has not received any expressions of concern about the handling of PII in connection with the sale.

### **Substance of the Report**

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

Conditions should be placed on the buyer's receipt and use of Customer Information because the current privacy policies do not provide adequate notice to consumers of the potential for transfer of PII. 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 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; (d) and agree to respect all prior requests by an individual to opt-out from receipt of marketing messages. Absent prior express consent from a customer, the buyer's future use of PII should be limited to the purposes of continuing business operations and continuing to provide goods and services to the individual. Absent prior express consent, the buyer can only use PII to deliver marketing messages related to the brands and stores being purchased.

The report examines the nature of the information collected by the Debtors, the law applicable to the Debtors' 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 should be allowed if the sale is subject to the stated reasonable conditions. The CPOs 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.

The APA with AOBW is consistent with the CPO's recommended conditions on transfer and use of PII.

**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 in the course of conducting online sale transactions with customers. This information included names, e-mail addresses, telephone numbers and mailing and billing addresses. In some cases, this information was associated with a username and password. The Debtors did not collect financial information.

The Debtors also collected PII in their stores and combined information collected in stores with other customer information.

**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.<sup>2</sup> 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 "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."<sup>3</sup>

A company's use of customer information violates Section 5 of the FTC Act

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<sup>2</sup> FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) *available at* <http://www.ftc.gov/ftc-policy-statement-on-deception> (last viewed February 21, 2017).

<sup>3</sup> *Id.*

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.”<sup>4</sup> 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.<sup>5</sup> 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 with a disclosed privacy policy.<sup>6</sup> 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

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<sup>4</sup> Id.

<sup>5</sup> See generally FTC Policy Statement on Unfairness, *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984) available at <http://www.ftc.gov/ftc-policy-statement-on-unfairness> (last viewed July 10, 2015).

<sup>6</sup> 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 July 10, 2015); *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 July 10, 2015); *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 July 10, 2015); *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 July 10, 2015).

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 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.<sup>7</sup> 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

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<sup>7</sup> 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.)

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,<sup>8</sup> or the Court, after appointment of the CPO and due consideration of the facts, circumstances and conditions of such sale, approves the sale.<sup>9</sup> 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

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<sup>8</sup> 11 U.S.C. § 363(b)(1)(A).

<sup>9</sup> 11 U.S.C. § 363(b)(1)(B).

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 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."<sup>10</sup> The FTC presumes express claims to be material.<sup>11</sup> 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.<sup>12</sup> 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

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<sup>10</sup> FTC Policy Statement On Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) *available at* <http://www.ftc.gov/ftc-policy-statement-on-deception> (last viewed July 10, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> 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 July 10, 2015) (Respondent accused of sharing customer data with third parties in violation of express statement in privacy policy.)

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, 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 Texas Little FTC Act,<sup>13</sup> like the FTC Act, generally prohibits deceptive acts or practices in commerce.

The Nebraska Little FTC Act,<sup>14</sup> at section 302(a), explicitly makes it a deceptive trade practice to knowingly make “a false or misleading statement in a privacy policy, published on the Internet or otherwise distributed or published, regarding the use of personal information submitted by members of the public.”

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**

The Debtors collected PII under written privacy policies governing the Debtors’ use of information. The Privacy Policy (Exhibit A) contains an express promise that the Debtors would not share customers’ PII with third parties.

The Privacy Policy also contains a number of provisions protective of customer PII, including an ability to review and change some PII and mechanisms for opting-out of marketing messages.

**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. The Privacy Policy states that PII is not shared with third parties

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<sup>13</sup> Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE §§ 17.41-17.63 (DTPA).

<sup>14</sup> Nebraska Revised Statute, 87-301, et. seq.

without consent. Because the proposed transfer of PII is not consistent with the privacy policy the Debtors maintained, the proposed transfer of PII should not be approved pursuant to 11 U.S.C. § 363(b)(1)(A). It can, however, be approved under § 363(b)(1)(B).

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 policy. 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 a 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 Debtors 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 operate the website, 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.

Additionally, customers that have provided e-mail addresses and have not taken advantage of the mechanisms provided to allow them to opt-out of future marketing messages, can be presumed to be interested in receiving such messages with respect to the Backwoods brands and stores. For these reasons, a conditioned approval of the sale is appropriate.

The CPO's recommendations regarding such conditions are described specifically in part (h) of this report.

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 Backwoods brands, or the specific stores operated by Debtors. 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 privacy policies, 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 or outdoor equipment brands, or even for goods and services outside of the 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), and reflected in the APA, effectively eliminate the risk of loss from the transfer. They require the buyer to maintain at least existing security protections, continue to maintain and use PII according to the expectations set by the existing privacy policies, respect prior requests to opt-out from receiving marketing messages, and limit the use of information to the existing brands and stores, absent express consent to different uses. The conditions also require the buyer to continue to maintain and use PII in compliance with applicable non-bankruptcy law.

No significant 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 the

Debtors as being with a firm, but instead view it as being with a brand. Customers providing information through the websites, or in a Backwoods store, 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 that the information and options available to them on the website no longer reflect their particular interests. Finally, customers may appreciate receiving a modest amount of marketing material targeted to their interests; informing them of available products and discounts. Customers who dislike such messages will still have the option to opt-out from receiving those messages. Barring the buyer from use of PII to provide marketing messages to customers that have already agreed to receive them eliminates the ability of those customers to receive desired information from Backwoods brands.

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

**h. Potential Alternatives to Mitigate Potential Costs or Losses.**

In each case, the provisions in section 7.9 of the proposed APA help reduce potential costs or losses from a transfer. These provisions should remain in the sale agreement approved by the Court.

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

1. The buyer acknowledge that the purchased assets 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) to abide by all applicable laws and regulations with respect to PII; and (C) to take such actions as may be agreed between the Debtors and buyer.
3. The buyer agree to abide by the Debtors' privacy policies, and privacy related covenants made in the Debtors' terms of service, in effect at the Petition Date and governing the specific PII.
4. The buyer agree to respect all prior requests by any individual who has opted-out from receiving marketing messages.

The CPO also recommends that the buyer's use of PII, once transferred be limited.

1. The buyer should be allowed to use the PII for purposes of continuing business operations and continuing to provide similar goods and services to individuals. Such use should not include contacting the individual other than with respect to a transaction already initiated by the individual.
2. The buyer should also be allowed to use PII collected in conjunction with the Backwoods brands or from its stores for marketing and advertising purposes in conjunction with those brands and stores, and subject to the terms of the existing privacy policy.
3. Before any use of PII for any purpose not already contemplated by the existing privacy policies, the buyer should be required to obtain the customer's express consent to the use ("opt-in"). Any notice used to obtain such consent must provide the customer with the official name and trade name for the new company, the effective date of the sale, the planned uses by the new company of the PII, and the buyer's intentions as to whether the buyer will adopt the Debtors' privacy policies or follow a new privacy policy. A copy of the privacy policy should be provided to the customer. The notice provided should not contain marketing or sale materials. A "click-through" webpage or pop-up, that includes the notice information could be used for this purpose. A "click-through" should also provide a clear and prominent option allowing the

customer to “opt-out” of such future marketing purposes.

These conditions and limitations are designed to ensure that the buyer continues to treat PII in the same manner, and with respect to the same business, as disclosed to customers by the Debtors. Customers will continue to have the ability to opt-out of marketing messages, using the existing mechanisms both on the websites and in the marketing messages themselves. The buyer would be required to obtain advance express consent (“opt-in”) to any expanded use of PII. The buyer also should, consistent with best privacy practices, provide customers with clear notice and disclosure, and an opportunity to opt-out, before making material changes to the privacy policies that might weaken consumer protections.

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 limited time before closing.

A second option is to allow the transfer of PII, but require the buyer to limit use to those purposes needed to provide customers' immediate needs, provide goods and services already ordered, and address warranty returns and consumer complaints. The buyer would not be allowed to use the PII to provide any marketing messages or retain the PII any longer than it is needed. Customers visiting the website or stores could be provided the option to "opt-in" to having their PII used for marketing purposes, after clear disclosure. This option is neither practicable nor in customers' best interests. Implementing the strategy would require that revisions be made to the Debtors' websites, marketing practices, and business operations; and to be effective these changes would have to be made before the transfer, not after, which is impracticable given the time pressures on the Debtors to conclude a sale.

For a sale of assets where the buyer does not plan to continue the business, but just run going out of business sales, another option is to have the Debtors retain the PII, and send out any marketing notices on the buyer's behalf. Because this does not involve a transfer of PII, it is allowable under section 363(b).

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 proposed APA's each contain provisions requiring continued use of PII in compliance with applicable law.

### **Conclusion**

The CPO believes that the proposed transfer of PII by the Debtors is not consistent with the Debtors' existing privacy policies, but the proposed sale can be allowed provided the Buyers' use of the information is conditioned as provided in the APA.

Dated at Boston, Massachusetts, February 27, 2017.

Warren E. Agin, Consumer Privacy  
Ombudsman

**Swiggart & Agin, LLC**

/s/Warren E. Agin  
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Boston, MA 02114  
(617) 517-3203  
wea@swiggartagin.com

Exhibit A

[Home](#) > [Privacy Policy](#)

# PRIVACY POLICY

We respect the privacy of our customers. This Privacy Policy is designed to help you understand what information we gather and how we use it. In our ongoing effort to improve the products, services and features we provide to our customers, Backwoods will continue to implement new technologies from time to time. As a result, this policy is subject to change without prior notice and we will post any revision on this web site. We encourage you to review our privacy policy periodically. When you do business with us or use our website, you accept this Privacy Policy.

## Personal Information

Personal information is information about a specific person, including the person's name, address, telephone number, email address, credit card number, birth date, information about the person's activities and purchases, and, if applicable, member number.

## Controlling your personal information

You may choose to restrict the collection or use of your personal information in the following ways:

- Whenever you are asked to fill in a form on the website, look for the box that you can click to indicate that you do not want the information to be used by anybody for direct marketing purposes
- If you have previously agreed to us using your personal information for direct marketing purposes, you may change your mind at any time by writing to or emailing us at [info@backwoods.com](mailto:info@backwoods.com)

We 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. We may use your personal information to send you promotional information about third parties which we think you may find interesting if you tell us that you wish this to happen.

You may request details of personal information which we hold about you under the Data Protection Act 1998. A small fee will be payable. If you would like a copy of the information held on you please write to [info@backwoods.com](mailto:info@backwoods.com)

If you believe that any information we are holding on you is incorrect or incomplete, please write to or email us as soon as possible, at the above address. We will promptly correct any information found to be incorrect.

## The Information We Gather

When you purchase products from Backwoods, become a registered shopper, or participate in our gear list creator, we collect and store your personal and transactional information in our customer database. This information is generally used to process your transactions, respond to your requests. You may also receive periodic printed or e-mail communications from us about new products and services, discounts, special promotions or upcoming events.

## How we use cookies

A cookie is a small file which asks permission to be placed on your computer's hard drive. Once you agree, the file is added and the cookie helps analyse web traffic or lets you know when you visit a particular site. Cookies

allow web applications to respond to you as an individual. The web application can tailor its operations to your needs, likes and dislikes by gathering and remembering information about your preferences.

We use traffic log cookies to identify which pages are being used. This helps us analyse data about web page traffic and improve our website in order to tailor it to customer needs. We only use this information for statistical analysis purposes and then the data is removed from the system.

Overall, cookies help us provide you with a better website, by enabling us to monitor which pages you find useful and which you do not. A cookie in no way gives us access to your computer or any information about you, other than the data you choose to share with us. You can choose to accept or decline cookies. Most web browsers automatically accept cookies, but you can usually modify your browser setting to decline cookies if you prefer. This may prevent you from taking full advantage of the website.

## List of cookies we collect

The table below lists the cookies we collect and what information they store.

COOKIE name	COOKIE Description
CART	The association with your shopping cart.
CATEGORY_INFO	Stores the category info on the page, that allows to display pages more quickly.
COMPARE	The items that you have in the Compare Products list.
CURRENCY	Your preferred currency
CUSTOMER	An encrypted version of your customer id with the store.
CUSTOMER_AUTH	An indicator if you are currently logged into the store.
CUSTOMER_INFO	An encrypted version of the customer group you belong to.
CUSTOMER_SEGMENT_IDS	Stores the Customer Segment ID
EXTERNAL_NO_CACHE	A flag, which indicates whether caching is disabled or not.
FRONTEND	You sesssion ID on the server.
GUEST-VIEW	Allows guests to edit their orders.
LAST_CATEGORY	The last category you visited.
LAST_PRODUCT	The most recent product you have viewed.
NEWMESSAGE	Indicates whether a new message has been received.
NO_CACHE	Indicates whether it is allowed to use cache.
PERSISTENT_SHOPPING_CART	A link to information about your cart and viewing history if you have asked the site.

COOKIE name	COOKIE Description
POLL	The ID of any polls you have recently voted in.
POLLN	Information on what polls you have voted on.
RECENTLYCOMPARED	The items that you have recently compared.
STF	Information on products you have emailed to friends.
STORE	The store view or language you have selected.
USER_ALLOWED_SAVE_COOKIE	Indicates whether a customer allowed to use cookies.
VIEWED_PRODUCT_IDS	The products that you have recently viewed.
WISHLIST	An encrypted list of products added to your Wishlist.
WISHLIST_CNT	The number of items in your Wishlist.

## Links to other websites

Our website may contain links to other websites of interest. However, once you have used these links to leave our site, you should note that we do not have any control over that other website. Therefore, we cannot be responsible for the protection and privacy of any information which you provide while visiting such sites and such sites are not governed by this privacy statement. You should exercise caution and look at the privacy statement applicable to the website in question.

## Privacy Policy Changes

This Privacy Policy replaces all previous disclosures we may have provided you about our information practices. We reserve the right to change this policy and to apply any changes to previously collected information as permitted by law. If our information practices change in the future, we will notify you by posting the changes on our website.

Exhibit B



Search...

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## Privacy Policy

Backwoods Retail Inc, dba Dynamic Earth Equipment. ("Dynamic Earth") and dynamicearth.net recognize the importance of security and confidence in all of our communications and interactions with our customers and partners. We are committed to ensuring your privacy.

Backwoods Retail Inc, dba Dynamic Earth Equipment is the owner of the information collected on this site. We will not sell or rent this information, nor will we share it in ways different from what is disclosed on this site unless you consent.



Personal information gathered by Dynamic Earth when you place an order is kept on a secure server. This information may include, but is not limited to: your IP address, name, address, phone number, e-mail address, credit card information and the same information for your ship-to or gift recipient if different from your bill-to information.

We may use this information to process and ship orders, to help diagnose problems with our server, to analyze sales and interactions, to assist us in understanding our current business, and to plan for the future. We also use this information to inform you about activities with our company, to gather demographic information, and from time to time we may inform you of activities on behalf of our partners. We will never sell or rent your personal information to the ownership of a third party.

E-mails collected will be used for informing our customers of events, promotions, and other marketing or informational purposes. If you receive e-mails from us and do not wish to receive any further e-mails, please use the opt-out information at the bottom of the e-mail to inform us of this decision. We use your shipping addresses in the fulfillment of your order and in future contact regarding information or products that we think you may be interested in receiving.

To remove, edit or change your address with us, you can contact us by:

1. Electronic mail to: [explorer@dynamicearth.net](mailto:explorer@dynamicearth.net)
2. Mailed letter to: Dynamic Earth
  - o Customer Service Dept.
  - o Backwoods Retail Inc, dba Dynamic Earth Equipment.
  - o 1110 E. Republic Rd. Suite 108
  - o Springfield, MO 65807
3. Phone at: 417-877-8855
4. Or if you have previously placed orders with us, log in to your account at dynamicearth.net and click to your profile information.

By providing any reviews, comments, photos, questions, posts, media, suggestions or any other content to dynamicearth.net or on any of our social media sites/pages, you are conferring the right and license to use such material to Dynamic Earth. In submitting the content, you are confirming that you are the author of the material and have obtained any necessary permission to post the content or media. Dynamic Earth reserves the right to use all content in any way it deems necessary, in full or in part or in modification. Dynamic Earth reserves the right to modify, edit, remove, or delete any user or user content at its discretion. Dynamic Earth is not responsible for the nature of the content or any liability associated to the content provided to the website.

All personal information entered into an order field is protected by 128-bit encryption during transit by Secure Socket Layer software. We are not responsible for any personal information included in an e-mail which is an insecure method of communication originating on the user's end, or posted on a public customer forum.

Dynamic Earth regularly reviews our security systems and protocols to make sure we are current with our industry partners in the level of protection and technological security we maintain. Credit card processing does require the communication of your personal information and full credit card number to the appropriate credit card processing company and Service Providers. In addition, when you visit our site, information is automatically collected regarding your visit and use of our site and services. This information is used to help us better understand what people are looking for and doing on our website. This information is shared with our Service Providers in order to better understand our business, customers, and potential needs for redesign or update of our website. Also, address information is communicated with our shipping services providers, such as FedEx, UPS, and USPS.

### Legal Disclaimer

If a legal authority contacts us regarding an investigation or inquiry that we believe in good faith requires our disclosure of information under applicable laws, we will work with the authorities to answer the request for disclosure. In addition, if we suspect a crime to have been committed or that legal action is needed, we reserve the right to report this, and all related information, to the appropriate authorities. If you have any questions regarding our policies or systems to safeguard your privacy, please contact us at [explorer@dynamicearth.net](mailto:explorer@dynamicearth.net). Please remember to never send any credit card information over the internet. We will always keep your login and password information in a secure location or format.

We may update this privacy policy periodically. Please check this page periodically for updates.

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