Robert G. Burns (RB 0970)
Kurt A. Mayr II (KM 5570)
Andrew J. Schoulder (AS 2018)
BRACEWELL & GIULIANI LLP
1251 Avenue of the Americas, 49th Fl.
New York, New York 10020
Telephone: (212) 508-6100
Facsimile: (212) 508-6101

Attorneys for Alden Global Value Recovery Master Fund, L.P.

Hearing Date and Time: March 20, 2013 at 10:00 a.m. (ET)
Objection Deadline: March 13, 2013 at 5:00 p.m. (ET)[1]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
ATARI, INC. et al.,[2]	)	Case No. 13-10176 (JMP)
Debtors.	)	(Jointly Administered)

LIMITED OBJECTION OF ALDEN GLOBAL VALUE RECOVERY MASTER FUND, L.P. TO THE APPLICATION TO RETAIN AND EMPLOY DUFF & PHELPS SECURITIES, LLC AS FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ATARI, INC., *ET AL.*, *NUNC PRO TUNC* TO FEBRUARY 11, 2013

Alden Global Value Recovery Master Fund, L.P., in its capacity as the debtor in possession financing lender (the "***DIP Lender***") to the debtors and debtors in possession (collectively, the "***Debtors***") in the above-captioned bankruptcy cases (the "***Cases***"), by and through its undersigned counsel, hereby submits this limited objection ("***Limited Objection***") to the Application (the "***Application***") of the Official Committee of Unsecured Creditors in the Cases (the "***Committee***") to Retain Duff & Phelps Securities, LLC ("***D&P***") as its Financial Advisor, *Nunc Pro Tunc*, to February 11, 2013, Pursuant to Section 1103 of chapter 11 of title 11

[1] Prior to the filing of this Limited Objection, Alden attempted to resolve the issues raised herein through direct discussions with D&P. In connection with this effort, Alden requested an extension of the Objection Deadline until 8:00 p.m. on March 13, 2013, which was granted by the Committee.
[2] The Debtors are Atari Inc., Atari Interactive, Inc., Humongous, Inc., and California U.S. Holdings, Inc.

of the United States Code (the "***Bankruptcy Code***"), Rule 2014 of the Federal Rules of Bankruptcy Procedures and Rule 2014-1 of the Local Rules of Bankruptcy Procedure for the Southern District of New York, and respectfully states as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157.

LIMITED OBJECTION

2. While the DIP Lender does not object to the Committee's retention of D&P as the Committee's financial advisor,[3] the DIP Lender objects to the Monthly Fee and Restructuring Fee of D&P proposed in the Application. As a general matter, the Debtors' meager cash flows are barely sufficient to support the operating costs required to provide the basic maintenance of the assets necessary to preserve their value until the completion of the pending sale process. After adding the costs of these Cases, the difference between administrative solvency and insolvency is the post-petition financing being provided by the DIP Lender to enable the Debtors to facilitate that sale process. The DIP Lender extended the DIP Loan to facilitate a sale, not compensate numerous professionals. Accordingly, in the first instance, it is questionable whether there will ever be estate funds available to compensate D&P.

3. The infirmities of the proposed D&P retention, however, are not limited to the economic realities of this situation. A more fundamental problem is that the structure of the compensation proposed in the D&P Application bears no reasonable relationship with the

[3] On Schedule II to the Declaration of Thomas Clark Carlson in Support of the Application, D&P discloses that it has represented in the past and is currently representing "Alden Global entities," which are affiliated with the DIP Lender, in connection with ongoing portfolio valuation services. Neither D&P nor the Committee have presented evidence to establish that D&P can satisfy the requirement of section 1103(b) of the Bankruptcy Code, which requires that a professional employed to represent a committee not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. For the avoidance of doubt, by this Limited Objection, the DIP Lender does not waive any conflict of interest arising from D&P's proposed retention.

services necessary or required by the Committee for these Cases. Quite simply, some of the work for which D&P seeks compensation was completed before D&P was even interviewed, let alone retained. Other aspects of the retention relate to services that are not required in these Cases. Finally, D&P seeks a significant Restructuring Fee based on recoveries that will be almost exclusively generated through the contributions and efforts of other parties.

4. Section 1103(a) of the Bankruptcy Code permits an official committee of unsecured creditors to employ professionals. 11 U.S.C. § 1103(a). Section 328(a) further provides:

> [A] committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis.

11. U.S.C. § 328(a).

5. A committee "seeking the employment of professionals under 328(a) must establish that the terms and conditions of employment are reasonable, and evidence, not conclusory statements, is required to satisfy that burden." In re High Voltage Eng'g Corp., 311 B.R. 320, 333 (Bankr. D. Mass. 2004) (denying debtors' application to retain restructuring professionals under section 328(a) where debtors failed to provide sufficient evidence from which the court could conclude that the proposed compensation was reasonable). A committee must demonstrate by a preponderance of the evidence, and not merely by conclusory statements, that its proposed section 328(a) retention: (i) reflects normal business terms in the marketplace; (ii) resulted from arms-length negotiations; and (iii) is in the best interests of the estate. See In re Energy Partners, Ltd., 409 B.R. 211, 225-31 (Bankr. S.D. Tex. 2009) (denying committees' applications to retain investment bankers under section 328(a) where committees failed, among other things, to present evidence sufficient to meet this standard).

6. The high standard to approve retention pursuant to section 328(a) is appropriate because, following the approval of a bankruptcy court of a fee arrangement pursuant to section 328(a) the ability of the bankruptcy court, creditors and other parties in interest to review the amount of compensation payable to the professional is circumscribed. High Voltage Eng'g Corp., 311 B.R. at 332. Namely, section 328(a) provides that:

> Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been *improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions*.

11 U.S.C. 328(a) (emphasis added).

7. Given this inflexible standard, a bankruptcy court must be particularly vigilant in assessing whether the requirements for retention pursuant to section 328(a) have been satisfied because 328(a) effectively locks-in the professionals' compensation. See Energy Partners, Ltd., 409 B.R. at 225 (noting that a bankruptcy court, "in its duties as a gatekeeper, must have a sufficiently strong record when deciding whether to approve a professional under § 328(a).") In addition, "a Bankruptcy Court need not approve or reject an application as presented but may approve an application with modified terms that the Court finds necessary to render the proposed employment reasonable." In re Federal-Mogul Global, Inc., 348 F.3d 390, 398 (3d Cir. 2003) (affirming authority of the bankruptcy court under section 328(a) to reduce the proposed fees of an equity committee's financial advisor).

The Restructuring Fee

8. As D&P's proposed retention is currently structured, the Restructuring Fee is based on the ultimate recovery of the general unsecured creditors in the Cases. The general unsecured creditors' recovery, however, is not clearly linked to the services that D&P seeks to provide. Their recovery, if any, will be primarily contingent upon the efforts of others, namely the Debtors and their investment banker, Perella Weinberg Partners LP ("***Perella***") in marketing and selling the Debtors' assets. Proceeds from this sale process will establish what assets, if any, are available for distribution to general unsecured creditors.[4]

9. Moreover, as the Debtors have reported at the hearings on March 6 and February 14, the DIP Lender has already provided the Committee with two proposals for a global resolution that would provide general unsecured creditors with meaningful recoveries. As of the filing of this Limited Objection, the Committee has yet to engage in any discussions with the DIP Lender regarding these proposals. In fact, the Committee has declined several requests by the DIP Lender for a meeting to discuss its most recent proposal. If the sale of the Debtors' assets is consummated in the manner proposed by the DIP Lender, D&P would be entitled to a substantial Restructuring Fee without ever having to engage in settlement discussions. Indeed, if a plan that is opposed by the Committee is, nonetheless, accepted by general unsecured creditors, D&P would still receive its Restructuring Fee.

10. The receipt of such a windfall would be patently unreasonable, but approval of the Restructuring Fee pursuant to Section 328(a) would render such a result difficult to challenge.

[4] It should be further noted that the material unencumbered assets are owned by Atari Interactive, Inc., while the vast majority of unsecured claims are against Atari, Inc. Accordingly, a robust sale does not immediately translate into significant distributions to Atari, Inc. creditors. To generate a meaningful recovery, if any, at the Atari, Inc. level, the Committee will be required to prevail on a variety of complex and costly litigation claims, including the recharacterization of prior transactions, avoidance of "old and cold" liens (some of which were granted as far back as 2006) and substantive consolidation of the Debtors' estates.

As such, the Restructuring Fee set forth in the Application is not reasonable, and the Committee has failed to set forth any evidence, let alone sufficient evidence to meet the standard set forth above, to show that the Restructuring Fee is reasonable under the circumstances

11. Success fees, such as the Restructuring Fee, are so named because they are designed to reward the successful efforts of a professional for achieving a favorable result for the constituency the professional represents. The Committee's financial advisor "ought not to be rewarded, at the estates expense, for serendipity, or for results more correctly attributable to the efforts of others." In re Interlogic Trace, Inc., 188 B.R. 557, 561 n.4 (Bankr. W.D. Tex. 1995). As one court has stated:

> the bankruptcy process is not designed "principally to serve as a fund for payment of professional fees." Rather, one of its main purposes is to maximize the estate for distribution to the creditors. The estate is not a cash cow to be milked to death by professionals seeking compensation for services rendered to the estate which have not produced a benefit commensurate with the fees sought.

In re Big Rivers Elec. Corp., 233 B.R. 768, 777 (Bankr. W.D. Ky. 1999). The Restructuring Fee will allow D&P to share in, and consequently dilute, the recovery of unsecured creditors without any reasonable connection to the services it is expected to perform. As such, the Court should eliminate the Restructuring Fee from the terms of D&P's retention.

The Monthly Fee

12. In addition to the Restructuring Fee, the Application seeks to compensate D&P $50,000 on a monthly basis. Like the Restructuring Fee, the Monthly Fee bears no reasonable relationship to the services that are necessary and required for these Cases. Prior to the Petition Date, the Debtors developed, maintained and licensed the intellectual property in the computer gaming industry. Currently, however, the Debtors' "operations" are limited to maintaining their intellectual property until the consummation of the sales process. The Debtors have no intention of continuing as a going concern business.

13. The Application identifies nine categories of services that D&P will purportedly provide the Committee in these Cases; however, of those categories, only four bear any relation to the realities of the Debtors' cases while the remainder ignore the Debtors' process to sell all or substantially all of their assets and cease to operate as a going concern. Specifically, D&P proposes to perform the following services in the Application:

a. review and analyze the Debtors' operations, financial condition, cash flows, business plan, strategy and operating forecasts,

b. assist in the determination of an appropriate go-forward capital structure for the Debtors,

c. determine a theoretical range of values for the Debtors on a going concern basis,

d. evaluate the Debtors' debt capacity in light of its projected cash flows,

e. assist the Committee in analyzing any new debt and/or equity capital including debtor-in-possession financing (including advice on the nature and terms of the new securities).[5]

Application at ¶ 6. Given that the Debtors intend to liquidate their assets, it is abundantly clear that the services enumerated above are patently unnecessary in these Cases. Accordingly, the DIP Lender believes that the Monthly Fee should accordingly be reduced by half, to $25,000 per month. In that regard, it will be proportional to the actual services that D&P will be providing to the Committee.

WHEREFORE, the DIP Lender respectfully requests that the Court (i) grant this Limited Objection to the Application; (ii) modify the Application (and all documents annexed thereto) to

[5] The Debtors' debtor in possession financing was negotiated and substantially finalized well before D&P was even interviewed by the Committee.

eliminate the Restructuring Fee from the proposed compensation of D&P and reduce the Monthly Fee to $25,000; and (iii) grant such additional relief as it considers just and proper.

Dated: March 13, 2013

By: /s/ Andrew J. Schoulder

Robert G. Burns
Robert.Burns@bgllp.com
Andrew J. Schoulder
Andrew.Schoulder@bgllp.com
BRACEWELL & GIULIANI LLP
1251 Avenue of the Americas, 49th Fl.
Telephone:(212) 508-6100
Facsimile: (212) 508-6101

Kurt A. Mayr II
Kurt.Mayr@bgllp.com
Telephone: (860) 947-9000
Facsimile: (860) 246-3201

Attorneys for Alden Global Value Recovery Master Fund, L.P.