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Honorable Samuel J. Steiner
Chapter 15
Hearing Date: Friday, May 28, 2010
Hearing Time: 9:30 a.m.
Hearing Location: Seattle – Room 8206

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

In re:
BIG NEVADA, INC., *et al*,

Debtors in a Foreign Proceeding.

Case No. 09-13569 (SJS) et seq.
(Jointly Administered)

**REPORT OF CONSUMER PRIVACY
OMBUDSMAN [11 U.S.C. § 332(b)]**

**TO THE HONORABLE SAMUEL J. STEINER, UNITED STATES BANKRUPTCY
JUDGE AND ALL PARTIES IN INTEREST:**

This report (the “CPO Report”) is being submitted to assist the Court in its consideration of the facts, circumstances, and conditions of the proposed Sale¹ of possible personally identifiable information (the “Possible PII”)² of the above-referenced jointly administered debtors under 11 U.S.C. § (“Section”) 363(b)(1). Section 332(b) provides that such information may include the presentation by the Consumer Privacy Ombudsman³ (the “CPO”) of (1) the Debtor’s privacy policy; (2) the potential losses or gains of privacy to consumers if such sale or such lease is approved by the Court; (3) the potential costs or benefits to consumers if such sale is approved by the Court; and (4) the potential alternatives that would mitigate potential privacy losses or potential costs to consumers. No personally identifiable information was disclosed by the CPO as part of this Report.

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I.

SUMMARY

BAPCPA made three changes to the Bankruptcy Code that, together, create a new process for selling a debtor’s customer information using Section 363. First, the new Section 101(41A) defines the term “personally identifiable information” in the context of bankruptcy sales out of the ordinary course of business. Second, amendments to Section 363(b) limit a debtor’s ability to sell or lease personally identifiable information. Finally, a new Section 332 controls the appointment of Consumer Privacy Ombudsmen and defines his or her role in the sale process.

Among the Purchased Assets under the Purchase Agreement are the "(ii) customer and player lists for the Casinos (and any data or documentation relating to this clause (ii) that is (A) in the Sonoma system database maintained by the Companies and/or (B) in the Receiver's possession)" which may constitute personally identifiable information under Section 101(41A). Attached hereto and incorporated herein as Exhibit A is the privacy policy of the Washington Players Club (the "Privacy Policy") which concerns the Possible PII. Subsequent to the execution of the Purchase Agreement, the CPO is informed that the Receiver and Nevada Gold have agreed that Nevada Gold shall adopt the Privacy Policy pursuant to the Sale. As such, the CPO concludes that: (a) the Sale is consistent with the Privacy Policy in compliance with section 363(b)(1)(A), and (b) giving due consideration to the facts, circumstances, and conditions of the Sale, the Sale would not violate applicable non-bankruptcy law in compliance with section 363(b)(1)(B).

II.

STATEMENT OF FACTS CONCERNING THE WASHINGTON PLAYERS CLUB

The Washington Players Club (“WPC”) is a marketing tool used by the Companies; registration is not necessary for patrons to gamble in the casinos. Participation in the WPC allows patrons to obtain free merchandise from the website www.waplayersclub.com by gaining points for visiting the casinos of the Companies. See Exhibit A. Points issued by the Companies are not direct consideration paid to patrons for gambling, but instead are purely promotional, as “Points will be permanently deducted from all member accounts on the one-year anniversary of their

1 accumulation” and “Membership cards, points or accounts associated with the Washington Players
2 Club may be revoked, closed, repossessed, modified or cancelled at any time at the sole discretion
3 of the Casinos and Washington Gaming, Inc.” See Exhibit A.

4
5 **A. The Privacy Policy.**

6 The Privacy Policy of the Washington Players Club is not found on the website
7 www.waplayersclub.com. Instead, Exhibit A is a brochure available only in the Casinos. The
8 CPO is informed that the only data collected by the Companies is a customer’s name and address.
9 The Privacy Policy is as follows:

10 The Washington Players Club uses personal information you
11 provide to keep you informed of special promotions and offers,
12 extend VIP invitations to special events, to confirm your identity
13 when you access your Players Club account, and to offer you
14 additional products and services reserved exclusively for
15 Washington Players Club members. The security of your personal
16 information is extremely important to us and will be kept completely
17 confidential.

18 See Exhibit A.

19
20
21 **B. The Potential Losses or Gains of Privacy to Consumers if the Sale Is Approved.**

22 Since the Possible PII is being transferred to an unaffiliated entity, there is a potential loss
23 of privacy to consumers. However, the Privacy Policy does not represent that the Possible PII will
24 under no circumstances be transferred to third parties and in fact suggests the opposite. See
25 Exhibit A (“...and to offer you additional products and services reserved exclusively for
26 Washington Players Club members.”) In any event, because Nevada Gold has agreed to continue
27 the Privacy Policy, there should be no potential loss of privacy to consumers.

28
29 **C. Costs or Benefits to Consumers if the Sale Is Approved.**

30 Because by the Sale the casinos will remain in business, it is reasonable to believe that the
31 Sale will be beneficial to their repeat customers. Indeed, consumers would reasonably expect that
32 any points that they have built up under the WPC would be honored by Nevada Gold.

1 **D. Potential Alternatives that Would Mitigate Potential Costs to Consumers.**

2 Since the transfer of the business goodwill of the casinos is the purpose of the Sale, and
3 since the Washington Players Club is presumably a material marketing vehicle by which that
4 goodwill is maintained, there are no potential alternatives to the transfer of the Possible PII under
5 the Purchase Agreement that would not destroy the value of the assets being sold to Nevada Gold.

6
7 **III.**

8 **ANALYSIS**

9 **A. The Data Collected by the Companies Is Probably Not Personally Identifiable**
10 **Information Under the Bankruptcy Code in Which Event Section 363(b)(1) Would**
11 **Not be Applicable.**

12 What constitutes “personally identifiable information” (“PII”) is defined in part under the
13 Bankruptcy Code as information “provided by an individual to the debtor in connection with
14 obtaining a product or a service from the debtor primarily for personal, family, or household
15 purposes”. See 11 U.S.C. § 101(41A). Gambling is probably a service for personal purposes that
16 would otherwise fall within the bankruptcy definition of PII. See generally Fidelity Sav. & Inv.
17 Co. v. New Hope Baptist, 880 F.2d 1172 (10th Cir. 1989) (gambling by a nonprofessional does
18 not qualify under the concept of ordinary business or financial affairs); In re Vianese, 192 B.R. 61,
19 68 (Bankr. N.D. N.Y. 1996); Meeks v. Harrah's Tunica Corp. (In re Armstrong), 231 B.R. 723,
20 730 (Bankr. E.D. Ark. 1999).

21 However, because the WPC is a marketing tool and is not “provided by an individual to the
22 debtor in connection with obtaining a product or a service”, and because only a name and address
23 are collected by the Companies which is data that would otherwise be found in a telephone book,
24 the data collected by the Companies is probably not PII which would be subject to federal
25 jurisdiction under 15 U.S.C. §§ 41-58 or subject to the provisions of Section 363(b)(1). See
26 Warren E. Agin, Handling Customer Data in Bankruptcy Mergers and Acquisitions: Coping with
27 the Consumer Privacy Ombudsman Provisions of BAPCPA, ABI Journal, Vol. XXIV, No. 6, p. 1,
28 July/August 2005 (PII under the Bankruptcy Code excludes information collected solely for

1 marketing purposes).

2
3 **B. The Sale Does Not Violate the Privacy Policy of the Companies and Is Therefore**
4 **Permissible Under Section 363(b)(1)(A).**

5 The Sale is permissible under the Bankruptcy Code if the Court finds that the sale of
6 personally identifiable information governed by a debtor's privacy policy "is consistent with such
7 policy". 11 U.S.C. § 363(b)(1)(A).

8 Based on the Sale Motion, it appears that Nevada Gold is in the same industry as the
9 Companies. Furthermore, Nevada Gold has agreed to honor the Privacy Policy. As such, the
10 CPO believes that the Sale may be approved under Section 363(b)(1)(A) as it is consistent with
11 the Privacy Policy.

12
13 **C. The Sale Does Not Violate Non-Bankruptcy Law and Is Therefore Also Permissible**
14 **Under Section 363(b)(1)(B).**

15 The privacy of consumers' personally identifiable information in the retail sales context is
16 primarily regulated by the Federal Trade Commission ("FTC") under the FTC Act. Section 5 of
17 the FTC Act declares unfair or deceptive practices in commerce as unlawful.⁴ To determine
18 whether Section 5 of the FTC Act's prohibition against deception has been violated, the FTC will
19 first identify what "express claims," and "implied claims," have been made by a company.⁵ An
20 "express claim" refers to a factual assertion made in an advertisement or promotion or other
21 publicly available statement such as a corporate policy. An "implied claim" refers to the net
22 impression conveyed by all elements of a company's policies or statements "including an
23 evaluation of such factors as the entire document, the juxtaposition of various phrases in the
24 document, the nature of the claim, and the nature of the transactions."⁶ Section 5 is violated when
25 an express or implied claim is "likely to affect a consumer's choice of or conduct regarding a
26 product" and is "likely to mislead reasonable consumers under the circumstances."⁷ In addition,
27 an act or practice may be considered "unfair" if it causes, or is likely to cause, substantial injury to
28 consumers that is not outweighed by countervailing benefits to consumers or competition and is

1 not reasonably avoidable by consumers.⁸

2 The FTC has explicitly applied the prohibition of 15 U.S.C. § 45(a) against deceptive acts
3 to corporate privacy statements in more than a dozen consent orders. The result in the seminal
4 bankruptcy case In re Toysmart.com, LLC, case no. 00-13995-CJK (D. Mass 2000) is instructive.

5 Toysmart.com (“Toysmart”) was engaged in the advertising, promotion, and sale of toys
6 on the Internet.⁹ In the course of doing business, Toysmart collected information from its
7 customers, including, among other things, its customers’ names, addresses, billing information,
8 and shopping preferences.¹⁰ Toysmart’s website included a privacy policy which assured
9 customers that “Personal information voluntarily submitted by visitors to our site . . . is never
10 shared with a third party. All information obtained by toysmart.com is used only to personalize
11 your experience online.”¹¹ On May 22, 2000, Toysmart announced that it had ceased operations,
12 and on June 9, 2000, Toysmart’s creditors filed an involuntary petition in bankruptcy.¹² One of
13 the assets offered for sale during the bankruptcy case was the personal information Toysmart had
14 collected about its customers.

15 The FTC filed a complaint in the United States District Court for the District of
16 Massachusetts alleging that any sale of Toysmart’s customer information would constitute a
17 deceptive act or practice in violation of section 5 of the FTC Act.¹³ On July 20, 2000, Toysmart
18 and the FTC entered a stipulation establishing conditions on the sale of Toysmart’s customer
19 information.¹⁴ The stipulation provided that Toysmart could only sell its customer information to
20 a “Qualified Buyer” – that is, a company that concentrates its business in the same industry as a
21 debtor, intends to purchase a debtor’s goodwill, agrees to become a debtor’s successor-in-interest
22 as to the customer information, and agrees to abide by the terms of a debtor’s privacy policy.

23 Based on the Sale Motion, it appears that Nevada Gold is in the same industry as the
24 Companies. Furthermore, Nevada Gold has agreed to honor the Privacy Policy. As such, the
25 CPO believes that Nevada Gold is a “Qualified Buyer” and the Sale would satisfy section 5 of the
26 FTC Act and other applicable non-bankruptcy law. Therefore the Sale may also be approved
27 under Section 363(b)(1)(B).

1 I declare under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct.

3 Executed this 26th day of May, 2010, at Los Angeles, California.

4 
5 Wesley H. Avery

6
7 ¹ All initially capitalized terms used herein are as defined in the "MOTION FOR ORDER (1)
8 AUTHORIZING SALE OF ASSETS FREE AND CLEAR OF INTERESTS, (2) AUTHORIZING
9 THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES, (3) WAIVING
ANY TEMPORARY STAY OF RELIEF, AND (4) GRANTING OTHER RELIEF" (the "Sale
Motion") filed in Case No. 09-13569-SJS as docket item # 54 on 5/10/10.

10 ² See "Notice of Sale Motion" filed in Case No. 09-13569-SJS as docket item # 55 on 5/10/10 at
11 3:2 ("The assets sold may include personally-identifiable information.")

12 ³ This Court's order appointing Wesley H. Avery as the Consumer Privacy Ombudsman was
13 entered on May 21, 2010.

14 ⁴ 15 U.S.C. § 45(a).

15 ⁵ FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174
16 (1984) available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

17 ⁶ Id.

18 ⁷ Id.

19 ⁸ See generally FTC Policy Statement on Unfairness, appended to International Harvester Co., 104
20 F.T.C. 949, 1070 (1984) available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>

21 ⁹ See First Amended Complaint, Civil Action No. 00-11341 at ¶ 6 (D. Mass. 2000) available at
22 <http://www.ftc.gov/os/2000/07/toysmartcomplaint.htm>

23 ¹⁰ Id. at ¶ 9.

24 ¹¹ Id. at ¶ 7. N.B. no such statement exists in the Privacy Policy at issue.

25 ¹² Id. at ¶¶ 12 and 13.

26 ¹³ Id.

27 ¹⁴ See Stipulated Consent Agreement and Final Order, Civil Action No. 0011341 (D. Mass. 2000)
28 available at <http://www.ftc.gov/os/2000/07/toysmartconsent.htm>