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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' OMNIBUS REPLY TO OBJECTIONS
TO THE DEBTORS' PROPOSED SALE INCENTIVE PLAN

Atari, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), file this reply (the "***Reply***") to the (i) *Objection of the United States Trustee* (the "***UST***") *to Motion for Entry of Order Authorizing the Debtors to Adopt and Implement a Sale Incentive Plan* (the "***Motion***")[2] [Docket No. 195] and (ii) *Objection of the Official Committee of Unsecured Creditors* (the "***Committee***" and with the UST, the "***Objectors***") *with Respect to*

[1] The Debtors are: Atari, Inc.; Atari Interactive, Inc.; Humongous, Inc.; and California U.S. Holdings, Inc.
[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

Debtors' Motion for Entry of an Order Authorizing the Debtors to Adopt and Implement a Sale Incentive Plan [Docket No. 226] (each an "***Objection***" and, collectively, the "***Objections***").[3]

Preliminary Statement

1. The Objections should be overruled because the Sale Incentive Plan rewards participants based upon actual sale results using challenging gross proceeds thresholds, is not prohibited by Bankruptcy Code section 503(c)(1), and satisfies the standard for approval under Bankruptcy Code sections 363(b) and 503(c)(3). The Debtors' goal throughout these chapter 11 cases has been to maximize the value of their estates through the upcoming sale(s) (the "***Sale(s)***") of substantially all of their Assets for the benefit of *all* stakeholders. To achieve this goal, the Debtors—in the exercise of their sound business judgment and with the input and guidance of their restructuring professionals, and the support of Alden, their largest economic stakeholder—developed the Sale Incentive Plan. The Sale Incentive Plan aligns the interests of the Debtors' stakeholders with those of the Sale Incentive Plan participants (the "***Participants***") by, among other things, tying the Plan payments to the Sale(s) proceeds. Indeed, the Sale Incentive Plan was carefully crafted to properly incentivize the Participants to remain motivated, and to undertake significant additional tasks to effectuate the Sale(s) and maximize the value of the Assets, while at the same time keeping the cost and the scope of the Sale Incentive Plan reasonable under the facts and circumstances of these cases.

2. Notwithstanding these efforts and the clearly-articulated justification for the Sale Incentive Plan in the Motion and the Verost Declaration, the UST and the Committee challenge

[3] On March 19, 2013, the Debtors filed the Motion [Docket No. 144] pursuant to which the Debtors sought approval of a Loyalty Plan and a Sale Incentive Plan. Following the filing of the Motion, the Debtors bifurcated the relief requested therein and sought approval of the Loyalty Plan separately from the Sale Incentive Plan. No objections were filed in connection with the Loyalty Plan. On April 11, 2013, the Court entered an order approving the Loyalty Plan [Docket No. 181]. The Debtors will be seeking approval of the Sale Incentive Plan at a hearing scheduled for June 6, 2013 (the "***Hearing***").

the Sale Incentive Plan on two familiar but equally specious grounds: (i) the Sale Incentive Plan is a disguised retention plan that violates Bankruptcy Code section 503(c)(1) and (ii) the Sale Incentive Plan runs afoul of Bankruptcy Code section 503(c)(3) because it is not justified by the facts and circumstances of these cases. Neither objection is supported by the facts and, therefore, should be overruled.

3. *First*, the Sale Incentive Plan clearly is an *incentive*-based plan, not a disguised retention plan. The Objectors' argument in this regard rests on two faulty premises: (i) that the Sale(s) targets established by the Sale Incentive Plan are too easily satisfied[4] and (ii) that providing an economic incentive to the Participants has no bearing on the ultimate outcome of the Sale(s) process. Both of these premises will be proven wrong by the facts and the evidence presented at the Hearing. The Sale(s) targets were not selected by the Debtors' management but rather by the Debtors' investment banker, Perella Weinberg Partners LP ("***PWP***"), at the outset of the Sale(s) process based upon PWP's judgment regarding potential Sale(s) results. While the Objectors contend that the minimum Sale(s) threshold is too low, the evidence will demonstrate that the minimum threshold is more than [redacted] higher than the highest bid for the Assets received by the preliminary bid deadline of April 3, 2013 (the "***Preliminary Bid Deadline***").

4. *Second*, the Sale Incentive Plan complies with Bankruptcy Code section 503(c)(3) because it constitutes a sound exercise of the Debtor's business judgment and is justified by the facts and circumstances of these cases. Specifically, the Sale Incentive Plan is a product of careful due diligence by the Debtors' and their advisors, and is narrowly tailored to properly

[4] In response to the Objections, the Debtors have modified the Sale Incentive Plan to exclude the repayment of the DIP loan as an initial threshold that the Participating Executives must satisfy to be eligible for incentives under the Sale Incentive Plan. Accordingly, the new minimum threshold for all Participants is now set at [redacted]. In light of this modification, the Debtors will not address any of Objections that relate to the repayment of the DIP loan as the initial threshold under the Sale Incentive Plan.

incentivize each Participant to achieve the desired goal of maximizing the value of the Assets through the Sale(s) process. Additionally, the Sale Incentive Plan is consistent with market-comparable compensation, is reasonable in cost, does not discriminate unfairly among the Participants and properly aligns the interests of the employees with the Debtors' advisors to run a value-maximizing Sale(s) process.

5. *Finally*, the Committee notes at the beginning of its Objection that it has failed to reach an agreement with Alden on a global resolution of issues relating to the allocation of sale proceeds, and suggests that guaranteed payments to Participants under the Sale Incentive Plan should not be permitted while recoveries to all other creditors of the Debtors' estates remain uncertain. The Debtors strongly disagree with the Committee's linkage of approval of the Sale Incentive Plan with the resolution of this unresolved intercreditor dispute because the Participants cannot exert any control or influence regarding a resolution of these issues. The speciousness of this position suggests that the Committee's objection is driven principally as a negotiating tactic with Alden, which supports the Sale Incentive Plan and has the largest economic exposure in these cases, rather than a well-founded objection to the merits of the Sale Incentive Plan.[5] While the Debtors continue to encourage all key stakeholders to come to a global resolution on intercreditor issues, the Sale Incentive Plan is neutral with respect to how these issues are resolved and should be evaluated on its own merits.

6. For all of the foregoing reasons, each as set forth in greater detail below, the Court should overrule the Objections and approve the Sale Incentive Plan.

[5] The chairman of the Committee, responding to Alden's rejection of the Committee's latest settlement proposal, recently advised Alden in an email, attached hereto as **Exhibit 1**: ***"Remember as creditors while we hope for a return and will do what is best for all, our debts have been written off by our companies so our next objective is to make sure if we do not get a return, no one will without opposition."*** *See* Email from Harvey Goldstein, Rackspace Hosting, to Alex Zyngier, Alden Global Value Recovery Master Fund, L.P. (May 30, 2013, 10:11 ET).

Reply

I. THE SALE INCENTIVE PLAN IS AN INCENTIVE-BASED PLAN AND SHOULD NOT BE EVALUATED UNDER BANKRUPTCY CODE SECTION 503(C)(1)

7. The Sale Incentive Plan should not be evaluated under Bankruptcy Code section 503(c)(1) because its primary purpose is to incentivize, not to retain. Courts in this district have held that if a plan is tailored to provide incentives to increase the value of the estate or achieve certain performance or financial targets, it is not a retention plan. *See, e.g., In re Velo Holdings Inc.*, 472 B.R. 201, 210 (Bankr. S.D.N.Y. 2012) (quoting *In re Dana Corp.*, 358 B.R. 567, 575 (Bankr. S.D.N.Y. 2006)) ("[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."); *see also In re Mesa Air Grp.*, No. 10-10018, 2010 WL 3810899, at *4 (Bankr. S.D.N.Y. Sept. 24, 2010) (holding incentive bonus program was not retention bonus because it was designed to "motivate . . . the employees to achieve performance goals."); *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 804 (Bankr. D. Del. 2007) (finding plan not retention-based because primary purpose was to incentivize and thus section 503(c)(1) was inapplicable).

A. __The Sale(s) Proceed Targets Are Challenging__

8. The Objectors contend that the Sale Incentive Plan is primarily retentive in nature due to Sale(s) proceed targets which they claim, without evidence, are easy to achieve. The evidence suggests otherwise. As discussed in the Verost Declaration and as will be shown at trial, the Sale(s) targets were developed by the Debtors' investment banker with the input of the Debtors' largest economic stakeholder. The payments under the Sale Incentive Plan are entirely contingent on the Debtors achieving challenging pre-determined Sale(s) proceed milestones at the upcoming Auction(s). Indeed, the Participants are not eligible for any compensation under

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the Sale Incentive Plan unless the Sale(s) proceeds are equal to or greater than [redacted], a figure, which is nearly [redacted] higher than the highest bid received by the Preliminary Bid Deadline. Specifically, as of the Preliminary Bid Deadline, the highest bid for all the Assets or the Debtors' entire business was [redacted], with the next highest bid being [redacted]. Furthermore, as set forth below, the sum of the highest bids received for individual Assets totaled approximately [redacted]:

[redacted]

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]		[redacted]

9. While subsequent to the Preliminary Bid Deadline the Debtors receive bids that were higher than the initial Sale(s) proceeds threshold of [redacted], none of those bids proved actionable for one or more reasons, including the bidders' (i) inability to confirm availability of financing, (ii) the continued need for further due diligence and (iii) refusal to agree to reasonable asset purchase agreement terms.

10. Accordingly, contrary to the Objections, neither the initial Sale(s) proceeds milestone nor any of the subsequent milestones are "lay ups". Indeed, even if the Participants

meet the initial Sale(s) target under the Sale Incentive Plan, their incentive payments increase only if higher Sale(s) values are achieved. In this way, the Sale Incentive Plan (like the plans in *Velo Holdings* and *Mesa Air*) *incentivizes* the Participants to work to maximize the value of the estates. The milestones and the Sale Incentive Plan payments, therefore, have a direct, mutually-reinforcing effect.

B. The Sale Incentive Plan Is Distinguishable From Other Compensation Plans Which Courts Have Rejected

11. The incentive plans at issue in *In re Hawker Beechcraft, Inc.* and *In re Residential Capital, LLC* ("***ResCap I***") are factually distinguishable from the instant Sale Incentive Plan. For example, in *In re Hawker Beechcraft, Inc.* the court rejected a plan which offered members of the senior leadership team "two mutually exclusive paths for awarding bonuses"—the "stand-alone plan" path and the "third-party transaction" path—which virtually guaranteed that the participants would earn a bonus. 479 B.R. 308, 313 (Bankr. S.D.N.Y. 2012). The court held that the debtors' had not established that the plan was not "a disguised [insider] retention plan". *Id.* at 312–13. In so ruling, the court focused on the fact that (i) the debtors were not required to meet any financial targets to pay bonuses if the debtors pursued the "stand-alone plan" and (ii) the plan participants were guaranteed to receive bonuses even if the debtors pursued a "third-party transaction" at a below stalking horse bid value. *Id.* at 313.

12. The incentive plan at issue in *ResCap I* is also distinguishable. *See In re Residential Capital, LLC*, 478 B.R. 154 (Bankr. S.D.N.Y. 2012). Specifically, in *ResCap I* the proposed plan provided that portions of the incentive payments would vest upon the accomplishment of five milestones: two of the milestones, representing approximately 70% of the awards, were based on asset sales negotiated prepetition that had stalking horse bidders, while the other three were based on achieving certain financial and operational results.

Significantly, at the hearing to approve the stalking horse bids, the successful stalking horse bidders increased their bid amounts by $125 million and $50 million, respectively. In rejecting the plan as retentive, the court found that the increases in the stalking horse bids created substantial doubt in the court's mind of whether the "Closing of the Asset Sales" was sufficiently aspirational and, therefore, incentivizing. *Id.* at 171. The court conceded that while the participants "may well have increased responsibilities to make the auction a success," the plan's payments were "not primarily measured by those efforts or the auction results," because the only thing that the participants were required to do for the awards to vest was to remain with the Debtors until the closing of the sales "that were substantially negotiated pre-petition." *Id.* at 171–72. Importantly, the court found that the debtors "must more closely link vesting of the [payments] to metrics that are directly tied to challenging financial and operational goals for the businesses, tailored to the facts and circumstances of the case," and in a footnote concluded, "[l]inking [the] awards to increases in the auction sale prices of the Debtors' assets . . . may also provide permissible metrics for an incentivizing KEIP." *Id.* at 173; n. 27.

13. As discussed above, the Sale Incentive Plan is distinguishable from the plans in *Hawker* and *ResCap I* and is, in fact, similar to the performance-based plan approved in *ResCap II*[6]. In contrast to *Hawker* and *ResCap I* where the participants in the debtors' respective incentive plans did not have to satisfy challenging financial targets to qualify for incentive payments, here, the payment of the incentives is directly linked to the Sale(s) proceeds

[6] The *ResCap* court ultimately approved a revised incentive plan. *See In re Residential Capital, LLC*, No. 12–12020 (MG), 2013 WL 1497313 (Bankr. S.D.N.Y. 2013) (hereinafter, "***ResCap II***"). Specifically, in *ResCap II*, after the asset sales were concluded, the debtors returned to the court seeking approval of a revised incentive plan. 2013 WL 1497313. The revised plan provided that each participant was involved in at least one of the following activities, "overseeing the transition and management of the Debtors' remaining operations, recovering restricted cash from Ginnie Mae, and monetizing and disposing of over $1 billion of . . . loans as well as hundreds of millions of dollars of related assets," and would not receive a full award unless the designated metrics were achieved. *Id.* at *12. The court concluded that the debtors had established that the plans were "performance-based incentive compensation plans, and . . . not retention plans," and "differ[ed] significantly from the plan rejected in [*ResCap I*] . . . ." *Id.*

milestones, each of which will be difficult to achieve because (i) there is ***no*** stalking horse bidder to set a minimum floor price and (ii) the initial Sale(s) milestone is [redacted] higher than the highest bid received before the Preliminary Bid Deadline and, as set forth above, no actionable bids were received subsequent to that deadline. Further, unlike *ResCap I* and *Hawker*, each of the Sale(s) milestones under the Sale Incentive Plan, including the initial target, is aspirational and none of the incentive payments are guaranteed. To the extent the targets are achievable, it is only because of the Participants' diligent efforts—which began no later than March 19, 2013, when the Motion was first filed, and which remain ongoing.

C. <u>The Sale(s) Process Is Ongoing And Participants Remain Essential</u>

14. The Committee challenges the incentive-based nature of the Sale Incentive Plan, arguing that the Plan is retentive because it seeks to compensate the Participants for the work that has already been completed. *See* Committee Obj. at 5. The Committee's argument is flawed because (i) it is based on the erroneous assumption that the Sale(s) process is complete and (ii) it implies that the Debtors cannot pay incentives for work performed since the Sale Incentive Plan was made public but prior to the upcoming evidentiary Hearing.

15. The Sale(s) process is far from complete and, as discussed below, substantial work remains to be done by the Participants. Indeed, the Debtors and their financial advisors continue to seek and consult with new potential bidders. And parties who have previously expressed interest in the Assets but did not actively engage in the Sale(s) process are now resurfacing and becoming more actively engaged. Further, additional parties are expected to enter the process once the Court approves the bid procedures contemplated in the Debtors' recently filed motion (the "***Sale Motion***"). In short, the Participants will remain instrumental in ensuring that the Debtors secure a value-maximizing Sale(s) transaction. Indeed, since at least March 19, 2013, when the Sale Incentive Plan was first made public, the Participants' work and

support of the Sale(s) process has been nothing short of exceptional. Below are the key functions that the Participants have performed and will continue to perform in connection with the Sale(s) process.

- ***James Wilson***: through his contacts within the gaming industry continues to generate interest in the Assets; advises potential buyers on how to best utilize and exploit the Assets in a value-maximizing manner; maintains relationships with licensors whose consent is required for the Debtors' to assign such licenses to the purchaser(s); is instrumental in preparing and participating in management presentations.

- ***Kristen Keller***: because of her in-depth knowledge about the Assets, responds to buyers' inquiries regarding the myriad legal issues concerning the sale or licensing of the Assets; contributed to preparation of the Data Room, the management presentations and other sale-related materials which are being used by interested parties to evaluate the Assets; continues to participate in management presentations and meetings with potential buyers, as necessary.

- ***Robert Mattes***: continues to participate in management presentations as necessary and respond to diligence requests from potential buyers, including requests for key financial information about the historical performance of the Assets and forecasts related thereto; has prepared management presentations and other sale-related materials currently used by interested parties in their diligence regarding the Assets.

- ***Emily Clock***: has contributed to the preparation of management presentations and other sale-related materials, participated in presentations to potential buyers, and continues to respond to inquiries from potential buyers regarding various licensing relationships, as needed. Enforces and manages the Debtors various license agreements and ensures that revenues therefrom are properly collected and managed in order to facilitate a smooth transition of the Assets to the new purchaser(s).

- ***Todd Shallbetter***: has assisted with preparation of management presentations and other sale-related materials and participated in presentations to interested parties; continues to respond to inquiries from potential buyers regarding digital distribution partners and performance of digital assets. Manages the valuable digital distribution business and maintains revenue stream therefrom, which is necessary to the potential buyer's valuation of the Assets.

- ***Joel Fashingbauer***: assisted with the development of business plans and management presentations for potential buyers; participated in presentations to, and conducted game demonstrations for, potential buyers; continues to respond to inquiries from potential buyers, as needed, and particularly to inquiries regarding the Casino games, which have generated significant buyer interest. Maintains relationship with developers of Atari Casino games to ensure continued integrity of third-party development teams, which is integral to continued viability of the Casino games.

- ***Giancarlo Mori***: assisted with the development of the business plans and management presentations for potential buyers; participated in presentations to, and conducted game demonstrations for, potential buyers. Serves as the key liaison with potential buyers regarding creative strategy with respect to the Assets; responds to potential buyers' inquiries regarding ways to maximize the value of the core games through various avenues; maintains relationships with developer of Roller Coaster Tycoon, one of the Debtors' most valuable assets; has prepared and participated in management presentations to potential buyers.

- ***Bob Spellerberg***: assisted in preparation of (i) business plans, particularly as it relates to historical financial performance of the Assets and other financial aspects of the plans, and (ii) management presentations; instrumental to the Debtors' orderly liquidation of their remaining retail inventory; leverages his relationships with the Debtor's retail partners to ensure the timely collection of receivables and reduction in estates' liabilities to retailers.

16. In fact, a case cited in the Committee's Objection, *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 791 (Bankr. D. Del. 2007), rejected the argument to disregard work performed by employees prior to approval of an incentive plan. In *Nellson*, the debtor had implemented a management incentive plan prior to the commencement of the chapter 11 cases. After filing for chapter 11, the debtor recognized that the prepetition performance targets would not be achieved and sought court approval to modify the prepetition targets to allow members of management to be paid under the incentive plan. *Id.* at 793–94. The Court approved the modified incentive plan notwithstanding the fact that the work was previously performed because its effect was to continue to motivate employees. *Id.* at 802. *See also In re New Page Corp.*, Case No. 11-12804 (KG) (Bankr. D. Del. Mar. 5, 2012) (approving an incentive plan based on performance goals measured over a period that began more than six months before the incentive plan was approved). Like the courts in *Nellson Nutraceutical* and *New Page*, the Court here should reject the Committee's position that the Sale Incentive Plan is an

impermissible retention plan simply because it seeks to compensate the Participants for work that has been performed since the Sale Incentive Plan was first introduced but prior to final court approval.

II. THE SALE INCENTIVE PLAN IS JUSTIFIED BY THE FACTS AND CIRCUMSTANCES OF THESE CASES

17. Finally, because the Sale Incentive Plan is incentivizing rather than retentive in nature and is not an ordinary course transaction, it must be justified by the "facts and circumstances of the case" in order to be approved. 11 U.S.C. § 503(c)(3). The facts and circumstances relevant to an incentive plan are analyzed according to the business judgment standard under Bankruptcy Code section 363(b). *See In re Dana Corp.*, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) ("***Dana II***"); *see also Global Home Prods.*, 369 B.R. at 786. More specifically, when considering whether the structure and implementation of an incentive plan meet the business judgment standard, courts apply a six factor test. *See Dana II*, 358 B.R. at 575.

18. In this case, the Sale Incentive Plan satisfies each of the six criteria provided by *Dana II* for assessing whether a plan meets the business judgment standard. *First*, the Sale Incentive Plan is "calculated to achieve the desired performance." *Dana II*, 358 B.R. at 576. As discussed above, the Participants will only receive payments under the Sale Incentive Plan if the Debtors' Assets are sold for an amount that reaches certain threshold dollar amounts. The payments under the Sale Incentive Plan increase as the revenue from Sale(s) increases. Thus, by directly linking Sale(s) revenue to each Participant's incentive payment, the Sale Incentive Plan gives Participants a personal stake in working to ensure that the Assets are sold for the highest price possible, which is the estates' and creditors' desired outcome. Courts in this district have approved plans similar to the Sale Incentive Plan that are designed to achieve targeted

performance goals. *See, e.g., In re Velo Holdings Inc.*, 472 B.R. 201, 213 (Bankr. S.D.N.Y. 2012) (finding that the fact that the KEIP was "keyed to the successful sale of the Debtors' businesses to a third-party purchaser" demonstrated that "a reasonable relationship existed between the plan proposed and the results to be obtained."); *In re Musicland Holdings Corp.*, Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Aug. 11, 2006) (approving an incentive plan tied to, among other things, the sale of substantially all of the debtors' assets.); *In re Calpine Corp.*, Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. 2005) (approving an incentive plan that tied incentives to increases in value as a result of certain sales or cost reductions).

19. *Second*, the cost of the Sale Incentive Plan is reasonable under the facts and circumstances of these cases. *Dana II*, 358 B.R. at 576. The total cost of the Sale Incentive Plan is commensurate with similar plans approved in other cases. The Sale Incentive Plan will be funded solely from proceeds of the Sale(s), and the maximum aggregate payout is approximately [redacted] of the gross sale proceeds. As demonstrated below, the cost of the Sale Incentive Plan is substantially the same as or lower than the costs of the incentive plans approved in the following cases, when viewed as a percentage of sale proceeds, each of which included a sale of substantially all of the debtor's assets: *In re Evergreen Solar, Inc.*, Case No. 11-12590 (Bankr. D. Del. Sept. 6, 2011), *In re Inspiration Biopharmaceuticals Inc.*, Case No. 12-18687 (Bankr. D. Mass. Nov. 29, 2012), *In re MiddleBrook Pharmaceuticals, Inc.*, Case No. 10-11485 (Bankr. D. Del. July 12, 2010), *In re Midway Games Inc.*, Case No. 09-10465 (Bankr. D. Del. Apr. 23, 2009), and *In re Noble International, Ltd.*, Case No. 09-51720 (Bankr. E.D. Mich. Apr. 29, 2009).

		[redacted]			
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

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[redacted]

20. In each of the foregoing examples, the assets sold for between [redacted]—values generally consistent with [redacted]. The *Midway Games* incentive plan, which paid [redacted] of sale proceeds, is particularly relevant because Midway Games and the Debtors are both in the video game industry.

21. *Third*, the Sale Incentive Plan does not unfairly discriminate among its Participants. While there are differences in the amount of compensation each Participant is eligible to receive, the differences are based on the specific roles that each individual will play in the Sale(s) process. In particular, the Participating Executives (Mr. Wilson, Ms. Keller and Mr. Mattes) will lead the Debtors during the Sale(s) process and will be most essential to its successful completion. As a result, their potential payments are larger than the other Participants' whose participation, while at different levels, is also crucial to the Debtors' success in the Sale(s) process. *See In re Borders Grp. Inc.*, 453 B.R. 459, 477 (Bankr. S.D.N.Y. 2011) (approving an incentive plan which treated employees differently, and observing that "not every employee is similarly situated in terms of their employment to the reorganization process.") (quotations omitted).

22. *Fourth*, the Sale Incentive Plan is consistent with plans approved in similar restructuring cases. In addition to aligning with industry standards with respect to cost, as described above, the Sale Incentive Plan's structure is similar to plans implemented in other

cases. *See, e.g.*, *In re Velo Holdings, Inc.*, 472 B.R. 201 (Bankr. S.D.N.Y. 2012) (approving a plan which provided payments tied to the results of asset sales).

23. *Finally*, the Debtors have exercised proper due diligence and obtained input and guidance from their restructuring advisors in formulating the Sale Incentive Plan. In connection therewith, the Debtors, in consultation with the advisors, identified the employees who would play an integral role in the Sale(s) process. Thereafter, based on input from the Debtors and Akin Gump, and in reviewing comparable incentive plans in the industry, PWP designed a plan that was best suited to maximizing the value of the Assets. The Sale Incentive Plan was ultimately reviewed and approved by the Debtors' board of directors. Accordingly, the Debtors performed more than adequate due diligence in formulating the Sale Incentive Plan. *See, e.g., In re Velo Holdings Inc.*, 472 B.R. 201, 213 (Bankr. S.D.N.Y. 2012) (finding that the Debtors exercised proper diligence in formulating a KEIP by utilizing their financial advisors "to assist, advise and guide the Debtors in developing a KEIP that would incentivize the Key Employees to maximize the value of [the assets to be sold].").

24. For the foregoing reasons, the Sale Incentive Plan constitutes a reasonable exercise of the Debtors' business judgment and is justified by the facts and circumstances of these cases.

III. CONFIDENTIAL INFORMATION CONTAINED IN THE INCENTIVE PLAN IS PROPERLY SEALED

25. In the Objections, both the UST and the Committee argue that the information regarding the specific Sale(s) milestones, Participants' individual incentive amounts and the scope and cost of the Sale Incentive Plan was improperly sealed, and should be released to the public. This information was filed under seal and only disclosed to the Court and the key stakeholders because, among other things, it contains highly sensitive commercial information

regarding the potential value of the Debtors' Assets that, if released to the public, would improperly influence the potential buyers and adversely impact the Sale(s) Process. The Court granted the Debtors' request to seal this information prior to the Debtors' filing the Motion. The Objections have failed to provide any compelling reason as to why this information should now be unsealed and released to the public. Absent such showing, the information should remain confidential.

Conclusion

26. The Debtors have provided ample evidence to support the approval of the Sale Incentive Plan. First, the Sale Incentive Plan, which the Debtors developed through an extensive internal process and deliberation with their advisors, is an *incentive*-based plan that is tied to challenging performance metrics that, if satisfied, will inure to the benefit of all stakeholders in these chapter 11 cases. Second, the Sale Incentive Plan is justified by the facts and circumstances of these cases because, among other things, (i) it is designed to achieve the desired performance by the Participants, (ii) it is similar to other compensation plans in the industry, (iii) it will incentivize the Participants to reach superior performance targets, and (iv) the cost and scope of the Sale Incentive Plan are reasonable. For all of the foregoing reasons, the Debtors respectfully request that the Court overrule the Objections and approve the Sale Incentive Plan.

New York, New York
Dated: June 5, 2013

AKIN GUMP STRAUSS HAUER & FELD LLP

By: */s/ Ira S. Dizengoff*

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Counsel to the Debtors and Debtors in Possession

Exhibit 1

(Email from Harvey Goldstein)

Manoukian, Kristine

From: Schoulder, Andrew [Andrew.Schoulder@bgllp.com]
Sent: Thursday, May 30, 2013 3:56 PM
To: Manoukian, Kristine
Subject: FW: In re Atari, Inc., et al. (Case No. 13-10176)
Attachments: Atari - Cohen Letter - 5-29-2013.pdf

Importance: High

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From: Alex Zyngier [mailto:AZyngier@aldenglobal.com]
Sent: Thursday, May 30, 2013 3:55 PM
To: Schoulder, Andrew
Subject: FW: In re Atari, Inc., et al. (Case No. 13-10176)
Importance: High

Alex Zyngier

T 212-418-6861 **E** azyngier@aldenglobal.com
885 Third Avenue • 34th Floor • New York, NY 10022

From: Harvey Goldstein [mailto:harvey.goldstein@rackspace.com]
Sent: Thursday, May 30, 2013 10:11 AM
To: Alex Zyngier
Subject: FW: In re Atari, Inc., et al. (Case No. 13-10176)
Importance: High

Alex;
I thought you were about keeping costs down. No one said this letter or proposal is not negotiable. However, if you prefer to spend money we can. We both always said only the attorneys and accountants get paid and creditors are last. I am happy to discuss and negotiate, but your attorney's response suggests you want to fight in court and let the judge decide. Remember as creditors while we hope for a return and will do what is best for all, our debts have been written off by our companies so our next objective is to make sure if we do not get a return, no one will without opposition. If you are interested in resolving this, saving money for us both and not leaving it up to one person, the judge, let me know. If not, good luck and see you in court.

Sincerely,

Harvey S. Goldstein
Senior Revenue Operations Manager

Rackspace Hosting
Direct 210-312-4497
Cellular 210-452-6230

rackspace
the open cloud company

From: Cohen, Jeffrey L. [mailto:jcohen@cooley.com]
Sent: Thursday, May 30, 2013 7:41 AM
To: Gottlieb, Lawrence; Alice Chong; Brent Williams (Brent.Williams@duffandphelps.com); Fred Stevens; Harvey Goldstein; Hershcopf, Cathy; Holly Newman; Indyke, Jay; John C. Leininger, Esq.; Mark Mondello; Michal Nowakowski; Ray Peng; Ryan Bouley; Sesha Devana; Tom Gross; Velinsky, Alex; Vikas Khosla; Winning, Robert
Subject: FW: In re Atari, Inc., et al. (Case No. 13-10176)

We received the below, terse response from Alden's counsel relative to the Committee's settlement offer. We will proceed with the KEIP depositions today.

Jeffrey L. Cohen
Cooley LLP • New York, NY 10036
Direct: (212) 479-6218 • Fax: (212) 202-5200

From: Schoulder, Andrew [mailto:Andrew.Schoulder@bgllp.com]
Sent: Wednesday, May 29, 2013 5:50 PM
To: Velinsky, Alex; Burns, Bob; Dizengoff, Ira; Alberino, Scott L.
Cc: Cohen, Jeffrey L.; Hershcopf, Cathy; Brent Williams (Brent.Williams@duffandphelps.com); Ken.Coleman@AllenOvery.com; Shane, Adam
Subject: RE: In re Atari, Inc., et al. (Case No. 11-10176)

The proposal is unacceptable.

Andrew J. Schoulder | Partner | Bracewell & Giuliani LLP
1251 Avenue of the Americas 49th Floor | New York, New York | 10020-1104
T: 212.508.6132 | F: 212.938.3832 | M: 646.982.5330
Andrew.Schoulder@bgllp.com | www.bgllp.com

From: Velinsky, Alex [mailto:avelinsky@cooley.com]
Sent: Wednesday, May 29, 2013 1:53 PM
To: Burns, Bob; Schoulder, Andrew; Dizengoff, Ira; Alberino, Scott L.
Cc: Cohen, Jeffrey L.; Hershcopf, Cathy; Brent Williams (Brent.Williams@duffandphelps.com); Ken.Coleman@AllenOvery.com
Subject: In re Atari, Inc., et al. (Case No. 11-10176)
Importance: High

Please see the attached.

Regards,

Alex R. Velinsky
Cooley LLP • New York, NY
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Email: avelinsky@cooley.com • www.cooley.com