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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
ATARI, INC., *et al.,*	Case No. 13-10176 (___)
Debtors.[1]	Joint Administration Requested

MOTION OF THE DEBTORS AND DEBTORS-IN-POSSESSION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING, BUT NOT DIRECTING, THE DEBTORS TO MAINTAIN A PREPETITION INSURANCE PREMIUM FINANCE AGREEMENT

The debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), by and through their proposed undersigned counsel, hereby move the Court (the "Motion") for the entry of interim and final orders, the proposed forms of which are attached hereto as **Exhibit A** and **Exhibit B** respectively, pursuant to sections 105(a), 363, 364, 1107 and 1108 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), authorizing, but not directing, the Debtors to maintain their existing Premium Finance Agreement (defined below), and scheduling a final hearing (the "Final Hearing") to consider entry of a final order, substantially in the form attached hereto as Exhibit B (the "Final Order"). In support of the Motion, the Debtors respectfully represent as follows:

[1] The other Debtors are Atari Interactive, Inc., Humongous, Inc., and California U.S. Holdings, Inc.

I. Introduction

1. On January 21, 2013 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court"). The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or an examiner has been made in the chapter 11 cases, and no statutory committees have been appointed or designated.

2. Concurrently with the filing of this Motion, the Debtors have sought procedural consolidation and joint administration of these chapter 11 cases under the case of Atari, Inc. A description of the Debtors' businesses, the reasons for filing these chapter 11 cases, and the factual basis for the relief sought from this Court to facilitate a smooth transition into chapter 11 is set forth in the *Declaration of Robert A. Mattes (I) In Support of Chapter 11 Petitions and First Day Motions And (II) Pursuant To Local Bankruptcy Rule 1007-2* (the "First Day Declaration").

II. Jurisdiction, Venue and Predicates for Relief Requested

3. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief requested herein are sections 105(a), 363, 364, 1107 and 1108 of the Bankruptcy Code.

III. The Premium Finance Agreement

5. In connection with the operation of the Debtors' businesses, Debtor California U.S. Holdings, Inc. ("CUSH") entered into a premium finance agreement (the "Premium Finance Agreement" or "PFA") as of December 31, 2012 with Premium Assignment Corporation ("PAC"). A copy of the Premium Finance Agreement is annexed hereto as **Exhibit C**. Under the Premium Finance Agreement, the Debtors pay an initial down payment and monthly installments thereafter to PAC, in exchange for PAC's agreement to pay the full annual insurance premium, in advance, to the insurer. The Premium Finance Agreement covers the premiums for the Debtors' Employment Practices Liability Insurance with National Union Fire Insurance Company (the "Financed Policy"). The Financed Policy[2] has a total premium amount of $37,500.00. Pursuant to the Premium Finance Agreement, after accounting for an initial down payment of $13,125.00 that has already been made by the Debtors, the Debtors are obligated to pay PAC each month a total of $3,072.07. The monthly payment covers all financing charges and other fees under the Premium Finance Agreement.

6. As of the Petition Date, the outstanding balance owed under the Premium Finance Agreement is approximately $24,375.00, which the Debtors intend to continue paying in monthly installments through August 31, 2013. The Debtors are current on all obligations under the Premium Finance Agreement. The next monthly installment payment is due January 31, 2013.

7. The Debtors' obligations under the Premium Finance Agreement are secured by all unearned premiums or other sums which may become payable to the Debtors under the

[2] Aside from the Financed Policy, the Debtors maintain other insurance coverage through various policies obtained by their French Parent Company, Atari S.A. Any obligations payable post-petition are intended to be paid in the ordinary course of business. Additionally, there are two premium finance agreements held in the name of Atari S.A. under which these Debtors have no payment obligations.

Financed Policy. If the Debtors fail to make monthly payments under the Premium Finance Agreement, PAC is appointed as attorney in fact for all named insured under the Financed Policy and is granted the authority to, among other things, cancel the Financed Policy.

8. Additionally, if all installment payments under the Premium Finance Agreement are not paid as they come due, PAC could seek relief from the automatic stay to terminate the Financed Policy. Pursuant to the Premium Finance Agreement, the Debtors assigned to PAC all unearned premiums and loss payments under the Financed Policy as security for payment of all obligations of the Debtors under the Premium Finance Agreement. The Premium Finance Agreement also grants PAC the right to cancel the Financed Policy in the event of a payment default by the Debtors. If PAC succeeds in obtaining such relief from this Court, the Debtors would be forced to seek replacement insurance coverage and it is doubtful that they would be able to do so on terms and conditions as favorable as those presently in place under the Financed Policy. In addition, given the current circumstances, there is no assurance that the Debtors would be able to obtain insurance coverage quickly enough to prevent a lapse in coverage.

9. The Financed Policy is essential to the preservation of the value of the Debtors' businesses and operations. Maintenance of insurance coverage under the Financed Policy is required under the laws (e.g., workers' compensation) of the states in which the Debtors' businesses operate. Furthermore, the Guidelines of the Office of the United States Trustee for the Southern District of New York (the "UST Guidelines") require debtors to maintain insurance coverage throughout their chapter 11 cases.

IV. Relief Requested

10. By this Motion, the Debtors request entry of interim and final orders, authorizing, but not directing, the Debtors to maintain their existing Premium Finance Agreement, and scheduling a final hearing (the "Final Hearing"). In light of the importance of maintaining the

Employment Practices Liability Insurance coverage, the Debtors believe that it is in the best interests of their estates and creditors for the Court to authorize the Debtors to honor their obligations under the Financed Policy and the Premium Finance Agreement. Any other alternative would likely require considerable cash expenditures, could result in the Debtors obtaining insurance coverage on less desirable terms than its existing coverage, and could be detrimental to the Debtors' restructuring efforts.

V. Basis for Relief Requested

A. Payment Of The Obligations Under The Premium Finance Agreement Should Be Authorized Under Bankruptcy Code Section 105 and The Doctrine Of Necessity

11. The proposed payments under the Premium Finance Agreement should be authorized under Bankruptcy Code section 105 and under the "doctrine of necessity." The Court's power to utilize the doctrine of necessity in chapter 11 cases derives from the Court's inherent equity powers and its statutory authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

12. The doctrine of necessity rule is consistent with the paramount goal of chapter 11 to facilitate the continued operation and rehabilitation of the debtor and "recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor." *In re Ionosphere Clubs, Inc*., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); *see also In re Just for Feet, Inc*., 242 B.R. 821, 826 (D. Del. 1999)(stating that where the debtor "cannot survive" absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment). Accordingly, pursuant to section 105(a) of the Bankruptcy Code, this Court is empowered to grant the relief requested herein.

13. Moreover, numerous courts in this jurisdiction and others have granted the relief requested herein in other chapter 11 cases. *See, e.g., In re Fortunoff Fine Jewelry and Silverware, LLC,* Case No. 08-10353 (JMP) (Bankr. S.D.N.Y. Feb. 29, 2008) [Docket No. 312], (Bankr. S.D.N.Y. Feb. 5, 2008) [Docket No. 42]; *In re Atkins Nutritionals, Inc., et al.*, Case No. 05-15913 (ALG) (Bankr. S.D.N.Y. Aug. 1, 2005) [Docket No. 32]; *In re Tribune Company*, Case No. 08-13141 (KJC) (Bankr. D. Del. Dec. 10, 2008); *In re Buffets Holdings, Inc.*, Case No. 08-10141 (MFW) (Bankr. D. Del. Feb. 11, 2008 (final order)); and *In re Quaker Fabrics Corp.*, Case No. 07-11146 (KG) (Bankr. D. Del. Sept. 5, 2007).

B. The Debtors Should Be Authorized To Pay The Premium Finance Obligations Under Bankruptcy Code Sections 1107(a) and 1108

14. Courts have generally acknowledged that it is appropriate to authorize the payment (or other special treatment) of prepetition obligations in appropriate circumstances. *See, e.g., In re Ionosphere Clubs, Inc*., 98 B.R. at 177; *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 398 (S.D.N.Y. 1983)(granting authority to pay prepetition claims of suppliers who were potential lien claimants). In authorizing payments of certain prepetition obligations, courts have relied on several legal theories, rooted in sections 1107(a) and 1108 of the Bankruptcy Code.

15. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors in possession are fiduciaries "holding the bankruptcy estate[s] and operating business[es] for the benefit of [their] creditors and (if the value justifies) equity owners." *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002)(internal citations omitted). Implicit in the fiduciary duties of any debtor in possession is the obligation to "protect and preserve the estate, including an operating business's going-concern value." *Id*. Some courts have noted that there are instances in which a debtor can fulfill this fiduciary duty "only … by the preplan satisfaction of a

prepetition claim." *Id.* The *CoServ* court specifically noted that the satisfaction of prepetition claims prior to the consummation of a plan would be a valid exercise of the debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate." *Id.*

C. Payment Of The Premium Finance Agreement Obligations Is Necessary In Order To Comply With The UST Guidelines

16. The Debtors believe that the payment of the obligations under the Premium Finance Agreement without further order of the Court, is necessary and essential to the Debtors' operation of their businesses during their reorganization. Additionally, as directed by the Office of the United States Trustee for Region 2, debtors in chapter 11 cases have a fiduciary obligation and a legal duty to account for their operations of a business, which in part is met by "maintain[ing] certain insurance coverage following the Petition Date.

D. Payment Of The Premium Finance Agreement Obligations Is Warranted Under Bankruptcy Code Sections 361, 362 and 363

17. Security interests created by premium finance arrangements generally are recognized as secured claims in bankruptcy to the extent of the amount of unearned premiums financed under such agreements. *See TIFCO, Inc. v. U.S. Repeating Arms Co. (In re U.S. Repeating Arms Co.*), 67 B.R. 990, 994-95 (Bankr. D. Conn. 1986); *Drabkin v. A.I. Credit Corp. (In re Auto-Train Corp.)*, 9 B.R. 159, 164-66 (Bankr. D.D.C. 1981). Section 361 of the Bankruptcy Code specifically contemplates providing adequate protection to the extent of the diminution in value of a secured creditor's collateral, and such security interest under the Premium Finance Agreement warrants adequate protection in the form of periodic payments. *See, e.g., In Waverly Textile Processing Inc.*, 214 B.R. 476 (Bankr. E.D. Va 1997); *In re Megamarket of Lexington, Inc.*, 207 B.R. 527 (Bankr. E.D. Ky. 1997); *In re Krimbrell Trucking Co., Inc.,* 3 B.R. 4 (Bankr. W.D. Wash. 1979). As a secured creditor, PAC would be entitled to seek relief from the automatic stay, either to cancel the Financed Policy in accordance with the

terms of the PFA, or to seek adequate protection of its investment. *See In Re Universal Motor Exp., Inc.*, 72 B.R 208, 211 (Bankr. W.D.N.C. 1987) (recognizing that a default under the financing arrangement and the resulting decline in value of the unearned premiums justified relief from the automatic stay).

18. Moreover, under the PFA, PAC maintains a security interest in the unearned premiums, and therefore PAC may be entitled to adequate protection of its interests in the unearned premium under Bankruptcy Code section 363(e). The Debtors failure to provide such adequate protection – for example by failing to pay the ongoing installments due under the PFA – may constitute cause under Bankruptcy Code section 362(d) for PAC to obtain relief from the automatic stay and terminate the underlying policies.

19. Even if the Debtors were successful in preventing PAC from lifting the automatic stay to pursue its remedies, such litigation likely would be contested and thus very costly to the estates. More importantly, if unsuccessful in the automatic stay litigation, the Debtors may be unable to find a carrier willing to provide them similar insurance coverage or a company willing to finance the premiums without charging significantly higher premiums and fees.

20. In addition, the use of estate assets to pay monthly installments under the PFA constitutes a use of estate property that should be authorized under section 363(b) of the Bankruptcy Code so long as a sound business purpose exists for doing so. *See, e.g., Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991); *In re Global Crossing Ltd.*, 295 B.R. 726, 742 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); *In re Gulf States Steel, Inc.,* 285 B.R. 497, 514 (Bankr. N.D. Ala. 2002). The Debtors have determined, in the exercise of their business judgment, that

financing the premiums related to the Financed Policy under the PFA enables the Debtors to maintain critical insurance coverage. Doing so is in the best interest of the Debtors' estates and that of their creditors and these actions should be approved.

E. Sufficient Cause Exists for the Court To Authorize the Debtors To Maintain The Premium Finance Agreement

21. Section 364 of the Bankruptcy Code provides, in relevant part, "[i]f the [debtor] is unable to obtain unsecured credit . . ., the court, after notice and a hearing, may authorize the obtaining of [secured] credit or the incurring of [secured] debt . . ." 11 U.S.C. § 364(c). In short, section 364 authorizes a debtor, in the exercise of its business judgment, to incur secured debt if the debtor has been unable to obtain unsecured credit and the borrowing is in the best interests of the estates. *See, e.g., In re Ames Dept. Stores*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (with respect to postpetition credit, courts "permit debtors-in-possession to exercise their basic business judgment consistent with their fiduciary duties"); *In re Mastercraft Interiors, Ltd.,* Case Nos. 06-12769, 06-12770, 2006 WL 4595946*,* at *4 (Bankr. D. Md. Aug. 10, 2006) (authorizing the debtor's incurrence of secured financing because the debtor's financing needs were "immediate and critical" to the success of the proceedings and the debtor was unable to obtain unsecured credit); *In re Budget Group, Inc.,* Case No. 02-12152, 2002 Bankr. LEXIS 1050 (Bankr. D. Del. Aug. 1, 2002) (court authorized funding of acquisition of property on a secured basis where acquired property was necessary to maintain operations and debtors could not obtain such funding on an unsecured basis); *see also* 3 Collier on Bankruptcy ¶ 364.04 (15th ed. Rev. 1999). Further, section 364(c) does not impose a duty on the debtor to request unsecured credit from every potential lender before seeking secured credit. *See In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1088 (4th Cir. 1986).

22. The Debtors entered into their existing PFA prior to the filing of their chapter 11 petitions. A debtor entering into a premium financing agreement incurs an obligation to the policy lender at the time the debtor signs the agreement rather than when each installment payment becomes due. *See, e.g., In re Paris Indus. Corp.,* 130 B.R. 1, 2-3 (Bankr. D. Me. 1991) (finding that the debtor "incurred the debt in question . . . when the premium finance agreement was signed, and not . . . when each installment payment became due"); *In re Pan Trading Corp., S.A.,* 125 B.R. 869, 875 (Bankr. S.D.N.Y. 1991) ("Unless an installment contract is made in the ordinary course of business, a debtor generally becomes legally obligated on it on the date when the debtor originally undertook the obligation, not when each payment comes due.") (citing *In re CHG Int'l. Inc.,* 897 F.2d 1479, 1486 (9th Cir. 1990)). Thus, the payment obligation under the Premium Finance Agreement is a prepetition debt that may be paid if the requirements of sections 105(a) and 363(b)(1) of the Bankruptcy Code are satisfied.

23. The Debtors sought and negotiated for the PFA with the best possible terms. Generally, lenders are unwilling to finance insurance premiums on an unsecured basis. Here, the Debtors provided PAC with liens on the amounts payable under the PFA in exchange for premium funding at considerable lower interest rates than what the Debtors could otherwise obtain. In the Debtors' business judgment, the terms of the PFA represent the best possible terms for financing the premiums related to the Financed Policy.

F. Immediate Relief Is Necessary To Avoid Immediate And Irreparable Harm

24. Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the "relief is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003; *see also In re First NLC Fin. Servs., LLC*, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008) (holding that Rule 6003 permits entry of retention orders on an interim basis to avoid

irreparable harm). The Second Circuit has interpreted the language "immediate and irreparable harm" in the context of preliminary injunctions. In that context, the court instructed that irreparable harm "is a continuing harm which cannot be adequately redressed by final relief on the merits' and for which 'money damages cannot provide adequate compensation.'" *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (citation omitted). Further, the "harm must be shown to be actual and imminent, not remote or speculative." *Id*. at 214; *see also Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1998). The relief the Debtors are requesting by this Motion on an interim basis is limited to the extent it avoids clear and irreparable harm to the Debtors. Accordingly, entry of an order on an interim basis is appropriate under the circumstances.

25. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtors seek in this Motion is necessary for the Debtors to operate their businesses without interruption and to preserve value for their estates. The Debtors respectfully request that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

VI. Notice

26. Notice of this Motion has been provided to: (a) the office of the United States Trustee for the Southern District of New York; (b) counsel to the proposed DIP lender, (c) Premium Assignment Corporation, (d) the creditors holding the thirty (30) largest unsecured claims against the Debtors' estates on a consolidated basis, as identified in the Debtors' chapter 11 petitions; and (e) all parties that have filed a notice of appearance or have requested service in

these chapter 11 cases. In light of the nature of the relief requested herein and the potential harm to the Debtors' estates if the relief requested herein is not granted, the Debtors respectfully submit that no other or further notice need be provided.

VII. No Prior Request

27. No prior motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as it deems just and proper.

Dated: New York, New York
January 21, 2013

Respectfully submitted,

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