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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 (JMP)
Debtors.[1]	Joint Administration Requested

MOTION OF DEBTORS AND DEBTORS-IN-POSSESSION PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364 AND 507 AND FED. R. BANKR. P. 2002, 4001 AND 9014 FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO INCUR POST-PETITION SECURED INDEBTEDNESS, (II) GRANTING FIRST PRIORITY PRIMING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (III) GRANTING ADEQUATE PROTECTION, (IV) MODIFYING AUTOMATIC STAY, AND (V) SCHEDULING A FINAL HEARING

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by their undersigned proposed counsel, hereby move (the "Motion") for entry of an interim order, the form of which is attached hereto as **Exhibit 1** (the "Interim Order"), authorizing the Debtors to, among other things, (i) enter into a post-petition, secured financing facility (the "DIP Facility") the key terms of which are provided in the summary term sheet (the "DIP Term Sheet") attached as Exhibit A to the commitment letter which is annexed hereto as **Exhibit 2** (the "Commitment Letter"), (ii) grant adequate protection to the Debtors' creditors holding valid,

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

enforceable and unavoidable liens ("Secured Creditors"), and (iii) scheduling a hearing to consider approval of a final order (the "Final Order" and together with the Interim Order, the "DIP Orders") in connection with the DIP Facility. In support of the Motion, the Debtors submit (i) 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"). In further support of this Motion, the Debtors respectfully represent as follows.

I. Background

1. On January 21, 2013 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code, §§ 101-1532 (as amended, the "Bankruptcy Code") commencing the above-captioned chapter 11 cases. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors have, pursuant to a separate motion, moved the Court for entry of an order authorizing joint administration of these chapter 11 cases.

2. No request for the appointment of a trustee or an examiner has been made in these cases and no statutory committees have been appointed or designated.

3. A description of the Debtors' businesses, the reasons for filing these chapter 11 cases and the relief sought from this Court to allow for a smooth transition into operations under chapter 11 is set forth in the First Day Declaration, which is being filed contemporaneously with this Motion.

II. Preliminary Statement

4. Following a diligent process, the Debtors obtained the Commitment Letter which provides for an aggregate $5.250 million DIP Facility on a superpriority, administrative claim and first-priority priming lien basis. The DIP Facility consists of a multiple draw term loan of

which $2.250 million will be available on an interim basis subject to the conditions of the Term Sheet being satisfied. Another $1 million will be available on a final basis after, among other things, entry of a final order approving the DIP Facility. Finally, the last $2 million of the DIP Facility will be made available to the Debtors upon the filing of a 363 sale motion or a plan of reorganization.

5. The Debtors are requesting authority to access the full $2.250 million on an interim basis pursuant to the Interim Order and are seeking a first priority priming lien in connection with existing pre-petition liens.

6. Access to the DIP Facility will allow the Debtors to continue normal business operations in chapter 11, maintain vendor and supplier relationships, pay their employees, and satisfy other working capital and operational requirements. Satisfaction of these key obligations is necessary to preserve and maintain the value of the enterprise. Accordingly, the Debtors respectfully submit that the DIP Facility should be approved.

III. Prepetition Capital Structure

7. The Debtors' French parent company, Atari S.A. ("Atari S.A." or the "Parent"), and certain European subsidiaries entered into a master credit agreement with Banc of America Securities Limited on April 21, 2006 aimed at refinancing all the short and medium term debt of it and most of its subsidiaries. This senior secured credit facility (the "Blue Bay Facility") was later assigned to Blue Bay Value Recovery (Master) Fund Limited ("Blue Bay"), which together with an affiliated fund, The Blue Bay Multi-Strategy (Master) Fund Limited, are the largest shareholders of Atari S.A. Blue Bay also holds a seat on Atari S.A.'s board of directors.

8. Although none of the Debtors is an obligor under the Blue Bay Facility, whether by pledge, guarantee or otherwise, the Blue Bay Facility appears to be secured by a security interest in certain intellectual property owned by Debtor Atari, Inc. pursuant to a UCC-1

statement dated April 24, 2009. That intellectual property, known as the "Test Drive Unlimited" franchise (the "Test Drive IP"), is subject to two exclusive, worldwide licenses (one for trademark and one for all other intellectual property) granted to the Parent in 2007 (the "Test Drive Licenses"). The Test Drive Licenses are for terms expiring in November 2014. On or about March 31, 2008, the Parent assigned all of its rights in the Test Drive Licenses to Debtor Atari Interactive. Any lien asserted by Blue Bay against Atari, Inc. is limited to the reversionary interest after the Test Drive Licenses expire. Furthermore, Blue Bay's lien on Test Drive Unlimited may be avoidable as a constructively fraudulent conveyance based on its "upstream" nature.

9. Atari S.A. also filed a financing statement reflecting a putative blanket lien on all assets of Debtor Atari, Inc., except for the Test Drive IP. The Test Drive IP is the only marketable asset at Atari, Inc. All other valuable assets (including the intellectual property) of the Debtors is held by Atari Interactive. Aside from this, it is unclear what, if any, debt is purportedly secured by the Parent's putative lien. Atari Inc.'s books and records reflect intercompany accounts purportedly owed to Atari S.A. and one of its European affiliates in the aggregate amount of approximately $21 million. The Debtors believe that these claims should and likely will be treated as equity.

10. Aside from the disputed liens asserted by Blue Bay and Atari S.A., the Debtors' assets are unencumbered.[2]

[2] Cinram Group, LLC ("Cinram") warehouses all of the Debtors' retail inventory in Tennessee. The Debtors believe that Cinram may assert a lien against inventory under the Uniform Commercial Code to secure its prepetition claim of approximately $44,000. On the Petition Date, the Debtors filed a motion [Docket No. 9] seeking authority to pay Cinram's claim in full.

IV. The Debtors' Efforts To Obtain PostPetition Financing

11. Prior to the Petition Date, the Debtors' management determined that the Debtors would require additional working capital after the commencement of these chapter 11 cases. While the Debtors did their best to conserve their available cash prior to the Petition Date, they need additional liquidity to ensure their ability to fund their day-to-day operations and to reassure their employees, trade vendors and other constituencies that the Debtors will be in a position to meet their obligations during the pendency of these cases.

12. The Debtors approached five (5) financial firms in the months leading up to the Petition Date regarding potential post-petition financing arrangements. Four of the five entities signed non-disclosure agreements with the Debtors. The Debtors then paid due diligence deposits to two of the firms and both of those firms came forward with proposals for financing. However, only the proposal from Tenor Capital Management Company, L.P. ("Tenor" or the "DIP Lender") offered the Debtors sufficient flexibility and met all of the Debtors' financing needs.

13. In or about October 2012, the Debtors also began discussions with, among other potential buyers, a private equity/investment firm with experience in consumer and technology businesses (the "Potential Strategic Buyer") that expressed interest in purchasing Blue Bay's secured claim against and stock in the Parent and/or providing financing to the Debtors. Negotiations with the Potential Strategic Buyer continued through the week before the filing of these cases. The Debtors initially identified the term sheet submitted by the Potential Strategic Buyer as the one that best met their structure and liquidity requirements. Ultimately, negotiations with the Potential Strategic Buyer broke down. Of the remaining parties that indicated an interest in lending to the Debtors, only the DIP Lender provided a term sheet that met the structure and liquidity requirements of the Debtors. The Debtors and their advisors

subsequently engaged in round-the-clock diligence with the DIP Lender to obtain the best terms possible. These negotiations were at arm's length and at all times were characterized by hard bargaining by all interested parties. Through such efforts, the Debtors were able to improve upon the initial offer of the DIP Lender until it ultimately made its best and final proposal.

14. Accordingly, following these extensive negotiations regarding the Debtors' working capital needs and the means by which the Debtors will seek to reorganize or sell their assets, the DIP Lender has offered to provide the Debtors with the DIP Facility to address the Debtors' anticipated working capital needs during the pendency of these cases. The DIP Lender is not a current creditor or equity security holder of the Debtors.

V. Summary Of The Proposed DIP Facility

15. The principal terms of the DIP Facility are set forth on the DIP Term Sheet, and are incorporated herein by reference. For ease of reference and in accordance with Rule 4001(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 4001-2 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules"), set forth below are the principle terms of the DIP Facility.[3] Attached as **Exhibit 3** hereto is the DIP Budget referenced in the Term Sheet.

MATERIAL TERMS OF THE DIP FACILITY	
Borrowers *Bankruptcy Rule 4001(c)(1)(B)*	Atari, Inc., Atari Interactive, Inc., California US Holding, Inc. and Humongous, Inc., jointly and severally.
DIP Lenders *Bankruptcy Rule 4001(c)(1)(B)*	Tenor Capital Management Company, L.P. ("**Tenor**") and/or its affiliates and/or any fund or entity managed by Tenor and/or any other entity designated as a lender by Tenor (collectively, the "**DIP Lenders**").
DIP Agent *Bankruptcy Rule*	Tenor or a third party designated by Tenor.

[3] This summary of the DIP Facility is intended to assist the Court in understanding key aspects of the arrangement and is qualified in its entirety by reference to the DIP Term Sheet attached to the Commitment Letter. All capitalized terms not otherwise defined in this description have the meanings given to them in the DIP Term Sheet.

4001(c)(1)(B)	
DIP Loan Documentation	Definitive financing documentation with respect to the DIP Loans, in form and substance acceptable to the DIP Lenders in their sole and absolute discretion, which documentation shall be executed by all parties thereto (the "**DIP Loan Documentation**"). The DIP Loan Documentation shall be executed and delivered by the parties thereto on or prior to the date that is 20 days after the Interim Closing Date (the date on which such event occurs, the "**Definitive Documentation Date**").
Commitment, Availability, and Purpose *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(1)*	The "DIP Credit Facility" shall consist of a multiple draw term loan facility in an aggregate principal amount of $5.250 million (the "**DIP Commitment**") to be made available to Borrowers as follows: (i) Interim DIP Loan: A term loan facility to be available in a single drawing on the Interim Closing Date in an aggregate principal amount of $2.250 million in order to provide sufficient working capital to the Borrowers until the Final Closing Date, in accordance with the DIP Budget and subject to the provisions of the DIP Term Sheet (the "**Interim DIP Loan**"); (ii) Final DIP Loan: Subject to DIP Lenders' completion of business and legal due diligence and sole and absolute satisfaction with the results thereof, a term loan facility to be available pursuant to draws made once every two weeks on and after the Final Closing Date up to an aggregate principal amount equal $1 million, subject to the DIP Budget and the terms and on the conditions set forth in the DIP Loan Documentation (the "**Final DIP Loan**"); and (iii) Sale/Plan Loan: Subject to DIP Lenders' completion of business and legal due diligence and sole and absolute satisfaction with the results thereof, a term loan facility to be available pursuant to draws made once every two weeks on and after a Sale Motion or Plan is filed with the Bankruptcy Court up to an aggregate principal amount equal to $2 million, subject to the DIP Budget and the terms and on the conditions set forth in the DIP Loan Documentation (the "**Sale/Plan Loan,**" and together with the Interim DIP Loan and Final DIP Loan, the "**DIP Loans**"). The DIP Loans will be used solely for (a) working capital and general corporate purposes of the Borrowers, (b) bankruptcy-related fees, costs and expenses, (c) fees, costs and expenses related to a sale of assets and/or plan of reorganization, in the case of (a), (b), and (c), in accordance with the approved DIP Budget, and (d) for any other purpose agreed upon in the DIP Loan Documentation (collectively, the "**Permitted Expenditures**").
Priority *Bankruptcy Rule 4001(c)(1)(B)(i); Local Bankruptcy Rule 4001-2(a)(4);*	All DIP Loans and other liabilities and obligations of the Borrowers to the DIP Lenders under or in connection with the DIP Term Sheet, the DIP Loan Documentation, the Interim Order and Final Order shall be: (i) pursuant to section 364(c)(1) of the Bankruptcy Code, entitled to an allowed superpriority administrative expense claim in the Chapter 11 Cases of the Borrowers with priority over any and all administrative expenses, whether heretofore or hereafter incurred, of the kind specified in sections 503(b) or 507(a) of the Bankruptcy Code and including the proceeds of avoidance actions, subject only to the Carveout; (ii) pursuant to section 364(c)(2) of the Bankruptcy Code, secured by a perfected first-priority lien on the Collateral, subject only to (a) valid, perfected and non-avoidable liens as of the date the Borrowers file the Chapter 11 Cases (the "**Petition Date**"), and (b) the Carveout (the "**First Priority DIP Liens")**; (iii) pursuant to section 364(c)(3) of the Bankruptcy Code, secured by a perfected second priority lien on the Collateral, to the extent that such Collateral is subject to valid, perfected

	and non-avoidable liens in favor of third parties in existence as of the Petition Date or to valid liens in existence as of the Petition Date that are perfected subsequent to such date as permitted by section 546(b) of the Bankruptcy Code, and to the extent such liens are expressly permitted in writing by the DIP Lenders in their sole and absolute discretion, subject only to the Carveout (the "**Second Priority DIP Liens**"); and (iv) pursuant to section 364(d) of the Bankruptcy Code, secured by a perfected first priority, priming and senior security interest and lien granted to the DIP Lenders on the Collateral to the extent that such Collateral is subject to any lien or security interest as of the Petition Date, subject only to the Carveout (the "**Priming DIP Liens**").
Collateral *Bankruptcy Rule 4001(c)(1)(B)*	"**Collateral**" means, collectively, all now owned or hereafter acquired assets and property of the Borrowers and their bankruptcy estates, whether real or personal, tangible or intangible, or otherwise, and any and all proceeds therefrom, including, without limiting the generality of the foregoing, all cash, accounts, accounts receivable, inventory, property, plant and equipment, real estate, leaseholds, avoidance actions under chapter 5 of the Bankruptcy Code, all intercompany claims, any and all proceeds arising from insurance policies, all claims and causes of action of each Borrower and any and all proceeds therefrom, all Intellectual Property, and the equity interests of each direct and indirect subsidiary of each Borrower.
Carveout *Bankruptcy Rule 4001(c)(1)(B)(ii); Local Bankruptcy Rule 4001-2(a)(5);*	"**Carveout**" means a $200,000 back-end carveout for the outstanding fees and expenses of the professionals of the Borrowers and any official committee of unsecured creditors that are allowed as administrative expenses by the Bankruptcy Court, and all statutory fees required to be paid to the Clerk of the Court and to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930(a), from and after the date of occurrence of any Event of Default. For the avoidance of doubt, the Carveout shall be in addition to any and all fees and expenses of such professionals allowed by an order of the Bankruptcy Court that is not subject to appeal, reconsideration or review and paid or accrued by the Borrowers in accordance with the DIP Budget, whether from draws on the DIP Credit Facility or otherwise, prior to the occurrence of any Event of Default.
Termination Date *Bankruptcy Rule 4001(c)(1)(B)*	All of the Borrowers' indebtedness, liabilities and obligations under the DIP Loans are due and payable in full on the earliest of (the "**Termination Date**") (i) 120 days after the Petition Date, subject to entry of the Interim Order and the Final Order, and subject to the filing of the Sale Motion or Plan (the "**Maturity Date**"), (ii) the date of the DIP Lenders' notice in writing to the Borrowers of the occurrence of an Event of Default, subject to any applicable cure period in the DIP Loan Documentation, or (iii) sale of any Borrower's assets outside the ordinary course of business or any Borrower's emergence from Chapter 11 pursuant to a plan of reorganization.
Budget *Bankruptcy Rule 4001(c)(1)(B)*	To provide for payment of Permitted Expenditures pursuant to Borrowers' weekly budget (on a line-item basis) for the first thirteen weeks and rolling thereafter, approved in each instance by the DIP Lenders (subject to the restrictions in the DIP Loan Documentation, the Interim Order and the Final Order), *provided*, *however*, that the DIP Lenders shall have no obligation to provide any credit under the DIP Credit Facility if the use of proceeds of the DIP Credit Facility would cause or has caused disbursements to exceed 110% of the amount of disbursements for any given four-week period as set forth in the most recent budget approved by the DIP Lenders, tested on a rolling four-week basis; *provided further*, *however*, that notwithstanding anything contained in any approved budget or the DIP Term Sheet, the Borrowers shall not pay any severance or retention obligations, compensation or bonuses owed to any current or former employee, director, or officer in excess of the aggregate amount of $100,000 until the DIP Loans have been paid in full in cash (collectively, the "**DIP Budget**"). The Borrowers shall deliver to the DIP Lenders by 12:00 p.m. (ET) on Wednesday of each

	week, a reconciliation for the prior week, the prior two-week operating period (if less than two weeks have elapsed since the Petition Date, such shorter period) and the cumulative period from the Petition Date to the date of determination of actual expenses and disbursements as compared to the amounts set forth in the DIP Budget.
Closing Dates *Bankruptcy Rule 4001(c)(1)(B)*	"**Interim Closing Date**" means the date on which the "Conditions Precedent to the Interim DIP Loan" set forth under "Conditions Precedent" below are satisfied or waived in accordance with the DIP Term Sheet. "**Final Closing Date**" means the date on which the conditions precedent to the Final DIP Loan as set forth in the DIP Loan Documentation (including, without limitation, entry of the Final Order) shall have been satisfied or waived. As used herein, "**Final Order**" means an order of the Bankruptcy Court not subject to appeal, reconsideration or review authorizing and approving the DIP Loans on a final basis, which order shall be consistent with the terms of the DIP Term Sheet and the DIP Loan Documentation, and shall be in form and substance acceptable to the DIP Lenders in their sole and absolute discretion. **"Sale/Plan Closing Date"** means the date on which the conditions precedent to the Sale/Plan Loan as set forth in the DIP Loan Documentation (including, without limitation, the filing of a Sale Motion or Plan in accordance with the Bankruptcy Milestones) shall have been satisfied or waived.
Bankruptcy Milestones, Deadlines for Sale or Plan *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(12)*	"**Bankruptcy Milestones**" shall include the following: (i) The Borrowers shall file a motion with the Bankruptcy Court seeking authority to retain the Investment Banker within 5 days after the Petition Date; (ii) The Borrowers shall file a motion with the Bankruptcy Court to sell substantially all of their assets for a minimum amount necessary to satisfy all obligations in cash owed to the DIP Lenders pursuant to the DIP Term Sheet and the DIP Loan Documentation, approve a committed stalking horse bidder with a demonstrated financial ability reasonably acceptable to the DIP Lenders to close a sale and approve bidding procedures under Section 363 of the Bankruptcy Code no later than 30 days after the Petition Date, which motion and any agreement the Borrowers seek approval of by the Bankruptcy Court shall be in form and substance acceptable to the DIP Lenders (the "**Sale Motion**"); (iii) A bidding procedures order for such sale in form and substance acceptable to the DIP Lenders shall have been entered by the Bankruptcy Court within 45 days after the Petition Date; (iv) An auction for such sale shall be scheduled by order of the Bankruptcy Court and take place (unless there is no other qualified bidder other than the stalking horse bidder) within 60 days after the Petition Date; (v) Such sale must be (a) approved by an order of the Bankruptcy Court that provides for payment to the DIP Lenders in full at the closing of the sale, that is in form and substance acceptable to the DIP Lenders, and that is not subject to appeal, reconsideration or review, and (b) consummated and the DIP Lenders must be paid in full in cash, in each case within 75 days after the Petition Date; and (vi) In lieu of such sale: (a) the Borrowers may file a disclosure statement, joint plan of reorganization and an executed and fully committed plan sponsor agreement or executed term sheet for plan sponsorship (which shall be wholly consistent with the DIP Term Sheet, unless otherwise consented to by the DIP Lenders in their sole and absolute discretion) no later than 30 days after the Petition Date, which disclosure statement, plan, agreement, term sheet and all of their respective attendant documents must be in form and substance acceptable to the DIP Lenders and must provide for payment to the DIP Lenders in full in cash on the effective date of the plan (collectively, the "**Plan**"); (b) an order approving such disclosure statement in form and substance acceptable to the DIP Lenders must be entered by the Bankruptcy Court within 75 days after the Petition Date; (c) the Plan must be confirmed by an order of the Bankruptcy Court in form and

	substance acceptable to the DIP Lenders that is not subject to appeal, reconsideration or review within 105 days after the Petition Date; and (d) the Plan must be consummated, and the DIP Lenders paid in full within 120 days after the Petition Date. Additional milestones shall be mutually agreed upon between the Borrowers and DIP Lenders in the DIP Loan Documentation or any portion thereof.
Commitment Fee *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(3)*	A commitment fee equal to $250,000 shall be fully earned upon execution of the commitment letter to which the DIP Term Sheet is attached and due and payable (i) in the event the Companies commence the Chapter 11 Cases in accordance with the terms hereof, on the Interim Closing Date, or (ii) in all other cases, on January 22, 2013
Origination /Take-Out Fee *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(3)*	A fee (the "**Origination Fee**") equal to five (5%) percent of the DIP Commitment under the DIP Credit Facility shall be fully earned on the Interim Closing Date and due and payable to the DIP Lenders on the Maturity Date. An additional fee of $1 million (the "**Take-Out Fee**") shall be due and payable to the DIP Lenders immediately if any Borrower obtains alternative financing at any time after the Interim Closing Date.
Exit Fee *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(3)*	A fee (the "**Exit Fee**") payable in cash in an amount equal to: (i) in the event of a Sale Motion, the sum of (x) thirty percent (30%) of the first $10 million of Sale Proceeds, plus (y) twenty percent (20%) of the Sale Proceeds in excess of $10 million and up to $20 million, plus (z) ten percent (10%) of the Sale Proceeds in excess of $20 million, or (ii) in the event of a Plan, the sum of (x) thirty percent (30%) of the first $10 million of Plan Proceeds, plus (y) twenty percent (20%) of the Plan Proceeds in excess of $10 million and up to $20 million, plus (z) ten percent (10%) of the Plan Proceeds in excess of $20 million. In the event of a Sale Motion, the Exit Fee shall be earned on the Final Closing Date and due and payable to the DIP Lenders prior to any other distribution of Sale Proceeds. In the event of a Plan, the Exit Fee shall be earned on the Final Closing Date and due and payable to the DIP Lenders prior to any other distribution of Plan Proceeds. "**Sale Proceeds**" shall mean the gross proceeds of a sale or sales pursuant to the Sale Motion, after deducting amounts repaid on the DIP Loans and amounts allowed by order of the Bankruptcy Court as administrative expenses payable as a commission to the Investment Banker retained by the Borrowers. "**Plan Proceeds**" shall mean the gross value of all distributions to be made after the commencement of the Chapter 11 Cases (including, without limitation, all securities issued under a Plan and any accrued value with respect thereto) calculated after deducting amounts repaid on the DIP Loans and amounts allowed by order of the Bankruptcy Court as administrative expenses payable as a commission to the Investment Banker retained by the Borrowers.
Interest Rate *Bankruptcy Rule(c)(1)(B)*	Five percent (5%) per annum, to be paid in kind with such interest added to the principal amount of the DIP Loans compounded monthly in arrears on the last day of each month. Interest shall begin to accrue on the Interim DIP Loan on the Interim Closing Date, on the Final DIP Loan from and after the Final Closing Date, and on the Sale/Plan Loan from and after the Sale/Plan Closing Date.
Default Rate *Bankruptcy Rule(c)(1)(B)*	At all times while a default exists, principal, interest and other amounts shall bear interest at a rate per annum equal to two percent (2%) in excess of the interest rate set forth under "Interest Rate" above.
Optional Prepayments *Local Bankruptcy*	The Borrowers may prepay the DIP Loans in whole or in part at any time. Amounts repaid under the DIP Loans cannot be re-borrowed.

Rule 4001-2(a)(13)	
Mandatory Prepayments *Local Bankruptcy Rule 4001-2(a)(13)*	Customary for debtor-in-possession financings of this type and otherwise as specified in the DIP Loan Documentation. Amounts repaid under the DIP Loans cannot be re-borrowed.
Conditions to Interim DIP Loan *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(2), 2(h)*	(i) the Borrowers shall have timely delivered to the DIP Lenders and the Lenders shall have approved the DIP Budget; (ii) the Borrowers shall have provided the DIP Lenders' technical, financial and legal advisors with full access to the Borrowers, and the Borrowers' technical, financial and legal advisors, and requested diligence materials and information; (iii) the Interim Order shall have been entered by the Bankruptcy Court; (iv) the Interim Order, as entered by the Bankruptcy Court, shall not have been reversed, modified, amended, stayed or vacated, or in the case of any modification or amendment, in a manner, or relating to a matter, without the consent of the DIP Lenders. As used herein, "**Interim Order**" means an order of the Bankruptcy Court authorizing and approving the DIP Loans (including, without limitation, the Interim DIP Loan) on an interim basis, which order shall be in form and substance acceptable to the DIP Lenders in their sole and absolute discretion; (v) the Borrowers shall have provided certified copies of board resolutions, constitutional documents, secretary's certificates and good standing certificates; (vi) the Borrowers shall be in compliance in all respects with the Interim Order; (vii) all documented, reasonable, out of pocket fees, costs and expenses of the DIP Lenders relating to the DIP Credit Facility (including, without limitation, reasonable fees and expenses of their counsel and advisors) shall have been paid in full; (viii)the Commitment Fee shall have been received by the DIP Lenders; (ix) the Borrowers shall have implemented and obtained Bankruptcy Court approval of a cash management system reasonably acceptable to the DIP Lenders; (x) the Borrowers shall have insurance (including, without limitation, commercial general liability and property insurance) with respect to the Collateral in such amounts and scope as is acceptable to the DIP Lenders and the DIP Lenders shall have received additional insured and loss payee endorsements, as applicable, with respect thereto, in form and substance reasonably acceptable to the DIP Lenders; (xi) no Event of Default shall have occurred and be continuing on the Interim Closing Date, or after giving effect to the Interim DIP Loan; (xii) subject to Bankruptcy Court approval, (a) each Borrower shall have the corporate power and authority to make, deliver and perform its obligations under the DIP Term Sheet and the Interim Order, and (b) no consent or authorization of, or filing with, any person or entity (including, without limitation, any governmental authority) shall be required in connection with the execution, delivery or performance of the DIP Term Sheet and the Interim Order by any Borrower, or for the validity or enforceability of the DIP Term Sheet and the Interim Order in accordance with their terms against any Borrower, except for consents, authorizations and filings which shall have been obtained or made and are in full force and effect and except for such consents, authorizations and filings, the failure to obtain or perform, could not be reasonably expected to cause a Material Adverse Change; (xiii) since the Petition Date, there shall not have been any material adverse change, individually or in the aggregate, in the validity or enforceability of any provision of the DIP Term Sheet, the DIP Loans, the First Priority DIP Liens, the Second Priority DIP Liens, the Priming DIP Liens, or the Interim Order, the rights and remedies of the DIP Lenders under the DIP Term Sheet or the Interim Order, or in the operations, assets, revenues, financial condition, profits or prospects of any Borrower, taken as a whole (other than as a result of the filing of the Chapter 11 Cases) (a "**Material Adverse Change**"); (xiv) execution and delivery of such documentation and performance of such other acts as the DIP Lenders may reasonably request, each satisfactory in form and substance to the DIP Lenders; (xv) The Debtors' Chief Financial officer shall have resigned from all officer and director roles with Atari S.A.; and

	(xvi) The Debtors shall have filed their petitions for bankruptcy protection on or before 6:00 p.m.. (New York time) on January 21, 2013.
Conditions to Final DIP Loan *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(2), 2(h)*	Conditions Precedent to Final DIP Loan. The obligations of the DIP Lenders to make the Final DIP Loan will be subject: (i) to the Borrowers' compliance with each Bankruptcy Milestone, (ii) to satisfaction or waiver of conditions precedent specified in the DIP Loan Documentation, including, without limitation, the Conditions Precedent to the Interim DIP Loan set forth in subsections (i)-(xvi) above (including as modified in the DIP Lenders' discretion to reflect the passage of time, the entry of the Interim Order and/or the occurrence of the Interim Closing Date), (iii) to entry of the Final Order, (iv) to the Interim Order, as entered by the Bankruptcy Court, and Final Order not having been reversed, modified, amended, stayed or vacated, or in the case of any modification or amendment, in a manner, or relating to a matter, without the consent of the DIP Lenders, (v) to UCC statements covering the Collateral having been filed, (vi) to the entry of an order by the Bankruptcy Court (or other court of competent jurisdiction) not subject to appeal, reconsideration or review that expressly holds that Atari SA, and any parent, affiliate or subsidiary entity thereof (other than a Borrower) has no interest in, no license to use and no right to use the ATARI trademark, any other trademark used in connection therewith, or any variation of the ATARI trademark or any other trademark used in connection therewith and that all agreements related to any such rights or licenses are fully terminated and of no further force or effect, (vii) the Debtors' Chief Executive Officer shall have resigned from all officer and director roles with Atari S.A., (viii) Borrowers shall have engaged an investment banking firm to assist with their sale and/or reorganization upon terms and conditions (including the identity of such firm) acceptable to the DIP Lenders in their sole and absolute discretion.(such approved firm, the "**Investment Banker**") and (ix) to the DIP Lenders' satisfaction, in their discretion, with the results of their legal and business due diligence performed after the Interim Closing Date.
Conditions to Sale/Plan Loan *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(2), 2(h)*	Conditions Precedent to Sale/Plan Loan. The obligations of the DIP Lenders to make the Sale/Plan Loan will be subject: (i) to the Borrowers' compliance with each Bankruptcy Milestone, (ii) to satisfaction or waiver of conditions precedent specified in the DIP Loan Documentation, including, without limitation, the Conditions Precedent to the Interim DIP Loan (set forth in subsections (i)-(xvi) therein) above and the Conditions Precedent to the Final DIP Loan (set forth in subsections (i)-(ix) therein) (including as modified in the DIP Lenders' discretion to reflect the passage of time, the entry of the Interim Order or Final Order, and/or the occurrence of the Interim Closing Date or Final Closing Date), (iii) to entry of the Final Order, (iv) to the Interim Order, as entered by the Bankruptcy Court, and Final Order not having been reversed, modified, amended, stayed or vacated, or in the case of any modification or amendment, in a manner, or relating to a matter, without the consent of the DIP Lenders, (v) to UCC statements covering the Collateral having been filed, (vi) to the entry of an order by the Bankruptcy Court (or other court of competent jurisdiction) not subject to appeal, reconsideration or review that expressly holds that Atari SA, and any parent, affiliate or subsidiary entity thereof (other than a Borrower) has no interest in, no license to use and no right to use the ATARI trademark, any other trademark used in connection therewith, or any variation of the ATARI trademark or any other trademark used in connection therewith and that all agreements related to any such rights or licenses are fully terminated and of no further force or effect, and (vii) to the DIP Lenders' satisfaction, in their discretion, with the results of their legal and business due diligence performed after the Interim Closing Date. Without limiting in any way the DIP Lenders' discretion consistent with the provisions of the DIP Term Sheet, the Interim Order and Final Order shall be in form and substance acceptable to the DIP Lenders in their sole and absolute discretion and provide, *inter alia*, the following:

	(a) that all indebtedness, liabilities and obligations of the Borrowers to the DIP Lenders, whenever and however arising, including without limitation, the DIP Loans and all fees, charges, costs and expenses contemplated by the DIP Term Sheet or otherwise incurred, shall be secured by the First Priority DIP Liens, the Second Priority DIP Liens and the Priming DIP Liens on all Collateral (as to the Interim Order, other than avoidance actions under Chapter 5 of the Bankruptcy Code and the proceeds thereof); (b) that due, adequate and proper notice has been given to all parties in interest; (c) as to the Final Order only, no fees, costs, expenses, or other charges may be assessed or attributed to the DIP Lenders in connection with the Collateral pursuant to Section 506(c) of the Bankruptcy Code, or otherwise; (d) a finding that the DIP Lenders have at all times acted in good faith; and (f) relief from the automatic stay to exercise any remedies upon an Event of Default on three (3) business days' notice to the Borrowers without further order of or application to the Bankruptcy Court.
Affirmative Covenants *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(8)*	Customary for debtor-in-possession financings of this type and otherwise as specified in the DIP Loan Documentation.
Negative Covenants *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(8)*	Customary for debtor-in-possession financings of this type and otherwise as specified in the DIP Loan Documentation, and subject to customary grace periods and cure periods, and materiality thresholds; provided that, from the Interim Closing Date until the Definitive Documentation Date, the Borrowers shall not, without the express, prior written consent of the DIP Lenders, do, cause to be done, or agree to do or cause to be done, any of the following: (i) create, incur, assume or suffer to exist any indebtedness, except indebtedness expressly permitted by the DIP Term Sheet; (ii) create, incur, assume or suffer to exist any indebtedness, except indebtedness expressly permitted by the DIP Term Sheet; (iii) convey, sell, lease, assign, transfer or otherwise dispose of (including through a transaction of merger, consolidation, or otherwise) any Borrower's property, business or assets, whether now owned or hereafter acquired, outside of the ordinary course of business; (iv) incur or make any expenditure (including, without limitation, any capital expenditure), investment or other payment, other than in accordance with the approved DIP Budget; or (v) create, or acquire any ownership interest in, any entity (whether direct or indirect) other than those existing on the Petition Date.
Events of Default *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(10)*	Events of default are those customary for debtor-in-possession financings of this type, and subject to customary grace periods and cure periods, and materiality thresholds, all reasonably acceptable to the DIP Lenders, or as otherwise specified in the DIP Loan Documentation, including, without limitation, those set forth in subsections (i)-(xxviii) below (collectively, "**Events of Default**"): (i) any representation, warranty, certification or other statement of fact made or deemed made by any Borrower in any DIP Loan Documentation or in a certificate delivered under or

	in connection with the Term Sheet shall prove to have been incorrect in any material respect when made or deemed made; (ii) (a) any Borrower shall fail to pay any principal of or a premium or interest on any debt that is outstanding and payable postpetition in a principal net amount of $100,000 or more; (b) any other event shall occur or condition shall exist under any agreement or instrument relating to any debt and shall continue after any applicable grace period and permits the holders or beneficiaries of such debt to accelerate such debt; or (c) any such debt shall be declared to be due and payable, or required to be prepaid or redeemed, in each case prior to its stated maturity; (iii) any judgments or orders arising from any investigation, litigation or proceeding shall be rendered against any Borrower; (iv) a change of control whereby Atari, S.A. or a Debtor no longer directly owns and controls 100% of the aggregate issued and outstanding equity interests in each of the Borrowers; provided, however, that the appointment of a receiver for Atari S.A. shall not constitute a change of control; (v) any security agreement or financing statement shall for any reason cease to create a valid and perfected first priority lien on and security interest in the Collateral; (vi) an order of the Bankruptcy Court shall be entered granting any superpriority claim (other than the Carveout) in any of the cases of the Borrowers that is *pari passu* with senior to the claims of the DIP Lenders against any Borrower, or any Borrower takes any action seeking or supporting the grant of any such claim; (vii) any Borrower is not duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization; (viii) a Borrower is engaged in the business of extending credit for the purpose of purchasing or carrying margin stock (within the meaning of Regulation U issued by the Board of Governors of the Federal Reserve System); (xi) a Borrower is an "investment company", or a company "controlled" by an "investment company", within the meaning of the Investment Company Act of 1940, as amended; (x) any Borrower is found not to have a valid and enforceable right to use all trademarks, service marks, trade names, domain names, goodwill associated with the foregoing, patents, copyrights, trade secrets, source codes and/or know-how (including, without limitation, all registrations and applications or registration of the foregoing) or any other intellectual property rights (collectively, "**Intellectual Property**") necessary for the conduct of its business as currently conducted; (xi) a claim has been asserted and is pending, or to the knowledge of any Borrower is threatened, challenging the use of any such Intellectual Property by any Borrower or the validity or enforceability of any such Intellectual Property or alleging that the conduct of the business of any Borrower infringes, misappropriates or otherwise violates the Intellectual Property rights of any other person; (xii) (a) Federal income tax returns or any other tax returns, domestic or foreign, required to be filed by any Borrower have not been filed on a timely basis, (b) taxes and assessments payable by any Borrower have become due and payable and remain unpaid, or (c) a claim is being asserted in writing with respect to any taxes against any Borrower; (xiii) any Borrower does not have good and marketable fee simple title to or valid leasehold interests in all of the real property owned or leased by such Borrower and good title to all of their personal property; (xiv) the security interest in the Collateral is not in full force and effect or is not valid or have first priority or the Collateral is not free and clear of any lien, except for the liens and security interests created or permitted under the DIP Loan Documentation; (xv) insurance with responsible and reputable insurance companies or associations in such amounts and covering such risks as is usually carried by companies engaged in similar business and owning similar properties in the same general areas in which each Borrower operates is not in effect; (xvi) failure by any Borrower to be in compliance with any Bankruptcy Milestone; (xvii) the occurrence of any deviation from the approved DIP Budget that is greater than permitted variances;

	(xviii) failure by any Borrower to be in compliance in all respects with any provision of the DIP Term Sheet (including, without limitation, any covenants contained herein), the Interim Order, or the Final Order; (xix) failure to pay any interest, principal, fees, costs, charges, or expenses when due; (xx) reversal, modification, amendment, stay or vacatur of the Interim Order or the Final Order, as entered by the Bankruptcy Court, without the prior written consent of the DIP Lenders; (xxi) failure of the DIP Loan Documentation to be executed and delivered by all parties prior to the Definitive Documentation Date; (xxii) if each Condition Precedent to the Final DIP Loan has not been satisfied or waived by the DIP Lenders on or before the date that is 30 days after the Interim Closing Date; (xxiii) if each Condition Precedent to the Sale/Plan Loan has not been satisfied or waived by the DIP Lenders on or before the date that is 30 days after the Interim Closing Date; (xxiv) the appointment in any of the Chapter 11 Cases of a trustee, receiver, examiner, or responsible officer with enlarged powers relating to the assets of any Borrower or the operation of the business of any Borrower (powers beyond those set forth in sections 1106(a)(3) and (a)(4) of the Bankruptcy Code); (xxv) conversion of any Borrower's Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code; (xxvi) the granting of relief from the automatic stay by the Bankruptcy Court to any creditor or party in interest other than a DIP Lender in the Chapter 11 Cases; (xxvii) the termination or commencement of liquidation of any Borrower's operations, business or assets; and (xxviii) the Borrowers' failure to obtain, within 60 days after the Petition Date, an order of the Bankruptcy Court that is not subject to appeal, reconsideration or review extending the deadline by which the Borrowers must assume or reject unexpired leases of real property to a date that is at least 270 days after the Petition Date.
Remedies Upon Event of Default *Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(10)*	Upon the occurrence and during the continuance of any Event of Default, subject to 3 business days' notice to the Borrowers, the DIP Lenders may take all or any of the following actions without further order of or application to the Bankruptcy Court notwithstanding section 362 of the Bankruptcy Code: (i) declare the principal of, and accrued interest on, any outstanding DIP Loans to be immediately due and payable; (ii) terminate any further commitment to lend to the Borrowers; (iii) set-off any amounts held as cash collateral (including, without limitation, in any cash collateral account held for the benefit of the DIP Lenders); (iv) foreclose upon, sell, dispose of, or otherwise realize upon the Collateral; or (v) without notice, application or motion to, or further orders from, the Bankruptcy Court or any other court, and without interference from the Borrowers or any other party in interest, take any other action or exercise any other right or remedy (including, without limitation, with respect to the First Priority DIP Liens, Second Priority DIP Liens, Priming DIP Liens and Collateral) permitted under the DIP Term Sheet, in the DIP Loan Documentation, the Interim Order or the Final Order, or under applicable law, including, without limitation, exercising any and all rights and remedies with respect to the Collateral or any portion thereof.
Automatic Stay *Bankruptcy Rule 4001(c)(1)(B)(iv)*	Upon three business days prior notice, the automatic stay is vacated to permit the DIP Lenders to exercise remedies to the extent set forth in the DIP Orders.

VI. Jurisdiction, Venue and Predicates for Relief Requested

16. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 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).

17. The predicates for the relief requested herein are sections 105(a), 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d), 364(e) and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001(c), and 6004(h) and Local Rule 4001-2.

VII. Relief Requested

18. By this Motion, the Debtors respectfully request entry of the DIP Orders, (i) approving the DIP Term Sheet, (ii) authorizing the Debtors to obtain post-petition financing on a priming secured, super-priority basis on the terms and conditions set forth in the DIP Term Sheet and the DIP Loan Documentation (as defined in the DIP Term Sheet), once it is executed, (iii) authorizing the Debtors to grant liens and security interests on their assets as contemplated by the DIP Term Sheet, and (v) granting certain related relief.

VIII. Basis for Relief Requested

A. The Debtors Should be Authorized to Obtain Postpetition Financing Through the DIP Facility.

19. The Debtors believe that it is essential that they obtain post-petition financing. The relief requested herein will enable the Debtors to continue their ordinary course, day-to-day operations, to preserve the value of their estates, and to facilitate the Debtors' ability to successfully reorganize or sell their assets pursuant to section 363 of the Bankruptcy Code. Access to credit under the DIP Facility is necessary to provide working capital during the pendency of these cases to deal with the liquidity constraints described in the First Day

Declaration and to provide the Debtors' employees, vendors and other key constituencies with confidence that the Debtors have sufficient resources available to maintain their operations in the ordinary course. Absent this new liquidity, not only would the Debtors' ability to maximize the value of their estates be jeopardized, but the Debtors almost certainly would be forced to cease their business operations, and lose the going-concern value of their businesses to the direct detriment of all parties in interest.

20. Section 364 of the Bankruptcy Code authorizes a debtor to obtain secured or superpriority financing under certain circumstances. In particular, section 364(c) of the Bankruptcy Code establishes the conditions under which a debtor may obtain certain types of secured credit and provides, in relevant part, as follow:

> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and hearing, may authorize the obtaining of credit or the incurring of debt –
>
> (1) with priority over any of all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

21. Courts have articulated a three-part test to determine whether a debtor may obtain financing under section 364(c) of the Bankruptcy Code:

(a) the debtor is unable to obtain unsecured credit under section 364(b) (*i.e.,* by granting a lender administrative expense priority);

(b) the credit transaction is necessary to preserve the assets of the estate; and

(c) the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed lender.

See In re Aqua Assocs., 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991) (applying the above factors and holding that "[o]btaining credit should be permitted not only because it is not available elsewhere, which could suggest the unsoundness of the basis for the use of the funds generated by credit, but also because the credit acquired is of significant benefit to the debtor's estate and the terms of the proposed loan are within the bounds of reason, irrespective of the inability of the debtor to obtain comparable credit elsewhere"); *In re Ames Dep't Stores*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990).

i. The DIP Facility Represents the Best Available Financing

22. To show that the credit required is not obtainable on an unsecured basis or on better terms, a debtor need only demonstrate "by a good faith effort that credit was not available without" the protections of sections 364(c) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. and Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, "[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." *Id.* at 1088; *see also Ames Dep't Stores*, 115 B.R. at 40 (holding that debtor made a reasonable effort to secure financing where it approached four lending institutions, was rejected by two, and selected the least onerous financing option from the remaining two lenders). Moreover, where few lenders are likely to be able and willing to extend the necessary credit to the debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom.*, *Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

23. As discussed above, to obtain post-petition financing, the Debtors and their advisors approached several sophisticated, commercial entities, including potential strategic

buyers, about providing debtor-in-possession financing in conjunction with a sale or other restructuring transaction. None of those potential lenders were willing to make a post-petition loan on an unsecured basis in an amount necessary for the Debtors' business operations and other financing needs. As such, when considering all of the factors, the Debtors concluded that the DIP Facility was their best financing alternative. The Debtors' efforts to seek necessary post-petition financing satisfies the statutory requirements of section 364 of the Bankruptcy Code. *See*, *e.g.*, *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 630 (Bankr. S.D.N.Y. 1992) (debtor seeking financing under section 364(c) of the Bankruptcy Code made acceptable attempt to obtain less onerous financing by speaking to several lenders that denied the loan request); *Ames Dep't Stores*, 115 B.R. at 40.

ii. The DIP Facility is Necessary to Preserve Assets of the Estates

24. It is essential that the Debtors obtain the financing required to continue, among other things, the orderly operation of the Debtors' businesses and to make certain capital expenditures and satisfy certain working capital requirements of the Debtors' businesses. The DIP Facility also is essential to provide the Debtors' various stakeholders, including employees, vendors, service providers and other key constituencies, with confidence in the Debtors' ability to reorganize.

25. The success of these cases depends, among other things, on (i) the Debtors' ability to meet their day-to-day working capital requirements without interruption or delay and (ii) the confidence of the Debtors' stakeholders. If the proposed DIP Facility is denied, the Debtors almost certainly will experience business disruptions or the ceasing of operations, and their ability to reorganize or realize value for stakeholders will be damaged irreparably. In addition to ensuring that the Debtors can fund their operations, the requested availability under

the DIP Facility will help provide assurances to the Debtors' vendors and employees that they will be paid for post-petition services. Approval of the requested borrowing under the DIP Facility thus is crucial to maximizing the value of the Debtors' estates.

iii. The Terms of the DIP Facility Are Fair, Reasonable and Appropriate

26. As discussed above, the terms and conditions of the proposed DIP Facility are fair and reasonable under the circumstances and are superior to the terms of any alternative financing available to the Debtors. The interest rates and other covenants negotiated with the DIP Lender are reasonable, and the terms of the DIP Facility were highly negotiated. Moreover, the other terms and conditions of the proposed DIP Facility are similar, or more favorable to the Debtors, than any other alternative financing available to the Debtors.

iv. Entry into the DIP Facility is an Exercise of the Debtors' Sound and Reasonable Business Judgment

27. Provided that an agreement to obtain secured credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant a debtor considerable deference in acting in accordance with its sound business judgment in obtaining such credit. *See*, *e.g., In re Barbara K. Enters., Inc.*, Case No. 08-11474, 2008 WL 2439649, at * 14 (Bankr. S.D.N.Y. Jun. 16, 2008) (explaining that courts defer to a debtor's business judgment "so long as a request for financing does not 'leverage the bankruptcy process' and unfairly cede control of the reorganization to one party in interest."); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("[C]ases consistently reflect that the court's discretion under section 364 [of the Bankruptcy Code] is to be utilized on grounds that permit [a debtor's] reasonable business judgment to be exercised as long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest"); *see also In re Farmland Indus., Inc.*, 294 B.R. 855, 881

(Bankr. W.D. Mo. 2003) (noting that approval of postpetition financing requires, inter alia, an exercise of "sound and reasonable business judgment").

28. As described above, after appropriate investigation and analysis, the Debtors' management has concluded that the DIP Facility provides the best alternative available in the circumstances of these cases. The Debtors have exercised sound business judgment in determining that a post-petition credit facility is both necessary and appropriate and have satisfied the legal prerequisites to incur debt under the DIP Facility. The terms of the DIP Facility are fair and reasonable, and are in the best interests of the Debtors' estates. The Debtors have reason to believe that the funds made available through the DIP Facility will be adequate to pay all administrative expenses due and payable during the post-petition periods. Accordingly, the Court should grant the Debtors authority to enter into the DIP Facility and obtain funds from the DIP Lender on the secured and administrative "superpriority" basis described above, pursuant to section 364(c) of the Bankruptcy Code.

B. Approval of the Priming DIP Liens is Appropriate

29. In addition to authorizing financing under section 364(c) of the Bankruptcy Code, courts also may authorize a debtor to obtain post-petition credit secured by a lien that is senior or equal in priority to existing liens on encumbered property, without the consent of the existing lien holders, if the debtor cannot otherwise obtain such credit and the interests of existing lien holders are adequately protected. *See* 11 U.S.C. § 364(d)(1). Specifically, section 364(d)(1) of the Bankruptcy Code provides, in relevant part, that a court may, after notice and a hearing:

> authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if --
>
> (A) the [debtor] is unable to obtain such credit otherwise; and

> (B) there is adequate protection of the interest holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d)(1).

30. When determining whether to authorize a debtor to obtain credit secured by a "priming" lien as authorized by section 364(d) of the Bankruptcy Code, courts focus on whether the transaction will enhance the value of the Debtors' assets. Courts consider a number of factors including, without limitation:

> (i) whether alternative financing is available on any other basis (*i.e.* whether any better offers, bids or timely proposals are before the court);
>
> (ii) whether the proposed financing is necessary to preserve estate assets and is necessary, essential and appropriate for continued operation of the debtors' business;
>
> (iii) whether the terms of the proposed financing are reasonable and adequate given the circumstances of both the debtors and proposed lender(s); and
>
> (iv) whether the proposed financing agreement was negotiated in good faith and at arm's length and entry therein is an exercise of sound and reasonable business judgment and in the best interest of the debtor's estate and its creditors.

See, e.g., Ames Dept. Stores, 115 B.R. at 37-39; *In re Lyondell Chem. Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. Mar. 5, 2009); *see also Bland v. Farmworker Creditors*, 308 B.R. 109, 113-14 (S.D. Ga. 2003);

31. As explained above, the Debtors have explored financial alternatives and are aware of the lack of financing available to them given the nature of their capital structure. In light of that, and given the state of the credit markets, the Debtors have concluded that financing comparable to that provided by the DIP Lender in the DIP Facility is currently unobtainable without the priming of any existing prepetition liens. *See Shaw Indus., Inc. v. First Nat'l Bank of PA (In re Shaw Indus., Inc.)*, 300 B.R. 861, 863, 865 (Bankr. W.D. Pa. 2003) (where debtor

made efforts by "contacting numerous lenders" and was unable to obtain credit without a priming lien, it had met its burden under section 364(d)); *In re Dunes Casino Hotel*, 69 B.R. 784, 796 (Bankr. D. N.J. 1986) (holding that the debtor had made required efforts under section 364(d)(1) of the Bankruptcy Code based on evidence that the debtor had attempted unsuccessfully to borrow funds on an unsecured basis or secured by junior liens, but that at least three such lenders were willing to advance funds secured by a superpriority lien). Thus, the Debtors are otherwise unable to obtain financing other than financing secured by first priority priming liens.

32. Additionally, the interests of a lien holder whose liens will be primed will be "adequately protected" under section 364(d) of the Bankruptcy Code. What constitutes adequate protection is decided on a case-by-case basis and it can come in various forms, including payment of adequate protection fees, payment of interest, or granting of replacement liens or administrative claims. *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) ("the determination of adequate protection is a fact-specific inquiry . . . left to the vagaries of each case"; *see also In re Realty Southwest Assocs.*, 140 B.R. 360 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986) (the application of the adequate protection "is left to the vagaries of each case, but its focus is protection of the secured creditor from diminution in the value of its collateral during the reorganization process") (citation omitted); *In re Continental Airlines Inc.*, 154 B.R. 176, 180-81 (Bankr. D. Del. 1993).

33. The DIP Facility contemplates priming Blue Bay's lien on the Test Drive IP in both the Interim Order and Final Order. Blue Bay is an "insider" of the Debtors as that term is defined in section 101(31) of the Bankruptcy Code. To account for any diminution in value, the Debtors will provide Blue Bay adequate protection in the form of (a) a subordinate replacement

lien on *all assets of the Debtors* that is junior to the DIP Liens being granted the DIP Lender and (b) a superpriority claim under section 507(b) that is junior only to the superpriority claims of the DIP Lender. Given the value of the unencumbered property held at Atari Interactive, the amount of the DIP Facility and the limited nature of Blue Bay's security interest on rights that are licensed away for the next two years, the Debtors submit that a second priority lien on all assets of the Debtors offers more than sufficient protection to Blue Bay and is, in fact, a better position to be in than a possibly avoidable lien on the only asset at Atari, Inc. The Debtors submit that the adequate protection being offered Blue Bay is both fair and reasonable, and is sufficient to satisfy the requirements of section 364(d)(1)(B) of the Bankruptcy Code.

34. As for the purported lien of the Parent, the Debtors will also seek to prime it at the interim hearing but only to the extent the Parent can prove the extent, validity and priority of its lien. Even if the Parent establishes a valid lien, its lien purportedly is secured by all assets of Atari, Inc. except for the Test Drive IP. This makes the Parent's lien virtually worthless as the Test Drive IP is the only marketable asset held by Debtor Atari, Inc. To the extent that the Parent proves up its alleged lien, the Debtors are prepared to offer adequate protection in line with what is being offered to Blue Bay and submit that such terms are both fair and reasonable.

C. The Debtors Should Be Authorized To Pay The Fees Required By The DIP Lender And Honor The Obligations Of the Commitment Letter

35. As described above, the Debtors have agreed, subject to Court approval, to pay certain fees to the DIP Lender in exchange for their providing the DIP Facility. Specifically, the Debtors will pay (i) interest charges at 5%, accrued and added to the principal balance, (ii) a commitment fee of $250,000, to be paid from the proceeds available during the interim period, (iii) an origination fee of $250,000 to be paid at the Maturity Date of the loan (after assets are sold), and (iv) an exit fee based on a sliding-scale formula tied to the amount of sale or plan

proceeds in excess of the DIP balance and investment banker commissions. The fees the Debtors have agreed to pay the DIP Lender and other obligations under the Term Sheet represent the most favorable terms to the Debtors on which the DIP Lender would agree to make the DIP Facility available. The Debtors considered the fees described herein when determining in their sound business judgment that the DIP Term Sheet constituted the best postpetition financing necessary to continue their operations and prosecute their chapter 11 cases, and paying these fees in order to obtain the DIP Facility is in the best interests of the Debtors' estates, creditors, and other parties in interest.

36. Court routinely authorize debtors to pay DIP financing fees where the financing, in the debtor's business judgment, is beneficial to the debtors' estates. *See, e.g., In re InSight Health Servs. Holding Corp.*, Case No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan. 4, 2011)(approving 2.0% DIP closing fee); *In re Lear Corp*., Case No. 09-14326 (ALG) (Bankr. S.D.N.Y. Aug. 4, 2009)(approving 5.0% up front fee and a 1.0% exit/conversion fee); *In re Aleris Int'l Inc.*, Case No. 09-10478 (BLS)(Bankr. D. Del. Mar. 18, 2009)(approving 3.5% exit fee and 3.5% front-end net adjustment against each lender's initial commitment). Accordingly, the Court should authorize the Debtors to pay the fees as provided in the Term Sheet.

D. <u>The Scope of the Carve-Out is Appropriate</u>.

37. The proposed DIP Facility subjects the security interests and administrative expense claims of the DIP Lender to the Carveout (as defined in the DIP Term Sheet). Such carve-outs for professional fees have been found to be reasonable and necessary to ensure that a debtor's estate and any statutory committee can retain assistance from counsel. *See, e.g., Ames Dep't. Stores,* 115 B.R. at 40; *In re United Retail*, Case No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2012); *In re Eastman Kodak Co.*, Case No. 12-10202 (ALG) (Bankr. S.D.N.Y. Jan. 19,

2012); *In re General Maritime Corp.*, Case No. 11-15285 (MG) (Bankr. S.D.N.Y. Nov. 17, 2011). The DIP Facility does not directly or indirectly deprive the Debtors' estates or other parties in interest of possible rights and powers by restricting the services for which professionals may be paid in these cases. *See In re Ames Dep't Stores*, 115 B.R. at 38 (observing that courts insist on carve-outs for professionals representing parties-in-interest because "[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced"). Additionally, the Carveout protects against administrative insolvency during the course of the case by ensuring that assets remain for payment of U.S. Trustee fees and professional fees of the Debtors and the future Committee notwithstanding the grant of superpriority and administrative liens and claims under the DIP Facility.

E. The DIP Lender Should be Deemed a Good Faith Lender under Section 364(e).

38. Section 364(e) of the Bankruptcy Code protects a good faith lender's right to collect on loans extended to a debtor, and its right in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal. Section 364(e) provides that:

> (e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

39. As explained in detail herein and in the First Day Declaration, the DIP Facility is the result of the Debtors' reasonable and informed determination that the DIP Lender offered the most favorable terms on which to obtain needed post-petition financing, and of extended arm's-

length negotiations between the Debtors and the DIP Lender. The term and conditions of the DIP Facility are fair and reasonable, and the proceeds of the DIP Facility will be used only for purposes that are permissible under the Bankruptcy Code. Further, no consideration is being provided to any party to the DIP Facility other than as described herein. Accordingly, the Court should find that the DIP Lender is a "good faith" lender within the meaning of section 364(e) of the Bankruptcy Code, and is entitled to all of the protections afforded by that section.

F. Approval of the DIP Facility on an Interim Basis is Necessary to Prevent Immediate and Irreparable Harm.

40. Bankruptcy Rule 4001(c)(2) governs the procedures for obtaining authorization to obtain postpetition financing and provides, in relevant part:

> The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Fed. R. Bankr. Proc. 4001(c)(2).

41. In examining requests for interim relief under the immediate and irreparable harm standard, courts apply the same business judgment standard applicable to other business decisions. *See, e.g., Ames Dep't Stores*, 115 B.R. at 36. After the 14-day period, the request for financing is not limited to those amounts necessary to prevent the destruction of the debtor's business, and the debtor is entitled to borrow those amounts that it believes are prudent to the operation of its business. *Ames Dep't Stores*, 115 B.R. at 36.

42. Immediate and irreparable harm would result if the relief requested herein is not granted on an interim basis. As described in detail herein and the First Day Declaration, the Debtors have an immediate need to obtain access to liquidity to, among other things, continue to

operate their businesses, maintain key business relationships, make payroll and satisfy other working capital and operational needs. Funding each of these expenditures is necessary to preserve and maintain the value of the Debtors' estates for the benefit of all parties in interest. Without approval of the DIP Facility on an interim basis, the Debtors would need immediately to cease operations. The DIP Lender has agreed to lend up to the amount of $2.25 million on an interim basis. The Debtors anticipate they will need, at the absolute minimum, the amount of $1.4 million to operate through a two-week period after the Petition Date. Having access to the amount offered by the DIP Lender will assure the Debtors sufficient breathing room to focus on maintaining business operations while dealing with the ongoing demands of the chapter 11 cases.

43. The crucial importance of a debtor's ability to secure postpetition financing to prevent immediate and irreparable harm to its estate repeatedly has been recognized in this district. *See, e.g., In re United Retail Grp., Inc.*, Case No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb 2, 2012) (order approving postpetition financing on an interim basis); *In re Sbarro, Inc.*, Case No. 11-11527 (SCC) (Bankr. S.D.N.Y. Apr. 5, 2011) (same); *In re MSR Resort Golf Course LLC*, Case No. 11-10372 (SHL) (Bankr. S.D.N.Y. Mar. 16, 2011); (same); *In re Great Atl. & Pac. Tea Co.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 13, 2010) (same); *In re Reader's Digest Assoc.*, Case NO. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2009) (same); *In re Tronox Inc.*, Case No. 09-10156 (ALG) (Bankr. S.D.N.Y. Jan 13, 2009) (same)., Accordingly, for the reasons set forth above, prompt entry of the Interim Order is necessary to avert immediate and irreparable harm to the Debtors' estates and is consistent with, and warranted under, Bankruptcy Rule 4001(c)(2).

44. Accordingly, the Debtors request that, pending the Final Hearing, the Court schedule an interim hearing on the Petition Date or as soon thereafter as is practical to consider the Debtors' request for authorization to obtain interim financing under the DIP Facility.

G. Modification of the Automatic Stay Is Warranted.

45. The Interim Order provides that the automatic stay provisions under section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to permit the DIP Lender to exercise, upon the occurrence and during the continuation of any Event of Default, all rights and remedies provided for in the DIP Term Sheet, and to take various actions without further order of or application to the Court. The Interim Order also proposes that the DIP Lender must provide the Debtors, any committee and the U.S. Trustee with three (3) business days' written notice prior to exercising any enforcement rights or remedies in the Event of Default.

46. Stay modification provisions of this sort are ordinary and usual features of debtor in possession financing facilities and, in the Debtors' business judgment, are reasonable under the present circumstances. *See, e.g., In re United Retail Grp., Inc.*, Case No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 22, 2012); *In re Sbarro, Inc.*, Case No. 11-11527 (SCC) (Bankr. S.D.N.Y. May 4, 2011); *In re MSR Resort Golf Course LLC*, Case No. 11-10372 (SHL) (Bankr. S.D.N.Y. Jan. 25, 2011); *In re Great Atl. & Pac. Tea Co.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Jan. 11, 2011); *In re InSight Health Servs. Holdings Corp.*, Case No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan 4, 2011). Accordingly, the Court should modify the automatic stay to the extent contemplated under the DIP Facility Term Sheet and the proposed DIP Orders.

H. Request for Final Hearing.

47. Pursuant to Bankruptcy Rules 4001(c)(2), the Debtors request that the Court set a date for the Final Hearing that is as soon as practicable, but in no event later than, 15 days

following the Petition Date, and fix the time and date prior to the Final Hearing for parties to file objections to this Motion.

I. Waiver of Bankruptcy Rules Regarding Notice and Stay of an Order.

48. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "an 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." As set forth above, the DIP Facility is essential to prevent irreparable damage to the Debtors' operations, value, and ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

IX. Notice

49. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the Southern District of New York; (ii) counsel to the DIP Lender; (iii) counsel to Blue Bay; (iv) counsel to Atari S.A.; (v) 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 (vi) 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.

X. No Prior Request

50. 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 (i) enter an order, substantially in the form of the Interim Order, granting the relief requested herein, and (ii) grant to the Debtors such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 22, 2013

Respectfully submitted,

/s/ *Peter S. Partee, Sr.*

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