Hearing Date and Time: June 6, 2013 at 10:00 a.m. (ET)
Objection Deadline (as Extended by Debtors): May 28, 2013

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: ATARI, INC., et al., Debtors,[1]	)	Chapter 11 Case No. 13-10176 (JMP)

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS WITH RESPECT TO DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ADOPT AND IMPLEMENT A SALE INCENTIVE PLAN

The Official Committee of Unsecured Creditors (the "Committee") of Atari, Inc., *et al.*, as debtors and debtors-in-possession in these proceedings (the "Debtors"), by its undersigned counsel, hereby submits this objection (collectively, the "Objection") with respect to the Debtors'

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

Motion (the "Motion")[2] (Doc. No. 144) *for Entry of an Order Authorizing the Debtors to Adopt and Implement (I) a Sale Incentive Plan* (the "Bonus Plan") *and (II) a Loyalty Plan* (the "Loyalty Plan").

PRELIMINARY STATEMENT

The Debtors have adjourned the hearing to approve the Bonus Plan multiple times in order to continue to market their assets as a going concern and in the hope that the Debtors' secured lender and majority equity holder, Alden, would negotiate and finalize a global settlement with the Committee that would guaranty a meaningful distribution to unsecured creditors. Throughout the various adjournments, it became abundantly clear that in order for the core parties in this case to agree on guaranteed (i) recoveries to general unsecured creditors through a global settlement with Alden and (ii) bonuses to executive management, through approval of the Bonus Plan, the Debtors needed to identify aggregate stalking horse bid(s) that were high enough to fund any and all such payments and meet certain minimum requirements of Alden. Unfortunately, the Debtors were unable to identify acceptable stalking horse bid(s) sufficient to meet such financial demands. Nevertheless, the Debtors have elected to move forward and seek approval of guaranteed payments to the Bonus Plan participants, while recoveries to all other creditors of the Debtors' estates remain uncertain.

The Debtors have not chosen a stalking horse and stand poised to enter into a sale process designed to maximize value by selling off the Debtors' assets in pieces through a series of

[2] Capitalized terms used herein but not otherwise defined shall have the meanings given to them in the Motion.

"naked" auctions. At the same time, Alden and the Committee face the likely prospect of litigation over the proceeds of such sales. Notwithstanding the radical change in the direction of the cases, the Debtors have decided to plow forward seeking approval of the Bonus Plan in an attempt to allocate a portion of the sale proceeds to eight[3] senior level employees, including three executives and five senior management-level employees.

While the Debtors have filed the details of the Bonus Plan under seal purportedly to protect the confidentiality of the affected employees, it appears more likely this information was deemed "confidential" to shield the magnitude of such payments from public scrutiny. Suffice to say, as discussed in greater detail in the Declaration of Brent Williams (the "Williams Declaration") annexed hereto and filed contemporaneously herewith under seal to maintain the Debtors' requested confidentiality, the Bonus Plan provides substantial bonuses to the plan participants at thresholds that should not be difficult to attain. Moreover, the Bonus Plan discriminates among the plan participants, providing the Debtors' top 3 executives an opportunity to receive bonus payments in excess of their annual salaries and guaranteed floor bonuses for merely repaying the DIP Facility. While the Debtors portray these bonuses as incentive payments, they are designed as a reward for the participating executives if they remain through the sale process as compensation upon their departure to ease the blow of unemployment. The Bonus Plan is an impermissible retention plan with very low performance thresholds—simply the full repayment of the DIP for the first payment to the top three Bonus

[3] The Committee understands that the Debtors have reduced the number of Bonus Plan participants from nine to eight.

Plan participants—and sales thresholds well below projected asset values for additional bonus payments to all plan participants.

To be clear, the Committee does not fault the Debtors for attempting to address the individual needs of their executives. That said, as the DIP Facility does not provide funding for the Bonus Payments, and the amount and allocation of sale proceeds among the Debtors' creditors is far from certain at this stage of the cases, the Bonus Plan irresponsibly seeks to pick the pockets of the Debtors' creditors for whom meaningful distributions are not guaranteed. In conjunction with its Objection, the Committee is scheduled to depose James Wilson (the Debtors' CEO and a participant under the proposed Bonus Plan), Robert Mattes (the Debtors' CFO and a participant under the proposed Bonus Plan), and a representative of the Debtors' investment bankers, Perella Weinberg Partners ("Perella"). The Committee further reserves its right to amend and supplement this Objection as a result of any supplemental discovery completed prior to the hearing on the Bonus Plan.

BACKGROUND

1. On January 21, 2013 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No request for the appointment of a trustee or an examiner has been made in these cases.

2. By an order entered on January 24, 2013, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered (Doc. No. 27). On

February 6, 2013, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed the Committee in these chapter 11 cases (Doc. No. 64).

3. On March 7, 2013, the Court entered a final order (Doc. No. 125) approving the senior secured super priority financing (the "DIP Facility") provided by Alden Global Distressed Opportunities Master Fund, L.P. and Alden Global Value Recovery Master Fund, L.P. (collectively, "Alden" or the "DIP Lender").

4. On March 19, 2013, the Debtors filed the Motion seeking approval of the Bonus Plan and the Loyalty Plan. On April 9, 2013 the Debtors filed a notice of adjournment of the hearing on the Motion (Doc. No. 178), which adjourned the hearing until April 11, 2013. On that date, the Court entered an order approving the relief requested by the Debtors in the Motion, solely as it relates to the Loyalty Plan, which the Committee and the U.S. Trustee did not oppose. The Motion, as it relates to the Bonus Plan, was further adjourned to April 18, 2013. The hearing on the Motion was further adjourned to May 9, 2013 at 10:00 a.m. and then subsequently further adjourned to June 6, 2013 at 10:00 a.m.

OBJECTION

5. The Bonus Plan is an impermissible retention program designed to richly compensate the participating executives for work that has already been completed. In short, the primary purpose of the Bonus Plan is to encourage certain insiders to remain with the Debtors while Perella completes the sale process. The Bonus Plan is tied to work that has already been substantially completed and will not serve to further incentivize the Bonus Plan participants to maximize the value of the Debtors' assets. Because the Debtors' assets have already been fully

marketed, the Bonus Plan participants' continued assistance in the sale process is no longer necessary. Whether the Bonus Plan is approved or not, Perella will be paid a substantial transaction fee upon consummation of a sale of the Debtors' assets. The estates should not be saddled with the added expense of the Bonus Plan, which will have no benefit to the estates or creditors.

I. Payments Under the Bonus Plan Are Impermissible Retention Payments to Insiders That Violate Section 503(c)(1)

6. The Debtors admit that three of the participants in the Bonus Plan are "insiders" within the meaning of the Bankruptcy Code, and have provided no evidence as to whether the remaining six "senior-management level" employees are insiders. With respect to insiders of the Debtors, the Bonus Plan is impermissible under Section 503(c) of the Bankruptcy Code, through which Congress sought to impose strict limits on payment of retention bonuses to insiders. Section 503(c)(1) generally prohibits debtors from paying retention bonuses to insiders unless a heightened standard is satisfied. See 11 U.S.C. § 503(c)(1).[4]

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[4] Section 503(c)(1) of the Bankruptcy Code prohibits:

> a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtors' business, absent a finding by the court based on evidence in the record that
>
> (A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
>
> (B) the services provided by the person are essential to the survival of the business; and
>
> (C) either –
>
> (i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to

7. Notwithstanding that the Debtors conveniently assert that the section 363(b) "business judgment rule" and/or section 503(c)(3) should apply (Motion ¶¶ 27-31), the "pay to stay" nature of the Bonus Plan is clear, therefore requiring section 503(c)(1) scrutiny, which requires denial of the Motion. Even the Motion admits that the Debtors formulated the Bonus Plan upon "recognizing the need to ***retain*** the Participating Employees" (Motion ¶ 1) (emphasis added).

8. Where the primary purpose of a bonus is to ensure the retention of an insider, the plan under which that bonus is paid must satisfy the challenging standards of section 503(c)(1), notwithstanding how the plan is labeled. See In re Dana Corp., 351 B.R. 96, 102 n.3 (Bankr. S.D.N.Y. 2006) ("Dana I") (stating that, if a bonus plan "walks like a duck (KERP), quacks like a duck (KERP), it's a duck (KERP)"); In re Nellson Nutraceutical, Inc., 369 B.R. 787, 802 (Bankr. D. Del. 2007). Courts consider the circumstances under which particular bonus proposals are made, along with the structure of the compensation packages, when determining whether bonus plans are subject to the rigorous criteria in section 503(c)(1). Compare Dana I, 351 B.R. at 102 (stating that "without tying [a] portion of [a] bonus to anything other than

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nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

11 U.S.C. §503(c)(1).

staying with the company until the Effective Date, this Court cannot categorize a bonus of this . . . form as an incentive bonus.") with In re Dana Corp., 358 B.R. 567, 584 (Bankr. S.D.N.Y. 2006) ("Dana II") (holding that "[b]y presenting an executive compensation package that properly incentivizes [management] to produce and increase the value of the estate, the Debtors have established that section 503(c)(1) does not apply").

9. It is the Debtors' burden to establish that the Bonus Plan is incentivizing rather than retentive, thereby alleviating the need for a section 503(c)(1) analysis. In re Borders Group, Inc., 453 B.R. 459, 471 (Bankr. S.D.N.Y. 2011). To be incentivizing rather than retentive, a bonus must be tied to achievement of particular milestones or accomplishment of transactions; the plan should "encourage[] the [participants] to increase their pre-bankruptcy job responsibilities to achieve the bonus requirements . . . to do more to meet wide-scale goals . . . ." Id. at 472. Merely emerging from bankruptcy is not a sufficiently incentivizing objective. In re Residential Capital, LLC, 478 B.R. 154, 172 (Bankr. S.D.N.Y. 2012) ("Other cases in this district make clear that triggering bonus awards solely on the basis of a sale transaction, confirming a reorganization plan or exiting bankruptcy are not sufficient to shift consideration of a plan providing for payment to insiders from section 503(c)(1) to section 503(c)(3).") (collecting cases). Indeed, incentive plans approved in this district, and in others, are based on the achievement of certain financial performance metrics. See, e.g., In re Velo Holdings, Inc., 472 B.R. 201, 205-07 (Bankr. S.D.N.Y. 2012) (under approved incentive program, $2 million was allocated to one of the debtors' business units to be paid to (i) non-executive employees based upon net proceeds generated for creditors and (ii) executive employees provided that the

debtors met the net operating cash flow covenant in their postpetition credit agreement over the initial thirteen weeks of their cases; the amounts allocated under the incentive program to the debtors' other business units were to be paid depending principally on whether, how, and for what value, each unit was sold); In re BearingPoint, Inc., No. 09-10691 (REG) (Bankr. S.D.N.Y. July 24, 2009) [Docket No. 1128] (incentives based on (i) the sale of business units, (ii) employees remaining with the debtors to conclude the wind-down of residual assets, and (iii) percentage of creditor recoveries); In re Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. May 15, 2006) [Docket No. 1580] (size of emergence incentive pool tied to the debtor's market adjusted enterprise value and plan adjusted enterprise value); In re Nortel Networks, Inc., Case No. 09-10138 (KG) (Bankr. D. Del. Mar. 5 and 20, 2009) [Docket Nos. 389, 436 and 511] (emergence incentive plan based on the achievement of separate milestones, including a cost reduction plan, "certain parameters . . . that will result in a leaner and more focused organization," and plan confirmation).

10. The Debtors argue that the Bonus Plan will "properly provide an incentive to the Participating Employee to remain dedicated to their jobs and to perform to the best of their abilities through the restructuring and sale processes." (Motion ¶ 29) Increased workload for senior management, which virtually always is the case in chapter 11, does not warrant the payment of bonuses to insiders. Residential Capital, 479 B.R. at 168 (stating that "section 503(c) requires more than increased responsibilities to justify increased pay for insiders"). Similar to Residential Capital, underlying the Debtors' argument is their acknowledgment of the significant retentive purpose of the Bonus Plan. See id. at 168 n.21.

11. Other recent opinions rendered by this Court further show that the Debtors' Motion cannot be approved. See In re Hawker Beechcraft, Inc., 479 B.R. 308 (Bankr. S.D.N.Y. 2012); In re Residential Capital, LLC, 479 B.R. 154 (Bankr. S.D.N.Y. 2012). In Hawker Beechcraft, Judge Bernstein denied approval of a so-called incentive program applying to eight insiders because, "when viewed as a whole, [the plan] sets the minimum bonus bar too low to qualify as anything other than a retention program for insiders." Id. at 309.[5] Similarly, in Residential Capital, Judge Glenn denied approval of a plan providing bonuses to seventeen insiders under section 503(c)(1). There, Judge Glenn determined that the debtors failed to carry their burden to show that vesting 63 percent of the plan's awards based solely upon the closing of two section 363 asset sales was not primarily retentive in nature. Residential Capital, 479 B.R. at 171-72.[6]

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[5] The proposed incentive plan in Hawker Beechcraft offered two mutually exclusive paths for awarding bonuses to the participants depending on whether the debtors consummate a debt-to-equity conversion pursuant to a plan of reorganization (the "Standalone Plan") or a sale to a third party (the "Third-Party Transaction"). Id. at 311. Judge Bernstein decided that the debtors failed to meet their burden of proving that the plan is not a retentive plan governed by section 503(c)(1) because (i) they did not identify the roles of each plan participant or establish why their services are necessary to achieve the plan's targets and (ii) the plan's lowest levels were well within reach. Id. at 313. The court determined that, given the indefinite deadlines and low financial targets tied to both the Standalone Plan and the Third-Party Transaction, the plan participants were likely to earn some bonus under the plan "merely by remaining with the Debtors and regardless or the road the Debtors take . . . " Id. at 315.

[6] The proposed incentive plan in Residential Capital provided that portions of the bonus award would vest upon the accomplishment of five milestones—two milestones were tied to the debtors closing two asset sales, and three milestones were related to financial and operational performance. Id. at 163-64. The marketing and negotiation of the assets sales was largely conducted before the debtors filed for bankruptcy protection. Id. at 159. Under the incentive plan, 63 percent of their overall bonus award would vest upon the closing of the asset sales without the occurrence of an auction. Id. at 157 n.2. In denying the approval of the debtors' "incentive" plan, the court noted that incentive payments are justified when participants are faced with more than a mere increase in their ordinary responsibilities, because chapter 11, by its very nature, increases employee workload. Id. at 168. Since the terms of the asset sales

12. Here, the Debtors have failed to sustain their burden of proof because they have not established that the Bonus Plan contains sufficiently challenging targets designed to "motivate insiders to rise to a challenge" (from the date of the Bonus Plan hearing going forward) rather than "merely report to work." See Hawker Beechcraft, 479 B.R. at 313. The bonuses to be paid to the top three executives under the Bonus Plan upon repayment of the DIP obligations are almost certain to occur whether or not the top three employees take any action whatsoever. The Debtors have failed to make any showing that the proposed sale benchmarks are not mere "lay-ups" and that the targets are actually difficult to achieve hurdles that will present a real challenge to the insiders. The non-incentivizing nature of the proposed sale-related benchmarks are discussed in more detail in the Williams Declaration. Moreover, the sale process is nearly complete and it is unclear what, if anything, the Bonus Plan participants can do to assist the Debtors' advisors in maximizing the value received for the Debtors' assets.

13. Because the Bonus Plan is primarily retentive, it is subject to the stringent requirements of Section 503(c)(1). The Debtors, therefore, must prove three elements before the Bonus Plan may be approved: (1) each of the insiders had bona fide job offers at the same or greater compensation; (2) each of the insider's services are essential to the business's survival; and (3) the proposed payments fall within the strict pay limits of Section 503(c)(1)(C). The Debtors have not even attempted to make this showing.

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were substantially negotiated prepetition and most of the overall bonus award would vest as long as the participant remained with the debtors until closing, the court determined that proposed plan was primarily retentive and impermissible under section 503(c)(1). Id. at *171-73.

14. First, the Debtors must show that each insider participant of the Bonus Plan has a bona fide job offer from another business at the same or greater rate of compensation. 11 U.S.C. §503(c)(1)(A). Neither the Motion nor the *Declaration of Adam Verost in Support of the Motion for Entry of an Order Authorizing the Debtors to Adopt and Implement (I) A Sale Incentive Plan and (II) a Loyalty Plan* (the "Verost Declaration") (Doc. No. 144-2) contains any information regarding alternative job offers with respect to any of the Participating Employees. Second, the Debtors must demonstrate that the services provided to the Debtors by the Participating Employees are essential to the survival of the business. 11 U.S.C. §503(c)(1)(B). Again, the Debtors fail to meet their burden with respect to this element. Indeed, as evidenced by the Debtors' recently filed motion for approval of procedures in connection with selling substantially all of their assets (the "Sale Motion") (Doc. No. 222), it is very likely that the business will be split up and sold to multiple buyers. Therefore, no employee is essential to the survival of the business. Finally, in order to satisfy the third prong of Section 503(c)(1), the Debtors must demonstrate that the amounts paid to insiders pursuant to the Bonus Plan are not in excess of the maximum provided for in Section 503(c)(1)(C)(i)-(ii) of the Bankruptcy Code. As is set forth in the Williams Declaration, certain of the proposed payments to insiders under the Bonus Plan would be in excess of the Section 503(c)(1)(C)(i) cap. See Williams Declaration ¶11. Because the Debtors have not, and cannot, satisfy their burden under Section 503(c)(1), the Court should deny the Motion.

II. Regardless of Its Purposes, the Bonus Plan Violates Section 503(c)(3)

15. The Debtors assert that the five senior management-level employee participants in the Bonus Plan are "non-insider employees" despite the fact that these employees have titles like "senior vice president" and "executive vice president". See Williams Declaration ¶4. The Debtors have failed to provide sufficient information for the Court to determine whether these senior employees are insiders of the Debtors. As an initial matter, in evaluating the validity of a key employee incentive plan, the Court must determine whether each eligible employee is an "insider" within the meaning of section 101(31). See generally, In re Borders Grp. Inc., 453 B.R. 459 (Bankr.S.D.N.Y.2011). If the Court determines that an employee is an insider, then the Debtors must meet the strict requirements of section 503(c)(1). The term "insider" is specifically defined by the Bankruptcy Code, see 11 U.S.C. § 101(31)(B).[7] The term "officer" is likewise not defined by the Code. However, courts have looked to Black's Law Dictionary as a source of authority. See Borders at 468. According to Black's, an "officer" is defined as a "person elected or appointed by the board of directors to manage the daily operations of a corporation, such as the CEO, president, secretary, or treasurer." BLACK'S LAW DICTIONARY 1193 (9th ed.

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[7] Section 101(31)(B) defines "insider" in the context of a corporation. The term includes a

(i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;
(iv) partnership in which the debtor is a general partner;
(v) general partner of the debtor; or
(vi) relative of a general partner, director, officer, or person in control of the debtor.

2009). Courts have also looked to state corporate law (including the Delaware Code) for additional guidance. Id. at 469.

16. If, as the Debtors assert, evidence sustains the Debtors' assertion that these employees are not insiders, then the Bonus Plan with respect to non-insider employees may be reviewed under the general administrative expense standards of Section 503(b) and the business judgment standard of Section 503(c)(3). Likewise, if this Court determines that the Bonus Plan is not primarily retentive with respect to the insiders, then the Bonus Plan as it applies to insiders would also be subject to review under Sections 503(b) and 503(c)(3). This Bonus Plan fails to pass muster under any standard.

17. Section 503(c)(3) of the Bankruptcy Code prohibits "transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case." 11 U.S.C. § 503(c)(3). Section 503(c)(3) reiterates the standards for assessing transactions outside the ordinary course of business under section 363, based on the business judgment of the debtor. Dana II, 358 B.R. at 576; but see In re Pilgrim's Pride Corp., 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (holding that section 503(c)(3) sets a higher standard of review and should not be equated to the business judgment rule as applied under section 363; to do so would render 503(c)(3) redundant, and explaining that "even if a good business reason can be articulated for a transaction, the court must still determine that the proposed transfer or obligation is justified in the case before it"). Courts consider several factors when determining whether bonus plans are justified by "the facts and circumstances of the case," including: (1) whether the plan is calculated to achieve the desired performance; (2) whether the plan's cost is

reasonable in the context of the debtor's assets, liabilities and earning potential; (3) whether the scope of the plan is fair and reasonable with respect to included employees; (4) whether the bonuses are consistent with industry standards; (5) whether the debtor performed due diligence in investigating the need for a plan and determining which key employees needed to be incentivized; and (6) whether the debtor's received independent counsel in developing the plan. See Dana II, 358 B.R. at 576-77.

a. The Bonus Plan, With its Easily met Thresholds, Does not Establish a Relationship Between Effort and Outcome

18. The Debtors have not established a nexus, much less a strong one, between the Bonus Plan and the results sought to be achieved. Even under the less rigorous standards of Sections 503(c)(3) and 363, the benchmarks for the payment of bonuses must be "difficult targets to reach." Dana II, 358 B.R. at 583. In addition to providing bonuses merely for repayment of the DIP Facility, the Bonus Plan contains various sale results to be reached before the bonuses become payable. The sale process is being run by Perella, the Debtors' investment banker. While the involvement of certain of the participating employees in the sale process has likely been helpful to date, the proposed payments under the Bonus Plan – well in excess of their normal compensation – are not justified by their continued assistance to Perella. Indeed, because the assets have already been thoroughly marketed to all interested bidders and the sale process is nearly complete, the participating employees are no longer needed to assist Perella, and their sustained efforts are not likely to result in further benefits to the Debtors' estates commensurate with the excessive proposed bonus payments.

19. As set forth more fully in the Williams Declaration, the proposed sale proceeds benchmarks are not "difficult to reach" targets as contemplated by the statute. See Dana II, 358 B.R. at 583. Furthermore, the record is devoid of any evidence that the sale would not be successful without payment of the proposed bonuses to the participating employees.

b. There is Insufficient Evidence to Conclude That the Costs are Reasonable

20. The Debtors fail to submit evidence showing that the costs of the Bonus Plan are reasonable. Rather, the Debtors, through the Verost Declaration, offer only conclusory statements as to the reasonableness of the cost of the Bonus Plan. See Verost Declaration ¶25. Importantly, the cost of the Bonus Plan is not provided for in the budget approved in connection with the DIP Facility. As such, any Bonus Plan payments will come directly out of sale proceeds that would otherwise be available to pay administrative expenses of the estate or to distribute to creditors. For this reason, the excessive Bonus Plan payments should not be approved.

21. The Debtors have also failed to establish whether the Bonus Plan is reasonable because they have failed to show that the Participating Employees would be entitled to receive severance payments in the absence of approval of the Bonus Plan. The Debtors make much of the fact that the Bonus Plan would supersede any prepetition severance benefits available to the Participating Employees, however, the Debtors have failed to provide sufficient evidence as to the Debtors' prepetition severance plan, which the Committee understands was not a formal, written plan, but rather something much more fluid. In light of the foregoing, neither the Committee nor the Court is able to determine whether the cost of the proposed Bonus Plan is reasonable. The Debtors have represented to the Committee that Wilson is the only Participating

Employee who has a written employment contract with the Debtors. Thus, the remaining plan participants, would only be waiving a right to severance purportedly arising under an amorphous, somewhat unsupported and informal, prepetition practice.

c. The Bonus Plan Discriminates Unfairly Among Participants

22. The Debtors seek to implement the Bonus Plan in addition to the Loyalty Plan, which was already approved by the Court. The Committee supported the approval of the Loyalty Plan, which applied to the Debtors' rank-and-file employees. The Committee does not, however, support the Bonus Plan which unfairly fairly treats the Bonus Plan participants (i) relative to each other and (ii) relative to the participants of the Loyalty Plan.

23. In fact, there is a stark difference among the treatment of the various participants under the proposed Bonus Plan. As set forth more fully in the Williams Declaration, under the Bonus Plan certain of the Debtors' insiders stand to receive much more generous payments than others, including the top 3 executives potentially receiving bonuses in excess of their annual salaries. Further, the Bonus Plan provides for much higher payments (as a percentage of annual salary) than the Loyalty Plan. The Debtors have not articulated any justification for the disparate treatment of the Bonus Plan participants either in comparison to each other or as compared to the Loyalty Plan participants. See William Declaration ¶10.

d. It is not Clear that the Bonus Plan Meets Industry Standards

24. The Motion and the Verost Declaration offer no evidence to prove that the Bonus Plan meets industry standards.

e. The Debtors Fail to Establish Their Reasonable Due Diligence in Assessing the Need for and Formulating the Bonus Plan

25. The Debtors assert that they formulated the Bonus Plan upon "recognizing the need to retain the Participating Employees." (Motion ¶1). Other than the unsupported statements that the "aggregate cost, scope and conditions of the Incentive Plans are reasonable given the unique facts and circumstances of these chapter 11 cases," (Verost Declaration ¶29), the Debtors offer no evidence that they undertook any due diligence in assessing the need for the Bonus Plan or to evaluate the cost of the Bonus Plan as compared to plans approved in other cases.

26. The Debtors failed to make the required showing that the Bonus Plan is reasonable and justified by the facts and circumstances of these cases. See Residential Capital, 479 B.R. at 167 ("The Debtors have not provided a basis for the Court to conclude that paying the KEIP Participants 30% more than they earned in each of the prior two years' operating outside of bankruptcy would be justified under the facts and circumstances of this case."). Rather, the Debtors have submitted only conclusory assertions, without identifying any comparable company or comparable incentive plan.[8] In fact, the evidence of incentive plans for comparable companies demonstrates that the Bonus Plan is not reasonable, as is discussed more fully in the Williams Declaration.

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[8] Expert evidence that is conclusory and does not identify its basis should be excluded. See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 311-12 (2d Cir. 2008) (stating that "expert testimony should be excluded if it is speculative or conjectural" and upholding the district court's determination that expert's conclusory assertions offered no basis for denying summary judgment) (quoting Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 22 (2d Cir. 1996)).

27. In sum, the Bonus Plan violates sections 503(b), 503(c)(1) and 503(c)(3) and, therefore, should not be approved.

WHEREFORE, the Committee respectfully requests that the Court sustain the foregoing Objection, deny the Motion with respect to the Bonus Plan, and grant such other and further relief as the Court may deem just and proper.

Dated: May 28, 2013
New York, New York

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