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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
ATARI, INC., <i>et al.</i> ,)	Case No. 13-10176 (JMP)
Debtors. ¹)	(Jointly Administered)

EX PARTE MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO FILE UNDER SEAL PORTIONS OF THE DEBTORS’ OMNIBUS REPLY TO OBJECTIONS TO THE DEBTORS’ PROPOSED SALE INCENTIVE PLAN

The above-captioned debtors and debtors-in-possession (collectively, the “*Debtors*” or the “*Company*”) seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “*Proposed Order*”), pursuant to section 107(b) of title 11 of the United States Code (the “*Bankruptcy Code*”), and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”) authorizing the Debtors to file under seal (the “*Sealing Motion*”) portions of the *Debtors’ Omnibus Reply to Objections to the Debtors’ Proposed Sale Incentive Plan* (the

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

“*Reply*”² redacting certain Confidential Information (as defined below) and provide an unredacted copy of the Reply on an “advisors’ eyes only” basis to the representatives of the (i) the Committee, (ii) the UST, (iii) the DIP Lender and (4) Atari, S.A. (collectively, the “*Receiving Parties*”). In support of the Sealing Motion, the Debtors respectfully state as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are Bankruptcy Code section 107(b) and Bankruptcy Rule 9018.

BACKGROUND

A. The Bankruptcy Cases

2. On 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.

3. 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 pursuant to Bankruptcy Rule 1015(b) [Docket No. 27]. On February 6, 2013, the U.S. Trustee appointed the Committee in these chapter 11 cases [Docket No. 64].

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Reply.

B. The Sale Incentive Plan

4. On March 19, 2013, the Debtors filed 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 “*Motion*”) [Docket No. 144], pursuant to which the Debtors sought approval of a Loyalty Plan and a Sale Incentive Plan.

5. Also on March 19, 2013, the Debtors filed the *Ex Parte Motion for Entry of an Order Authorizing the Debtors to File Under Seal Certain Confidential Information* (the “*Original Sealing Motion*”) [Docket No. 147]. The Original Sealing Motion was approved by the Court on March 20, 2013 [Docket No. 151].

6. Following the filing of the Motion, the Debtors bifurcated the relief requested therein and sought the approval of the Loyalty Plan separately from the Sale Incentive Plan. No objections were filed in connection with the Loyalty Plan and on April 11, 2013, the Court entered an order approving the same [Docket No. 181]. The Debtors will be seeking approval of the Sale Incentive Plan at a hearing scheduled for June 6, 2013.

7. On April 24, 2013, the United States Trustee (the “*U.S. Trustee*”) filed the *Objection of the United States Trustee to Motion for Entry of Order Authorizing the Debtors to Adopt and Implement a Sale Incentive Plan* [Docket No. 195].

8. On May 28, 2013, the Committee filed the *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* [Docket No. 226].

9. On May 30, 2013, the Committee filed its *Ex Parte Motion for Entry of an Order Authorizing the Official Committee of Unsecured Creditors to File Under Seal the Declaration of Brent C. Williams in Support of the Committee’s Objection with Respect to the Debtors’ Motion for Entry of an Order Authorizing the Debtors to Adopt and Implement a Sale Incentive*

Plan (the “*Committee Sealing Motion*”) [Docket No. 228]. The Committee Sealing Motion was approved by the Court on May 30, 2013 (the “*Committee Sealing Order*”) [Docket No. 229].

RELIEF REQUESTED

10. By the Motion, the Debtors seek entry of an order pursuant to Bankruptcy Code section 107(b) and Bankruptcy Rule 9018 authorizing the Debtors to (a) file under seal portions of the Reply, redacting certain Confidential Information and (b) provide an unredacted copy of the Reply to the Receiving Parties on an “advisors’ eyes only” basis.

BASIS FOR RELIEF REQUESTED

11. Bankruptcy Code section 107(b) provides, in relevant part:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court’s own motion, the bankruptcy court may—

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information . . .

11 U.S.C. § 107(b). Bankruptcy Rule 9018, in turn, implements section 107 and states:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . .

Fed. R. Bankr. P. 9018.

12. The Second Circuit has noted that while “the right of public access to court records is firmly entrenched and well supported by policy and practical considerations, the right is not absolute.” *Video Software Dealers Assoc. v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d. Cir. 1994). When open inspection of court records may be used as a vehicle for improper purposes, “courts must deny access to judicial documents.” *Id.* (citing *Nixon v. Warner Commc’ns Inc.*, 435 U.S. 589, 597 (1978)).

13. While court documents are generally open for public inspection, Congress provided an exception for bankruptcy cases in Bankruptcy Code section 107(b). *Id.* Under Bankruptcy Code section 107(b), a party seeking to seal information must show only that the information was “confidential” and “commercial” in nature. *Id.* at 27. The Second Circuit has held that Bankruptcy Code section 107(b) and Bankruptcy Rule 9018 do “not require that commercial information be the equivalent of a trade secret before protecting such information.” *Id.* at 28. In addition, unlike Federal Rule of Civil Procedure 26(c), there is no requirement for “good cause” to be shown before a court grants such a request. *Id.*

14. As set forth in the Original Sealing Motion, the Debtors have sought to limit public access to a very narrow set of information—confidential commercial information relating to compensation of employees participating in the Sale Incentive Plan and the projected values of the Debtors’ Assets (collectively, the “*Confidential Information*”) that serve as benchmarks for the proposed compensation under the Sale Incentive Plan. Historically, the Debtors have kept their employee compensation information confidential. Publishing such information could disrupt the Sale(s) process and the Debtors’ operations. Specifically, as the amount of the incentive awards is not uniform among the Participants, disclosure of the individual award amounts could cause friction among the Participants and undermine the very purpose of the Sale Incentive Plan—to focus the Participants on maximizing proceeds of the Sale(s) process. Additionally, revealing the Sale(s) price benchmarks that were specifically developed for calculating the compensation under the Sale Incentive Plan could improperly influence the Potential Buyers’ bids and adversely impact the results of the Sale(s) process.

15. Against this backdrop, the Court entered the Sealing Order and the Committee Sealing Order. Because the Reply makes frequent references to the Confidential Information,

the relief requested herein is necessary to protect the Debtors' estates and their creditors from the harm that may result from the disclosure of such information. Similar relief has been granted by courts in this and other districts. *See, e.g., In re Arcapita Bank B.S.C.(c)*, Case No. 12-11076 (SHL) (Bankr. S.D.N.Y. July 9, 2012) [Docket No. 304] (authorizing debtors to file confidential employee information relating to an employee incentive plan under seal); *In re Allied Holdings, Inc.*, 337 B.R. 716, n. 1 (Bankr. N.D. Ga. 2005) (court ordered exhibit listing key employees to be filed under seal); *In re Georgetown Steel Co., LLC*, 306 B.R. 542, 547–48 (Bankr. D.S.C. 2004) (holding that key employee names and specific amounts paid to these employees constituted confidential commercial information).

16. The Debtors will provide an unredacted copy of the Reply, on an “advisors’ eyes only” basis, to the Receiving Parties. Accordingly, all key stakeholders in these cases—including the two parties who objected to the Sale Incentive Plan—will have the relevant information contained in the Reply. The Debtors believe that further disclosure of the Confidential Information is not necessary to protect the interests of the Debtors’ creditors. In addition, any party or member of the public with a compelling interest in the Confidential Information may obtain such information by petitioning this Court to have that information disclosed. In short, the relief sought herein is necessary to protect the Debtors’ confidential commercial information and will not impair the ability of this Court to protect the public interest or otherwise prejudice the Debtors’ creditors.

NOTICE

17. Notice of this Sealing Motion has been provided to: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to the DIP Lender; (d) counsel to Atari, S.A.; and (e) all parties who have filed a notice of appearance or have requested services in these chapter 11 cases. A copy of this Sealing Motion is also available on the website of the Debtors’ claims and

noticing agent, BMC Group, Inc., at <http://www.bmcgroup.com/atari>. The Debtors respectfully submit that no other or further notice need be provided.

NO PRIOR REQUEST

18. 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 (a) enter an order substantially in the form annexed hereto as **Exhibit A**, granting the relief requested herein and (b) grant the Debtors such other and further relief as the Court may deem just, proper and equitable.

New York, New York
Dated: June 5, 2013

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EXHIBIT A

Proposed Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

)	
In re:)	Chapter 11
)	
ATARI, INC., <i>et al.</i> ,)	Case No. 13-10176 (JMP)
)	
Debtors. ¹)	(Jointly Administered)
)	

**ORDER AUTHORIZING THE DEBTORS TO FILE UNDER SEAL PORTIONS OF
THE DEBTORS’ OMNIBUS REPLY TO OBJECTIONS TO THE
DEBTORS’ PROPOSED SALE INCENTIVE PLAN**

Upon the motion (the “*Sealing Motion*”)² of the Debtors seeking entry of an order pursuant to Bankruptcy Code section 107(b) and Bankruptcy Rule 9018 authorizing the Debtors to file portions of the Reply under seal; and it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors and other parties in interest; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that the relief requested herein being a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Sealing Motion appearing to be adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Sealing Motion is granted to the extent set forth herein.
2. Pursuant to Bankruptcy Code section 107(b) and Bankruptcy Rule 9018, the Debtors are authorized to file portions of the Reply under seal (the “*Sealed Document*”), redacting certain Confidential Information, with the Court.

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

² Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Sealing Motion.

3. The Clerk of the Bankruptcy Court shall accept the Sealed Document for filing under seal pursuant to this Order.

4. The Sealed Document shall be available to the Court and other parties specifically designated by the Debtors but shall otherwise remain under seal, and may not be unsealed unless authorized by order of the Court.

5. The Debtors shall file the redacted version of the Reply on the docket.

6. The Debtors shall dispose of the Sealed Document at the closing of these cases.

7. The relief granted in this Order is without prejudice to the rights of any party in interest, or the U.S. Trustee, to seek to unseal the Sealed Document.

8. The Debtors are authorized to take all actions necessary and appropriate to effectuate the relief granted pursuant to this Order in accordance with the Motion.

9. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation of this Order.

Dated: June ____, 2013
New York, New York

THE HONORABLE JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE