

COOLEY LLP
1114 Avenue of the Americas
New York, New York 10036
Tel.: 212-479-6000
Cathy Hershcopf
Jeffrey L. Cohen
Alex R. Velinsky

*Counsel for the Official Committee
Of Unsecured Creditors*

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

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

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
PRECLUDE TESTIMONY REGARDING “PRECEDENT INCENTIVE PLANS”**

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, files this motion to (i) preclude the Debtors from submitting into evidence the “Precedent Incentive Plans” referenced in the *Debtors’ Omnibus Reply to Objections to the Debtors’ Proposed Sale Incentive Plan* (the “Reply”) (Doc. No. 240) or any related analysis, and (ii) preclude Perella Weinberg Partners LP (“Perella”) from testifying regarding the Precedent Incentive Plans. In support of this motion, the Committee respectfully represents the following:

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

I.

PRELIMINARY STATEMENT²

The Debtors filed their Sale Incentive Plan Motion on March 19, 2013. At that time, they also filed the Verost Declaration in support of the Sale Incentive Plan Motion. Neither the Verost Declaration nor the Sale Incentive Plan Motion make reference to the “Precedent Incentive Plans” (or any other purportedly comparable incentive plans). The Precedent Incentive Plans are first introduced to the Committee in the Debtor’s Reply which was first provided in unredacted form to Committee counsel at approximately 6:30 p.m. the night before the hearing on the Sale Incentive Plan. As such, the Committee has not been afforded an opportunity to (i) review the Precedent Incentive Plans to any degree of detail or (ii) depose the Debtors’ investment banker, Perella, regarding the Debtors’ methodology in developing the set of Precedent Incentive Plans or regarding the Debtors’ assertions in the Reply that the Precedent Incentive Plans are similar to the plan proposed by the Debtors. The Committee deposed Perella’s representative, Adam Verost on May 30, 2013 and, if given the opportunity, would have certainly focused a portion of the deposition on the Precedent Incentive Plans. However, due to the fact that the Debtors chose to file their Reply, including the Precedent Incentive Plans, the night before the hearing—a full 8 days after the Committee’s Objection was filed and almost 3 months after the Sale Incentive Plan Motion was filed—the Committee has been deprived of that opportunity. The Debtors, on the other hand, were able to depose Brent Williams of Duff & Phelps Securities, LLC, the Committee’s financial advisor, regarding the comparable incentive plans that Mr. Williams submitted with his declaration in support of the Committee’s Objection. The Debtors should be precluded from submitting the Precedent Incentive Plans as evidence at

² All capitalized terms not defined in the Preliminary Statement are defined below.

the hearing on the Sale Incentive Plan and the Debtors' witnesses should be precluded from testifying about the Precedent Incentive Plans unless the Committee first has an opportunity to depose the Debtors' witness(es) regarding the Precedent Incentive Plans.

II.

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 19, 2013, the Debtors filed their *Motion for Entry of an Order Authorizing the Debtors to Adopt and Implement (I) a Sale Incentive Plan and (II) a Loyalty Plan* (the "Sale Incentive Plan Motion") (Doc. No. 144) seeking approval of a sale incentive plan (the "Sale Incentive Plan"). On April 9, 2013 the Debtors filed a notice of adjournment of the hearing on the Sale Incentive Plan 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 Sale Incentive Plan Motion, solely as it relates to the Loyalty Plan, which the Committee and the U.S. Trustee did not oppose. The Sale Incentive Plan Motion, as it relates to the Sale Incentive Plan, was further adjourned to April 18, 2013. The hearing on the Sale

Incentive Plan 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.

4. On May 28, 2013, the Committee filed its objection (the “Committee’s Objection”) (Doc. No. 226) to the Sale Incentive Plan Motion, along with a declaration of Brent Williams in support of the Committee’s Objection (Doc. No. 231).

5. On June 5, 2013, at approximately 6:30 p.m. the Debtors provided the Committee with an unredacted copy of their Reply, which was filed in redacted form on the docket of the Debtors’ bankruptcy case at shortly before 6:00 p.m. (Doc. No. 240)

III.

THE DEBTORS SHOULD BE PRECLUDED FROM INTRODUCING INTO EVIDENCE THE PRECEDENT INCENTIVE PLANS OR ANY RELATED TESTIMONY BY THEIR WITNESS(ES) AT THE HEARING ON THE SALE INCENTIVE PLAN

6. The Debtors had ample opportunity to submit a set of comparable incentive plans in a timely fashion, but they failed to do so. Indeed, their Sale Incentive Plan Motion has been pending for almost 3 months, yet the Debtors waited until the night before the hearing to present the Precedent Incentive Plans to the Committee and the U.S. Trustee who have each objected to the Sale Incentive Plan. Without a reasonable amount of time to review the Precedent Incentive Plans and supporting information and to depose Perella on the Precedent Incentive Plans, the Committee is put at an unfair disadvantage. The Debtors should not, at this late hour, be afforded the opportunity to introduce detailed new evidence that the Committee will not have any meaningful opportunity to review and question. As such, the Committee requests that the Court preclude the Debtors’ from submitting into evidence the Precedent Incentive Plans and any related analysis or testimony by Perella or any other witness that the Debtors choose to call at the Sale Incentive Plan Hearing.

WHEREFORE, the Committee respectfully requests that this Court enter an order (i) granting this motion and precluding the Debtors submitting into evidence the Precedent Incentive Plans or any related analysis or testimony in support of the Debtors' Sale Incentive Plan Motion, and (ii) granting such other and further relief as this Court deems just and proper.

Dated: June 6, 2013
New York, New York

/s/ Jeffrey L. Cohen
COOLEY LLP
1114 Avenue of the Americas
New York, New York 10036
Tel.: 212-479-6000
Cathy Hershcopf
Jeffrey L. Cohen
Alex R. Velinsky

*Counsel for the Official
Committee of Unsecured Creditors*