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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:)	Chapter 11
)	
ATARI, INC., <i>et al.</i> ,)	Case No. 13-10176 (JMP)
)	
Debtors. ¹)	Joint Administration Requested
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**APPLICATION OF THE DEBTORS AND DEBTORS-IN-POSSESSION FOR
ENTRY OF AN ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION
OF BMC GROUP, INC. AS NOTICING AND CLAIMS AGENT FOR THE DEBTORS**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), by and through their undersigned proposed counsel, hereby submit this application (the “Application”) for the entry of an order substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), pursuant to 28 U.S.C. § 156(c), Rule 2002 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), Rule 5075-1(a) of the Local Rules for the United States Bankruptcy Court for the Southern District of New York (the “Local Rules”), and General Order M-409, *In re Retention of a Claims and Noticing Agent Pursuant to 28 U.S.C. § 156(c)* (Bankr. S.D.N.Y. Sept. 22, 2010) (“General Order M-409”), authorizing the Debtors to

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

retain BMC Group, Inc. (“BMC Group”) as their claims and noticing agent effective as of the Petition Date (defined below). In support of this Motion, the Debtors rely on (i) *the Declaration of Tinamarie Feil in Support of Application of the Debtors and Debtors-in-Possession for Entry of an Order Authorizing the Employment and Retention of BMC Group, Inc. as Noticing and Claims Agent for the Debtors* (the “Feil Declaration”), which is attached hereto as **Exhibit B**; and (ii) *the Declaration of Peter S. Peter, Sr., in Support of Application of the Debtors and Debtors-in-Possession for Entry of an Order Authorizing the Employment and Retention of BMC Group, Inc. as Noticing and Claims Agent for the Debtors* (the “Partee Declaration”), which is attached hereto as **Exhibit C**. In further support of this Application, 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, 11 U.S.C. §§ 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 *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, which is being filed contemporaneously with this Motion.

II. Jurisdiction, Venue and Predicates for Relief Requested

4. 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).

5. The predicates for the relief requested herein are 28 U.S.C. § 156(c), Bankruptcy Rule 2002, Local Rule 5075-1(a), and General Order M-409.

III. Relief Requested

6. By this Application, the Debtors seek entry of the Proposed Order authorizing them to retain BMC Group as their noticing and claims agent effective as of the Petition Date in accordance with the terms and conditions of the Agreement for Services, dated January 15, 2013 (the “Retention Agreement”), by and between the Debtors and BMC Group. A copy of the Retention Agreement is annexed hereto as **Exhibit D**.

A. BMC Group’s Qualifications

7. BMC Groups specializes in chapter 11 administration and related tasks, including noticing, claims processing, voting, and other administrative tasks in chapter 11 cases. The Debtors desire to engage BMC Group to prepare and send certain designated notices and to maintain claims files and a claims register. The Debtors believe that such assistance will expedite service of notices, streamline the claims administration process and permit the Debtors to focus on their reorganization efforts.

8. The Debtors submit that BMC Group is well-qualified to serve in the capacity as claims and noticing agent and that BMC Group's retention is in the best interests of the Debtors' estates, creditors, and other parties in interest. BMC Group has provided identical or substantially similar services in other chapter 11 cases filed in this District and elsewhere, including, among others: InSight Health Services Holdings Corp., et al., Case No. 10-16564 (Bankr. S.D.N.Y. 2010); FairPoint Communications, Inc. et al., Case No. 09-16335 (Bankr. S.D.N.Y. 2009); In re Dana Corp., et al., Case No. 06-10354 (Bankr. S.D.N.Y. 2006); Coach Am Group Holdings Corp. et al., Case No. 12-10010 (Bankr. D. Del. 2012); Cano Petroleum, Inc., et al., Case No. 12-31549 (Bankr. N.D. Tex. 2012); The Cliffs Club & Hospitality Group, Inc., et al., Case No. 12-01220 (Bankr. D.S.C. 2012); Graceway Pharmaceuticals, LLC., et al., Case No. 11-13036 (Bankr. D. Del. 2011); In re Urban Brands, Inc. et al., Case No. 10-13005 (Bankr. D. Del. 2010); In re Ultimate Escapes Holdings, LLC, et al., Case No. 10-12915 (Bankr. D. Del. 2010); LC Liquidating f/k/a Lincolnshire Campus, LLC, et al., Case No. 10-34176 (Bankr. N.D. Tex. 2010); TriDimension Energy, L.P., et al., Case No. 10-33565 (Bankr. N.D. Tex. 2010); Erickson Retirement Communities, LLC, et al., Case No. 09-37010 (Bankr. N.D. Tex. 2009); In re NextMedia Group, Inc., et al., Case No. 09-14463 (Bankr. D. Del. 2008); In re Kitty Hawk, Inc., et al., Case No. 07-44536 (Bankr. N.D. Tex. 2007).

9. By appointing BMC Group as the noticing and claims agent in these chapter 11 cases, the Debtors and the creditors of their estates will benefit from BMC Group's significant experience in acting as noticing and claims agent in other cases and the efficient and cost effective methods that BMC Group has developed in its years of providing case administration services. Utilizing BMC Group as the Debtors' noticing and claims agent in these cases will

allow the Debtors to avoid duplication in claims administration and in providing notices to their creditors.

10. Additionally, the large number of creditors and other parties-in-interest involved in the Debtors' chapter 11 cases would almost certainly impose heavy administrative and other burdens upon the Court and the Office of the Clerk of the Court (the "Clerk's Office"). To relieve the Court and the Clerk's Office of these burdens, the Debtors propose to engage BMC Group as their noticing and claims agent in these chapter 11 cases.

11. Accordingly, the Debtors submit that the retention of BMC Group as their noticing and claims agent in these cases pursuant to the Retention Agreement will promote the economical and efficient administration of their estates.

B. Services To Be Provided

12. The Debtors propose to retain BMC Group on the terms and conditions set forth in the Retention Agreement. Under the Retention Agreement, BMC Group has agreed to perform the following services, if necessary, at the request of the Debtors or the Clerk's Office:

- (a) notify all potential creditors of the filing of the Debtors' bankruptcy petitions and of the setting of the date for the first meeting of creditors, pursuant to § 341(a) of the Bankruptcy Code, under the proper provisions of the Bankruptcy Code and the Bankruptcy Rules;
- (b) maintain an official copy of the Debtors' schedules of assets and liabilities and statements of financial affairs (collectively, the "Schedules") listing the Debtors' known creditors and the amounts owed thereto;
- (c) notify all potential creditors of the existence and amount of their respective claims, as evidenced by the Debtors' books and records and as set forth in the Schedules;
- (d) furnish a notice of the last day for the filing of proofs of claim and a form for the filing of a proof of claim, after such notice and form are approved by this Court;

- (e) maintain a post office box for the purpose of receiving claims;
- (f) for all notices, file with the Clerk's Office an affidavit or certificate of service which includes a copy of the notice, a list of persons to whom it was mailed (in alphabetical order), and the date mailed, within seven (7) days of service;
- (g) docket all claims received by the Clerk's Office, maintain the official claims registers (the "Claims Registers") for each Debtor on behalf of the Clerk's Office, and, upon the Clerk's Office's request, provide the Clerk's Office with certified duplicate unofficial Claims Registers;
- (h) specify, in the applicable Claims Register, the following information for each claim docketed: (i) the claim number assigned, (ii) the date received, (iii) the name and address of the claimant and agent, if applicable, who filed the claim, (iv) the filed amount of the claim, if liquidated, and (v) the classification(s) of the claim (e.g., secured, unsecured, priority, etc.) according to the proof of claim;
- (i) record all transfers of claims and provide any notices of such transfers required by Bankruptcy Rule 3001(e);
- (j) relocate, by messenger, all of the court-filed proofs of claim to the offices of BMC Group, not less than weekly;
- (k) upon completion of the docketing process for all claims received to date for each case, turn over to the Clerk's Office copies of the Claims Registers for the Clerk's Office review (upon the Clerk's Office's request);
- (l) make changes in the Claims Registers pursuant to Court Order;
- (m) maintain the official mailing list for each Debtor of all entities that have filed a proof of claim, which list shall be available upon request by a party-in-interest or the Clerk's Office;
- (n) thirty (30) days prior to the close of these cases, arrange to have submitted to the Court a proposed order dismissing BMC Group and terminating the services of BMC Group upon completion of its duties and responsibilities and upon the closing of these cases;
- (o) file with the Court the final version of the Claims Registers immediately before the close of the these cases; and
- (p) at the close of these cases, box and transport all original documents in proper format, as provided by the Clerk's Office, to the Federal

Archives Record Administration, located at Central Plains Region,
200 Space Center Drive, Lee's Summit, MO 64064.

C. Compensation

13. The Debtors request authority to compensate and reimburse BMC Group in accordance with the payment terms, procedures and conditions set forth in the Retention Agreement for services rendered and expenses incurred in connection with these cases.

14. As set forth in the Retention Agreement, BMC Group will be compensated in the ordinary course of business based on the services it provides at the rates set forth therein. The Debtors submit that the Retention Agreement contemplates compensation at a level that is reasonable and appropriate for services of this nature, and is consistent with the compensation arrangement charged by BMC Group in other cases in which it is retained to provide similar services. Prior to the filing of these chapter 11 cases, the Debtors have paid BMC Group a retainer of \$5,000.00 (the "Retainer").

14. The Debtors request that the fees and expenses of BMC Group incurred in the performance of the above services be treated as an administrative expense of the Debtors' chapter 11 estates and be paid by the Debtors in the ordinary course of business; provided, however, that BMC Group shall apply the balance of its Retainer (after the payment of prepetition fees and expenses) against any postpetition fees and expenses prior to payment under any carve-out provided for in any cash collateral or financing orders entered in the chapter 11 cases. Accordingly, BMC Group will not be required to file interim or final applications in these cases for fees or expenses paid in accordance with the Retention Agreement.

15. If any dispute arises between BMC Group and the Debtors with respect to fees and expenses, such dispute shall be presented to the Court for resolution thereof.

16. In the event these chapter 11 cases are converted to cases under chapter 7 of the Bankruptcy Code, the Debtors request that BMC Group continue to be paid for its services until the claims filed in these cases have been completely processed, and that if claims agent representation is necessary in the converted chapter 7 cases, BMC Group would continue to be paid in accordance with 28 U.S.C. § 156(c).

17. BMC Group has informed the Debtors that it would maintain records of all services provided, showing dates, categories of services, fees charged, and expenses incurred and that it would serve monthly invoices on the Debtors, counsel for the Debtors, the Office of the United States Trustee (the “U.S. Trustee”) and any official committees that may be appointed in these chapter 11 cases.

18. BMC Group will comply with all requests of the Clerk’s Office and follow the guidelines promulgated by the Judicial Conference of the United States for the implementation of 28 U.S.C. § 156(c).

D. BMC Group’s Disinterestedness

19. Although the Debtors do not propose to retain BMC Group under section 327 of the Bankruptcy Code, BMC Group nonetheless has reviewed its electronic database and, to the best of its knowledge and except as disclosed in the Feil Declaration, BMC Group does not (a) hold or represent an interest materially adverse to the Debtors’ estates with respect to any matter for which it will be employed or (b) have any materially adverse connection to the Debtors, their creditors or other relevant parties.

20. As set forth in the Feil Declaration, (i) BMC Group is not a creditor of the Debtors as of the Petition Date; and (ii) BMC Group is a “disinterested person,” as defined in section 101(14) of the Bankruptcy Code.

21. As further set forth in the Feil Declaration, BMC Group represents, among other things, that:

- (a) it will not consider itself employed by the United States government and shall not seek any compensation from the United States government in its capacity as noticing and claims agent in these chapter 11 cases;
- (b) by accepting employment in these chapter 11 cases, it waives any right to receive compensation from the United States government in its capacity as noticing and claims agent in these cases;
- (c) in its capacity as noticing and claims agent in these cases, it is not an agent of the United States government and is not acting on behalf of the United States government; and
- (d) it will not employ any past or present employees of the Debtors for work involved in these chapter 11 cases.

22. To the extent BMC Group discovers any new relevant facts or relationship bearing on the matters described herein during the period of its retention, BMC Group will use reasonable efforts to supplement the Feil Declaration.

IV. Basis for Relief Requested

23. Bankruptcy Rule 2002 generally regulates what notices must be given to creditors and other parties in interest in bankruptcy cases. Under Bankruptcy Rule 2002, the Court may direct that some person other than the Clerk's Office give notice of the various matters described below.

24. Moreover, 28 U.S.C. § 156(c), which governs the staffing and expenses of bankruptcy courts, states in pertinent part:

Any court may utilize facilities or services, either on or off the court's premises, which pertain to the provision of notices, dockets, calendars, and other administrative information to parties in cases filed under the provisions of title 11, United States Code, where the cost of such facilities or services are paid for out of the assets of the estate and are not charged to the United States. The utilization of such facilities or services shall be subject to such

conditions and limitations as the pertinent circuit council may prescribe.

28 U.S.C. § 156(c).

25. Local Rule 5075-1(a) also provides, in relevant part:

The Court may direct, subject to supervision of the Clerk, the use of agents either on or off the Court's premises to file Court records, either by paper or electronic means, to issue notices, to maintain case dockets, to maintain Judges' calendars, and to maintain and disseminate other administrative information where the costs of such facilities or services are paid for by the estate.

Local Bankr. R. 5075-1(a).

26. Additionally, General Order M-409 authorizes the retention of an approved claims and noticing agent in a case having less than one thousand creditors, provided that such retention is obtained by Court order. Although the Debtors estimate that they have a few hundred creditors, but less than one thousand creditors, due to the anticipated administrative burden on the Clerk's Office in these chapter 11 cases, the engagement of BMC Group is in the best interests of the Debtors' estates, their creditors, and parties in interest.

27. The Court also has promulgated a protocol "to ensure the use of a competitive process in the selection of claims and noticing agents in instances where the Court has authorized such use under 28 U.S.C. § 156(c)" (the "Claims Agent Protocol"). See *Protocol for the Employment of Claims and Noticing Agents* (Bankr. S.D.N.Y. Nov. 15 2011). In compliance with the Claims Agent Protocol, the Debtors obtained and reviewed engagement proposals from other court-approved claims and noticing agents to ensure selection through a competitive process. The Debtors submit that based on all engagement proposals obtained and reviewed that BMC Group will provide the most cost effective and efficient service as a claims and noticing agent for these chapter 11 cases.

28. For all the foregoing reasons, the Debtors believe that the retention of BMC Group as the noticing and claims agent is appropriate and in the best interests of the Debtors, their estates and the creditors. As an administrative agent and an adjunct to the Court, the Debtors do not believe that BMC Group is a “professional person” whose retention is subject to approval under section 327 of the Bankruptcy Code or whose compensation is subject to approval of the Court under sections 330 and 331 of the Bankruptcy Code.

V. Notice

29. Notice of this Motion will be provided to: (a) the Office of the United States Trustee for the Southern District of New York; (b) 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; (c) Internal Revenue Service; (d) the New York State Attorney General; (e) counsel for Tenor Capital Management Company, L.P.; (f) counsel for Atari, S.A.; (g) counsel for Blue Bay Multi-Strategy (Master) Fund Limited and Blue Bay Value Recovery (Master) Fund Limited; and (h) 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.

VI. No Prior Request

15. No prior application for the relief requested in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court (a) enter an order substantially in the form of the Proposed Order granting the relief requested herein, and (b) grant the Debtors such other and further relief to the Debtors as the Court may deem just and proper.

Dated: New York, New York
January 22, 2013

Respectfully submitted,

/s/ Peter S. Partee, Sr.

Peter S. Partee, Sr.

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