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ATTORNEYS FOR THE BLUEBAY VALUE
RECOVERY (MASTER) FUND LIMITED

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

| | | |
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| In re: | : | Chapter 11 |
| | : | |
| ATARI, INC., et al., | : | Case No. 13-10176 (JMP) |
| | : | |
| Debtors. | : | Joint Administration Pending |

**OBJECTION OF THE BLUEBAY VALUE RECOVERY (MASTER) FUND LIMITED TO THE (CORRECTED) 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, AND DEMAND FOR ADEQUATE PROTECTION**

The BlueBay Value Recovery (Master) Fund Limited ("BlueBay"), as Lender, Facility Agent and Security Agent under that certain Credit Facility Agreement, dated April 21, 2006 (as amended and restated, the "Credit Facility Agreement") among Atari Europe SAS, as Borrower, Atari SA, as Parent, and BlueBay, hereby submits this objection (the " Objection") to the (Corrected) 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 [Docket No. 17] (the "Motion")[1], and requests adequate protection of its interests in the property of the Debtors' estates, and, by and through its undersigned counsel, respectfully represents as follows:

**BACKGROUND**

1. BlueBay holds claims against Debtor affiliates Atari Europe SAS, as borrower, and Atari S.A., as guarantor, in respect of debt under the Credit Facility Agreement currently totaling approximately €21 million.[2] These claims are secured by, among other things, a first priority lien on all the shares of Debtor Atari, Inc. (the "Share Pledge"), which are property of CUSH's Chapter 11 estate, and a first priority lien in Atari, Inc.'s interest in the Test Drive IP (the "TD IP Lien," and together with the Share Pledge, the "BlueBay Collateral"). In addition, BlueBay's claims are secured by a lien on certain intercompany claims of Atari Europe SAS and Atari SA against Atari Interactive, Inc. ("Atari Interactive") totaling over $144 million as of June 30, 2009 and, as such, BlueBay's interests are effectively aligned with the unsecured creditors of Atari Interactive.

**OBJECTION**

2. BlueBay opposes the relief requested in the Interim Order because the terms of the proposed $5.25 million DIP Facility are onerous, and the facility itself may ultimately prove to be unnecessary and wasteful. By seeking interim approval of this DIP Facility, the Debtors

[1] Capitalized terms not otherwise defined herein shall carry the meanings set forth in the Motion.
[2] BlueBay also owns equity in certain affiliates of the Debtors and holds a lien on the shares of Atari Interactive that also secure claims under the Credit Facility Agreement.

are essentially asking the Court (and parties in interest) to assume that there is meaningful going-concern value realizable in a Chapter 11 sale process (over and above the amount of the DIP loans, the outsized proposed DIP fees and other administrative costs) which will exceed the value achievable, likely at much lower cost, in a simple Chapter 7 liquidation of the Debtors' assets. Although the Debtors need not show today that a Chapter 11 proceeding is a more appropriate liquidation vehicle than a proceeding under Chapter 7, such a showing may be necessary in the near future for these cases to continue and, in the meanwhile, the Debtors have fiduciary responsibilities to creditors and equity and must, in this context, demonstrate that entering into the Credit Facility Agreement is an exercise of sound business judgment.

3. Here, the Debtors seek authority to borrow up to $5.25 million while admitting, among other things, that (i) their principal assets are intangible—mainly intellectual property and contract rights, (ii) notwithstanding significant efforts, the Debtors were unable to achieve a going concern sale before the Petition Date, and (iii) the ultimate goal of this proceeding is a sale transaction (either under Section 363 or through a plan) within the next 75 to 120 days. In such circumstances, the proposed DIP Facility is exorbitantly expensive, its terms are oppressive, and approval would effectively limit the rights of other parties in interest to participate in these cases. Entering the Interim Order proposed by the Debtors could swamp the estates with massive administrative liabilities and make it significantly more difficult and expensive for the Debtors to pursue a Chapter 7 sale process should this Court ultimately determine that such a path is the appropriate one for these cases. At the very least, the more onerous terms of the DIP Facility should be stricken from the Interim Order and await consideration at a final hearing.

4. BlueBay also opposes the Motion because the Debtors provide no real adequate protection of BlueBay's interests in the BlueBay Collateral from diminution in value as a result

of, among other things, any imposition of the proposed priming First Priority DIP Liens, the automatic stay and any use, lease and sale of the BlueBay Collateral during the pendency of these Chapter 11 cases.

**The Terms of the Proposed DIP Facility are Outlandish**

5. The terms of the proposed DIP Facility far exceed what might otherwise be justifiable for borrowing up to $5.25 million under the protection of Chapter 11's postpetition financing provisions. Notably, while the Debtors seek authority to borrow $2.25 million on an Interim Basis, the remainder of the $5.25 million is uncommitted and subject to certain conditions, including due diligence on the part of the lender, Tenor Capital Management, L.P. ("DIP Lender") (see DIP Term Sheet, p. 2).

6. For the "commitment" to lend the initial $2.25 million, the proposed Interim Order would entitle the DIP Lender to a $250,000 "Commitment Fee" payable at the Interim Closing Date, even though the DIP Lender will have made no commitments in respect of the second and third borrowings under the facility, i.e., the Final DIP Loan and the Sale/Plan Loan. See Motion at p. 7 and DIP Term Sheet (Exhibit A to Motion) at 2 (stating future advances are "[s]ubject to DIP Lenders' completion of business and legal due diligence and sole and absolute satisfaction with the results thereof. . . .").

7. In addition to having its legal fees paid out of the initial advance (see Interim Order ¶ 24), the proposed Interim Order would also entitle the DIP Lender to payment at maturity of an additional 5% Origination Fee (i.e., $262,500), which fee is fully earned at the Interim Closing Date (DIP Term Sheet, p. 5), again notwithstanding the absence of any commitment to fund beyond the initial draw. Thus, for lending $2.25 million and with no further commitment, the DIP Lender will be entitled to receive more than $500,000 in fees, yielding a

net return of more than twenty percent (20%) and an annualized return of more than 60 percent (60%) based on the initial $2.25 million commitment and a 120 day term, leaving aside any applicable accrued interest and the other amounts set forth below.

8. Moreover, the proposed Interim Order would hamstring the Debtors' ability to obtain more economical financing. In the event that the Debtors are able to obtain a more favorable DIP financing facility after approval of the Interim Order, the DIP Lender is entitled to a $1 million "Takeout Fee" on top of the so-called Commitment and Origination fees. (DIP Term Sheet, p. 5)

9. As if this were not enough, the DIP Lender is entitled under the DIP Facility to a further sliding scale "Exit Fee," starting at 30% of the first $10 million in Sale Proceeds or Plan Proceeds (i.e., proceeds in excess of the DIP repayment and amounts payable to any retained investment banker), i.e., at least $3 million if Sale Proceeds equal or exceed $10 million, and continuing at 20% on the next $10 million in Sale Proceeds, and then 10% of amounts achieved thereafter.[3] (see DIP Term Sheet, p. 5)

10. Noting that the maximum term of the loan is 120 days and taking into account the five percent (5%) rate of interest and the fees summarized above, the all-in cost of $5.25 million of low risk funds (much of which will be utilized to pay DIP and professional fees and is fully secured on a priming basis) could easily reach 200% on an annualized basis if Sale Proceeds or Plan Proceeds reach $10 million. And, once again, even if the Debtors are able to secure better financing, they will still have to pay a $1 million Exit Fee as well as the Commitment and

[3] Because the Debtors provide only a book value for their consolidated assets, it is not possible to estimate just how high these fees could go, but they certainly compare unfavorably with Chapter 7 trustee compensation, which may not exceed 3% after the first $1 million of funds disbursed. 11 U.S.C. § 326(a). Moreover, it is doubtful a Chapter 7 trustee would need a longer period of time to sell the Debtors' assets than proposed here and, if necessary, could even do so as a going concern. See 11 U.S.C. § 721.

Origination Fees, each of which will have been paid or fully earned.

11. Finally, the foregoing does not even take into account the projected administrative costs (totaling over $1.6 million for the 13-weeks ending April 19, 2013, see Budget—"Restructuring/Other"), including the expenses of the Debtors' professionals and of any committee and its professionals appointed in the Cases, and any fees payable to an investment banker the Debtors apparently propose to retain in the next few days.

12. BlueBay recognizes that normally the Court should not substitute its judgment for the sound business judgment of the Debtors, but the Debtors must still show that their business judgment is sound, and that requires that they act on an informed basis and that they avoid waste. The Debtors urge that all of the fees they would have to pay and the control over the cases they would have to cede should be exchanged for a 75-120 day, $5.25 million credit secured by priming liens, because they are "unable to obtain such credit otherwise." 11 U.S.C. § 364(1)(A). That no sale has yet occurred after concerted efforts and that the Debtors have failed to identify any other lender willing to meet the Debtors' unspecified "structure and liquidity requirements" is not a justification; rather, it is cause for serious concern that if the DIP Facility is approved as proposed and these cases proceed unchecked, any remaining value will be wasted. Indeed, the market may have already determined, and the Court may soon decide, that the potential value of keeping the Debtors' "operations" (such as they are) going is too speculative to warrant any financing even if reasonable terms could be obtained. The mere fact that the proposed terms were "highly negotiated" as the Debtors allege does not make them reasonable. Reasonableness requires that value exceeding the costs of the DIP Facility be added to the Debtors' estates in order for the Motion to be granted.

**Lack of Adequate Protection**

13. The Motion seeks to impose liens senior to those of BlueBay on the BlueBay Collateral under section 364(d) of the Bankruptcy Code. Under that statute, such a lien may be imposed only if (i) the Debtors are unable to obtain financing on other terms and (ii) there is adequate protection of BlueBay's interests in the BlueBay Collateral. 11 U.S.C. § 364(d)(1). "[T]he [adequate protection] proposal should provide the pre-petition secured creditor with the same level of protection it would have had if there had not been post-petition superpriority financing." In re Mosello, 195 B.R. 277, 288 (Bankr. S.D.N.Y. 1996) (internal quotation marks and citation omitted). The Debtors have the burden of proof on the issue of such adequate protection. Id. § 364(d)(2).

14. The Debtors propose to grant the DIP Lender priming liens in the BlueBay Collateral and to grant BlueBay "replacement liens" (collectively, the "Adequate Protection Lien") on such collateral that would rank just below the DIP Lien. Interim Order ¶ 9.[4] However, as BlueBay already has a lien in such collateral, the Adequate Protection Lien would provide no compensation for the priming. Conversely, the senior priming DIP Lien covers all of the Debtors' assets and property, including the BlueBay Collateral.

15. The Debtors also propose granting an administrative superpriority claim in the Atari Interactive estate to the extent the Adequate Protection Lien does not adequately protect against any diminution in value of BlueBay's interests in the BlueBay Collateral. Proposed Interim Order ¶ 10. Though the Debtors hint that there is sufficient value available from "unencumbered property held at Atari Interactive," Motion ¶ 33, they do not provide evidence of

[4] The Interim Order is inconsistent with the Motion at paragraph 33 where the Debtors propose to grant BlueBay a replacement lien on all assets of the Debtors that is junior to the DIP Liens (subject to dilution by any adequate protection liens in favor of Atari S.A.).

such value or whether it is comparable to that of the BlueBay Collateral (nor do they even attempt to quantify the values). In any event, administrative superpriority under section 507(b) is not "adequate protection," see 11 U.S.C. § 361(3) (excluding such priority from the definition of "adequate protection"), but rather a statutory right enjoyed by lienholders where the adequate protection provided has proven inadequate. In summary, the Debtors have not carried their burden of showing that BlueBay's interests in the BlueBay Collateral will be adequately protected.

16. For the avoidance of doubt, BlueBay hereby requests adequate protection for its interests in the BlueBay Collateral to the extent such interests are adversely affected by the automatic stay, liens imposed under section 364(d) of the Bankruptcy Code or use, lease or sale of the BlueBay Collateral during the pendency of these cases.

**Other Issues**

17. Other issues of serious concern regarding the DIP Facility include the following:

- A series of milestones (with more to be "agreed") which appear to be unnecessarily long and which effectively cede control of the process to the DIP Lender. DIP Term Sheet, at p. 6-7.
- All of the major orders to be entered in the case will require DIP Lender approval to prevent breach of the DIP Facility, again ceding control of the cases to the DIP Lender.
- The default and termination events of the DIP Facility are onerous, including:
    - A "change of control" (any time Atari S.A. or a Debtor is no longer a 100% equity owner) of a Debtor is an event of default under the DIP Facility. Id. at p. 12.
    - A challenge to the use of intellectual property of the Debtors is an event of default under the DIP Facility. Id. at 13.
    - The taking of any action that is "materially adverse to the DIP Lenders or their rights and remedies under [the] Interim Order" is a "Termination Event." Interim Order ¶

18(c).

- The Remedies Notice Period (as defined in the Interim Order) should be longer than three (3) business days, see Interim Order ¶ 19(b), and should require further Court order before any remedies may be exercised.

18. BlueBay reserves the right to supplement this Objection as the cases develop.

## CONCLUSION

19. Wherefore, BlueBay respectfully requests that the Motion be denied and that the Court grant such other relief as it determines to be just and proper.

Dated: New York, New York
January 23, 2013

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