

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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:
RECORDED BOOKS, LLC, : Civil Action No. 8:07-cv-01427-DKC
:
Plaintiff, :
:
v. : **DECLARATION OF BRIAN T.**
: **DOWNING IN SUPPORT OF**
: **RECORDED BOOKS, LLC’S**
: **MOTION FOR MORE DEFINITE**
: **STATEMENT**
:
OCLC ONLINE COMPUTER LIBRARY :
CENTER, INC. d/b/a NETLIBRARY, :
:
Defendant. :
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I, Brian T. Downing, hereby declare and state as follows pursuant to 28 U.S.C. § 1746:

1. I am the Publisher of plaintiff Recorded Books, LLC (“Recorded Books”). I submit this declaration in support of Recorded Books’ motion for a more definite statement.

2. After numerous and repeated breaches by OCLC Online Computer Library Center, Inc. d/b/a NetLibrary (“NetLibrary”), of the eContent Production and Distribution Agreement (the “Agreement”) between Recorded Books and NetLibrary, including its violation of the Agreement’s Exclusivity Provision, Recorded Books took steps to terminate the Agreement and to inform subscribers (the “Subscribing Libraries”) about the conclusion of its business relationship with NetLibrary.

3. On April 20, 2007, Recorded Books sent NetLibrary notice that it was exercising its right to terminate the Agreement.

4. On April 25, 2007, I sent a memorandum to all Recorded Books sales representatives and customer service personnel. A true and accurate copy of that memorandum is attached hereto as Exhibit A.

5. The April 25 memorandum provided the following specific directions for Recorded Books' sales representatives and customer service personnel to follow when informing customers that Recorded Books had ended its relationship with NetLibrary:

Recorded Books has ended its relationship with NetLibrary. If the customer wishes to proceed with the existing contract process, we will submit it to NetLibrary and honor it if NetLibrary accepts it. It is however, not completely within our control. We apologize in advance for any inconvenience. (PLEASE NOTE: Stick to that script and leave the decision to the customer).

6. The April 25 memorandum also instructed the Recorded Books' sales representatives and customer service personnel that they should:

Speak no ill. The NetLibrary relationship was very important to Recorded Books over the past few years and it allowed us to be pioneers in a new digital age. Both organizations have expressed a desire to head in a different direction, and now we are doing that. We wish NetLibrary well. If a customer does express anything negative you should express sympathy, but not say anything to disparage NetLibrary in any way.

7. I followed up on that memorandum with a lengthy conference call with all representatives, managers, and customer service personnel to review the memo so that there could be no misunderstanding. I further instructed every manager to review the instructions with each sales representative on a one-on-one basis, and to "role play" the instructions, to make sure they understood. Over the past few months, I have reinforced this message numerous times.

8. I sent an e-mail to the Subscribing Libraries on May 4, 2007, stating that Recorded Books had terminated its relationship with NetLibrary and that subscriptions for the Recorded Books/NetLibrary service would need to be renewed by May 18, 2007. An accurate representative copy of my e-mail to the Subscribing Libraries is attached hereto as Exhibit B.

9. My May 4 e-mail stated:

Dear Valued Customer,

I am writing to inform you that Recorded Books is ending its relationship with NetLibrary on a going forward basis.

For those customers in an agreement, whether it is one year or multi-year, nothing will change. Recorded Books will continue to provide customer support as in the past. We will also continue to refresh your collection with great new content every month. You should not see a single difference in the service you have been offering. Your agreement will go on as scheduled, and end as scheduled at the end of your subscription term.

For those customers wishing to renew, please do so by May 18th, 2007. Please contact us if for some reason you cannot meet that date.

After a cut off date of May 18th or otherwise agreed to, it will not be possible to renew the present service. Obviously the marketplace offers you choices – now with NetLibrary, and at some point in the future with Recorded Books. It just won't be together.

Please contact me with any questions or comments.

Very best,

Brian T. Downing
V.P., Publisher
Recorded Books, LLC
bdowning@recordedbooks.com

10. In response to inquiries and requests from Subscribing Libraries, Recorded Books extended the cut off date for new subscriptions and renewals to May 31, 2007.

11. While Recorded Books has responded to inquiries from Subscribing Libraries following my May 4, 2007 e-mail, I am unaware of any instance in which any Recorded Books employee or representative communicated any message to any Subscribing Library concerning the termination of the business relationship between Recorded Books and NetLibrary that varies from the instructions in my April 25 memorandum to sales representatives and customer service personnel. I do not believe that any such instance has occurred.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



BRIAN T. DOWNING

Executed on: July 12, 2007
Prince Frederick, Maryland

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