

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Chapter 11
ATARI, INC., *et al.*, 13- 10176 (JMP)
Debtors.¹ (Jointly Administered)

**FIRST AND FINAL APPLICATION OF ALAN CHAPPELL, CONSUMER PRIVACY
OMBUDSMAN, APPOINTED PURSUANT TO SECTION 332 OF THE BANKRUPTCY
CODE FOR APPROVAL AND ALLOWANCE OF COMPENSATION FOR SERVICES
RENDERED DURING THE PERIOD FROM
JULY 22, 2013 THROUGH AND INCLUDING JULY 29, 2013**

Name of Applicant: Alan Chapell

Authorized to Provide Professional Services to: United States Bankruptcy Court for the Southern District of New York

Date of Retention: July 22, 2013

Period for which compensation is sought: July 22, 2013 – July 29, 2013

Amount of Compensation requested: \$8,940.00

Amount of Expense reimbursement requested: \$ 0.00

This is a: _____ interim X final application

The total time expended for the preparation of this application is approximately 2.8 hours and the corresponding compensation requested is approximately \$ 1,680.00 (which amount will be included in the final fee application).

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

FINAL FEE APPLICATION OF ALAN CHAPELL, CONSUMER PRIVACY OMBUDSMAN,
(JULY 22, 2013 – JULY 29, 2013)

NAME	POSITION; EXPERIENCE	HOURLY RATE	TOTAL HOURS	TOTAL COMPENSATION
Alan Chapell	President, Chapell & Associates, LLC; admitted to practice in NY in 2002; certified as an Information Privacy Professional in 2005	\$600.00	14.90	\$8,940.00
Alan Chapell	Expenses	n/a	n/a	\$ 0.00
Alan Chapell	Total Payment Requested	\$600.00		\$8,940.00

SUMMARY TABLE OF SERVICES RENDERED DURING
ALAN CHAPELL'S COMPENSATION PERIOD
(JULY 22, 2013 – JULY 29, 2013)

ACTIVITY	HOURS	FEES
Total Payment Requested	14.90	\$8,940.00

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Chapter 11
: :
ATARI, INC., *et al.*, : 13- 10176 (JMP)
: :
Debtors.² : (Jointly Administered)
: :
: :
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**FIRST AND FINAL APPLICATION OF ALAN CHAPPELL, CONSUMER PRIVACY
OMBUDSMAN, APPOINTED PURSUANT TO SECTION 332 OF THE BANKRUPTCY
CODE FOR APPROVAL AND ALLOWANCE OF COMPENSATION FOR SERVICES
RENDERED DURING THE PERIOD FROM
JULY 22, 2013 THROUGH AND INCLUDING JULY 29, 2013**

TO THE HONORABLE JAMES PECK, UNITED STATES BANKRUPTCY JUDGE:

Alan Chappell, Consumer Privacy Ombudsman (“Ombudsman”), appointed pursuant to Section 332 of the Bankruptcy Code, hereby submits his application (the “Application”) pursuant to 11 U.S.C. § 330, Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), the *Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases*, adopted by the Court on June 24, 1991, and amended December 4, 2009 (together, the “Amended Guidelines”), the *United States Trustee Guidelines for Reviewing applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330*, effective January 30, 1996 (the “United States Trustee Guidelines”) and the *Final Order Under 11 U.S.C. §§ 105 and 331, Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professional*, dated December 13, 2005 (the “Interim

² The “**Debtors**” are Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California U.S. Holdings, Inc.

Compensation Order”) for the allowance of Interim compensation for professional services rendered from July 22, 2013 through and including July 29, 2013 (the “Compensation Period”), and in support thereof, respectfully represents as follows:

I. INTRODUCTION

1. Bankruptcy Filing. On January 22, 2013 (the “Petition Date”), Atari, Inc., *et al* (“Debtors”) filed voluntary petitions for relief under chapter 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the “Bankruptcy Code”).

2. Consumer Privacy Ombudsman. In connection with the sale of Debtors’ assets, the Consumer Privacy Ombudsman was appointed by the United States Trustee on July 21, 2013, pursuant to the *Ex Parte Order Under 11 U.S.C. §§ 332 and 363(b)(1) Appointing Consumer Privacy Ombudsman*, entered July 21, 2013. The appointment is attached as Exhibit “A.”

3. Jurisdiction. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue of the Debtors’ chapter 11 cases (the “Chapter 11 Cases”) is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). The statutory predicate for the relief sought herein is section 330 of the Bankruptcy Code. Pursuant to the Amended Guidelines, a certification regarding compliance with the Amended Guidelines is attached hereto as Exhibit “B.”

II. APPLICATION

4. The Ombudsman makes this First and Final application for approval and allowance of compensation pursuant to section 330 of the Bankruptcy Code. In particular, he seeks approval of \$8,940.00 for legal services rendered in his capacity as Consumer Privacy Ombudsman.

5. **While Debtors ultimately did not include personally identifiable information in the purchased Assets, paragraph 24 of the Bidding Procedures order (Docket No. 260) stipulated as follows: “if the consumer privacy ombudsman is discharged, he or she may**

seek compensation for any services performed until the date of such discharge.”

Accordingly, the Ombudsman is seeking compensation here.

6. The Ombudsman has not entered into any agreement, express or implied, with any other party for the purpose of fixing or sharing fees or other compensation to be paid for professional services rendered in these cases.

7. No promises have been received by the Ombudsman or any member of Alan Chapell & Associates, LLC (“C&A”), his privacy consulting firm, as to compensation in connection with these cases other than in accordance with the provisions of the Bankruptcy Code.

8. The fees sought by this Application reflect an aggregate of 14.90 hours of time spent by the Ombudsman and recorded in performing his duties as Ombudsman at an hourly rate of \$600.00. The Ombudsman has taken all possible measures to reduce his fees in these cases, given the overall amount of professional fees incurred.

9. The Ombudsman rendered all services for which compensation is sought solely in connection with these cases, in furtherance of his duties and functions as Ombudsman. Attached hereto as Exhibit “C” are time entry records broken down in tenths of an hour, based upon the United States Trustee Guidelines, setting forth a detailed description of services performed by Mr. Chapell in his capacity as Ombudsman.

10. C&A maintains computerized records of the time expended in the rendering of professional services required by Mr. Chapell’s responsibilities as Ombudsman. These records are maintained in the ordinary course of C&A’s practice. For the convenience of the Court and parties in interest, a billing summary for the period from March 5, 2013 to July 29, 2013 is attached as part of the cover sheet, showing that it is the work of only Mr. Chapell for which compensation is sought. The compensation requested herein is based on the customary compensation charged by the Ombudsman for similar services and by comparably skilled practitioners in his field.

11. C&A also maintains computerized records of all expenses incurred in connection with the performance of professional services. There were no expenses associated with this project.

III. SUMMARY OF PROFESSIONAL SERVICES RENDERED

14. The Ombudsman has performed services related only to the carrying out of his duties as Consumer Privacy Ombudsman.

15. In his capacity as Ombudsman, Mr. Chapell reviewed multiple privacy and legal agreements submitted by attorneys for the Debtors. Mr. Chapell also reviewed the privacy policies of Debtors, and researched Debtors' previously posted privacy policies via www.archive.org. Mr. Chapell further sought and obtained additional information about the nature and origin of the personally identifiable information contained in the assets that the Debtors wished to transfer; reviewed relevant U.S. and State laws relating to the collection and use of personal data; and drafted the report for the Court containing information pertinent to the facts, circumstances and conditions of the proposed transfer by the Debtors of the customer records.

IV. FACTORS TO BE CONSIDERED IN AWARDING ATTORNEYS' FEES

16. The factors to be considered in awarding attorneys' fees as enumerated in *In re: First Colonial Corp. of America*, 544 F.2d 1291, 1298-99 (5th Cir. 1977), have been adopted by most courts.³ The Ombudsman respectfully submits that the consideration of these factors should result in this Court's allowance of the full compensation sought.

³ *In Re: Nine Assoc., Inc.*, 76 B.R. 943, 945 (S.D.N.Y. 1987). The Factors Embraced By The Fifth Circuit In *First Colonial* Were Adopted By The Fifth Circuit's Decision In *Johnson V. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), Except That *First Colonial* Also Included The "Spirit Of Economy" As A Factor, Which Was Expressly Rejected By Congress In Enacting Section 330 Of The Bankruptcy Code. *Stroock & Stroock & Lavan V. Hillsborough Holdings Corp. (In Re: Hillsborough Holdings Corp.)*, 127 F.3d 1398, 1403 (11th Cir. 1997). The Remaining *First Colonial* Factors Continue To Apply To Determine The Reasonableness Of Fees Awarded Under The Bankruptcy Code. 3 COLLIER ON BANKRUPTCY ¶ 330.04(3)(C) (Lawrence P. King, *Et Al.*, Editors, 15th Ed. 1997). In Addition, A Majority Of The *First Colonial* Factors Are Now Codified In 11 U.S.C. § 330(A)(3). *Id.*

- (A) The Time and Labor Required. The Ombudsman was appointed on July 22, 2013, and had only a few days to familiarize himself with the facts and circumstances of the case, and research the possible data protection law issues. The situation required a high degree of professional competence and expertise in order for the report to be completed in time for the hearing.
- (B) The Novelty and Difficulty of Questions. Debtor’s proposed transfer is governed by Federal law, state law and non-U.S. law – which are sometimes in conflict. Consequently, understanding the basic flows of consumer data into and outside of Debtor also proved to be challenging.
- (C) The Skill Requisite to Perform the Legal Services Properly. In addition to his background of more than nine (9) years in privacy, the Ombudsman is certified as an Information Privacy Professional by the International Association of Privacy Professionals (“IAPP”).⁴ Given the very brief time period available in which to research and prepare a report, only someone with significant familiarity with privacy laws and data protection schemes would have been able to complete the report.
- (D) The Preclusion of Other Employment by Applicant Due to Acceptance of the Case. The time spent on this proceeding did preclude other work.
- (E) The Customary Fee. The compensation sought herein is based upon Mr. Chapell’s normal hourly rates for privacy consulting services.

⁴ Certification As An Information Privacy Professional Requires Passing An Exam That Covers The “Definitions, Concepts And Applications Of U.S. And International Privacy Laws And Information Management Practices As Well As The Privacy Implications Of Emerging Technologies. This Includes HIPAA, COPPA, GLBA, APEC Principles, OECD Guidelines, EU Directive, Employee Records Management, Workplace Monitoring, Contingency Planning, Incident Handling, ... And Other Key Items.” *See* https://www.privacyassociation.org/index.php?option=com_content&task=view&id=36&Itemid=223. Once Certified, A Minimum Of Thirty (30) Credits Over A Three (3) Year Period Of Qualifying Continuing Privacy Education (“CPE”) Training Are Required To Maintain Certification. *See* https://www.privacyassociation.org/index.php?option=com_content&task=view&id=18&Itemid=88.

- (F) Whether the Fee Is Fixed or Contingent. C&A charges customary hourly rates for the time expended by its members, and its fees are not outcome-dependent.
- (G) Time Limitations Imposed by Client or Other Circumstances. The Ombudsman had less than a few days to obtain and review the documents, research and identify the relevant privacy policies, research and determine the relevant privacy and data protection laws, and prepare his report. This required him to work evenings and at night – including through a weekend.
- (H) The Amount Involved and Results Obtained. **While Debtors ultimately did not include personally identifiable information in the purchased Assets, paragraph 24 of the Bidding Procedures order (Docket No. 260) stipulated as follows: “if the consumer privacy ombudsman is discharged, he or she may seek compensation for any services performed until the date of such discharge.” Accordingly, the Ombudsman is seeking compensation here.**
- (I) The Experience, Reputation and Ability of the Professional. As previously noted, Mr. Chapell has more than ten (10) years’ experience in practicing privacy, and is a Certified Information Privacy Professional. He serves as New York City Chapter Chair for the IAPP, the largest association of privacy professionals in the world, and the only credentialing authority for privacy practitioners. He is recognized widely as a thought leader on issues of privacy and interactive marketing, is a highly sought after speaker on issues of privacy, and has published articles on subjects relating to privacy and data protection law. Mr. Chapell’s experience and expertise enabled him to complete his report in time for the scheduled hearing.

- (J) The “Undesirability” of the Case. This appointment was not undesirable.
- (K) Nature and Length of Professional Relationship. The statute requires the Consumer Privacy Ombudsman to be “a disinterested person”⁵ to ensure an objective and unbiased report be provided to the Court. The Ombudsman has rendered and filed an objective, unbiased report with the Court.

V. ALLOWANCE OF COMPENSATION

17. The professional services rendered by the Ombudsman required a high degree of professional competence and expertise to address, with skill and dispatch, the complex issues that arose in these cases. The Ombudsman respectfully submits that the services rendered to the Court were performed efficiently, effectively and economically.

18. The allowance of compensation for the services rendered in bankruptcy cases by a Consumer Privacy Ombudsman is expressly provided for in section 330(a)(1) of the Bankruptcy Code.

19. With respect to the level of compensation, section 330(a)(1)(A) of the Bankruptcy Code provides, in pertinent part, that the Court may award to a consumer privacy ombudsman, “reasonable compensation for actual, necessary services rendered.” Section 330(a)(3), in turn, provides that:

In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

⁵ 11 U.S.C. § 332(A).

- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and expertise in the bankruptcy field; and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. §330(a)(3).

20. The congressional policy expressed above provides for adequate compensation in order to continue to attract qualified and competent professionals, including Consumer Privacy Ombudsmen, to bankruptcy cases.⁶

21. The total time spent by the Ombudsman during the period of July 22, 2013 through and including July 29, 2013, was 14.90 hours and has a fair market value of \$8,940.00. As shown by this Application and supporting exhibits, the Ombudsman's services were rendered economically and without unnecessary duplication of efforts.

VI. EXPENSES

22. The expenses incurred during this period and relating to these matters are in the nature of "nonreimbursable overhead," as defined in the Guidelines. Consequently, no reimbursement for expenses is sought.

VII. WAIVER OF MEMORANDUM OF LAW

23. Based upon the supporting authorities contained herein, and because this Application presents no novel issues of law, the Ombudsman respectfully requests that the Court

⁶ *In Re: Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 850 (3d Cir. 1994) ("Congress Rather Clearly Intended To Provide Sufficient Economic Incentive To Lure Competent Bankruptcy Specialists To Practice In The Bankruptcy Courts." [Citation And Internal Quotation Marks Omitted]); *In Re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 18 (Bankr. S.D.N.Y. 1991) ("Congress' Objective On Requiring That The Market, Not The Court, Establish Attorneys' Rates Was To Ensure That Bankruptcy Cases Were Staffed By Appropriate Legal Specialists.")

waive the requirement of Local Bankruptcy Rule 9013-1(b) of filing a separate memorandum of law in support of this Application.

VIII. NOTICE

24. The Ombudsman has given notice of this Application to (a) counsel for the Debtors, and (b) the Office of the United States Trustee. The Ombudsman understands other parties in interest will receive notice separately.

IX. CONCLUSION

WHEREFORE, the Ombudsman respectfully requests the Court to enter an order, substantially in the form attached hereto as Exhibit "D," (a) allowing Alan Chapell Final compensation for professional services rendered as Consumer Privacy Ombudsman for the period July 22, 2013 through and including July 29, 2013 in the amount of \$8,940.00 and (b) such other and further relief as is just.

Dated: August 13, 2013
New York, New York

/s/ Alan Chapell
Alan Chapell
Alan Chapell & Associates, LLC
692 Greenwich Street, #5
New York, NY 10014
achapell@chapellassociates.com
Consumer Privacy Ombudsman

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x Chapter 11
In re Case No. 13-10176 (JMP)
ATARI, INC., et al.,
Debtors. (Jointly Administered)
-----x

NOTICE OF APPOINTMENT OF CONSUMER PRIVACY OMBUDSMAN

Tracy Hope Davis, the United States Trustee for Region 2 (the “United States Trustee”), hereby appoints Alan Chapell, as Consumer Privacy Ombudsman in these cases in respect of the sale transaction approved by the Order Signed on June 14, 2013 Approving (A) Bid Procedures in Connection with the Sale(s) of Substantially All of the Debtors Assets, (B) Procedures Related to the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection With Such Sale(s), (C) the Form and Manner of Notice Thereof, (D) Scheduling the Hearing to Consider Approval of the Sale(s), (E) Granting Related Relief and (F) Procedures to Sell the Remaining De Minimis Assets without Further Court Approval (the “Bidding Procedures Order”). ECF Doc. No. 260. The Verified Statement of Mr. Chapell is attached hereto.

The appointment is made pursuant to the Bidding Procedures Order, which, among other things, directs the United States Trustee to appoint a Consumer Privacy

Ombudsman pursuant to Bankruptcy Code Section 332. See Bidding Procedures Order
at 24.

Dated: New York, New York
July 22, 2013

TRACY HOPE DAVIS
UNITED STATES TRUSTEE
Region 2

By: /s/ Richard C. Morrissey
Richard C. Morrissey
Trial Attorney
201 Varick Street, Room 1006
New York, New York 10014
Tel. No. (212) 510-0500
Fax. No. (212) 668-2255

EXHIBIT B

Atari, Inc., *et al* debtors (the “Debtors”) hereby certifies with respect to his First and Final application for allowance of compensation for services rendered dated July 29, 2013 (the “Application”), for the period of July 22, 2013 Through and including July 29, 2013 (the “Compensation Period”) as follows:

1. I am the professional designated in respect of compliance with the Guidelines.
2. I make this certification in support of the Application for First and Final compensation for the Compensation Period, in accordance with the Amended Guidelines.
3. I certify that:
 - a. I have read the Application;
 - b. To the best of my knowledge, information and belief formed after reasonable inquiry, the fees and disbursements sought fall within these Amended Guidelines and the UST Guidelines, except as specifically noted in the certification and described in the fee application;
 - c. Except to the extent that fees or disbursements are prohibited by these Amended Guidelines or the UST Guidelines, the fees and disbursements sought are billed at rates and in accordance with practices customarily employed by C&A and generally accepted by C&A’s clients; and
 - d. In providing reimbursable service, C&A does not make a profit on that service, whether the service is performed by C&A in-house or through a third-party.
4. I further certify that (a) the Office of the United States Trustee and (b) counsel for the Debtors, and (c) the chair of each official committee have all been provided not later than 21

days after the end of each month with a statement of fees and disbursements accrued by C&A during such month.

5. I further certify that a) the Office of the United States Trustee and (b) counsel for the Debtors, and (c) the chair of each official committee have all been provided with a copy of the relevant fee application at least 14 days before the date set by the court or any applicable rules for filing fee applications.

Dated: New York, New York
August 13, 2013

/s/ Alan Chapell

EXHIBIT C

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TIME RECORDS

Atari, Inc.

Consumer Privacy Ombudsmanship

Date	Project	Activity	Comments	Hours
7/19/13	Initial Call	Call with Debtor's counse lKristine Manoukian to get overview of relevant issues.		0.30
7/19/13	Initial Questions	Craft initial set of questions, send questions to Kristine Manoukian		0.50
7/19/13	Initial Quesitons	Review list of backup bidders		0.30
7/21/13	Research	Review Atari.com privacy policy Disclosures (including previous PP disclosures via www.Archive.org)		1.80
7/21/13	Research	Researching relevant privacy law		1.30
7/21/13	Research	Receiving answers to initial questions from Debtor. Review answers.		0.40
7/22/13	Initial Quesitons	Call with Kristine to discuss timeline re: when I would receive answers to my initial questions form Debtor.		0.20
7/22/13	Initial Questions	Call with Kristine to discuss the concept of Qualified Buyer and how that applies to potential Purchasers.		0.30
7/22/13	Initial Questions	Sent email to Kristine wth previous versions of Atari privacy policies and background information on Qualified Buyer concept from FTC Toyspart proceeding.		0.20
7/22/13	Report	Begin Drafting report		2.40
7/22/13	Quesitons	Send follow up questions to Kristine - particularly regarding database vendor and data fields being collected by Debtor.		0.30
7/22/13	Questions	Receive sale order language from Kristine re: Qualified Buyer. Review language and suggested edits.		0.60
7/22/13	Report	Continue Drafting Privacy Report		0.90
7/22/13	Report	Finalize and Proof the Report		1.70
7/22/13	Report	Sent Report to Kristine Manaukian		0.10
7/22/13	Report	Email with Krstine re: notice and choice requirements for qualified buyers.		0.30
7/22/13	Report	order (.1) Scan of BPO (.2) Email with Krstine re: states of Debtor's customer PII (.1)		0.40
7/22/13	Report	Email to UST confirming that I do not need to participate in hearing.		0.10
7/29/13	Fee Application			2.80

Total Hours (including fee app) 14.90

Rate \$ 600.00

Reg Hourly rate = \$600/hr

Fees \$ 8,940.00

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
ATARI, INC., <i>et al.</i> ,	:	13- 10176 (JMP)
	:	
Debtors. ²	:	(Jointly Administered)
	:	
	:	

**FIRST AND FINAL APPLICATION OF ALAN CHAPPELL, CONSUMER PRIVACY
OMBUDSMAN, APPOINTED PURSUANT TO SECTION 332 OF THE BANKRUPTCY
CODE FOR APPROVAL AND ALLOWANCE OF COMPENSATION FOR SERVICES
RENDERED DURING THE PERIOD FROM
JULY 22, 2013 THROUGH AND INCLUDING JULY 29, 2013**

Upon consideration of the Application(s) for Allowance of First and Final Compensation and Reimbursement of Expenses (the “Application(s)”) for professional services rendered and expenses incurred during the period commencing July 22, 2013 through and including July 29, 2013; and a hearing having been held before this Court to consider the Application(s) on ; and notice having been giving pursuant to Federal Rules of Bankruptcy Procedure 2002(a)(7) and (c)(2); and due consideration having been given to any responses thereto; and sufficient cause having been shown therefore, it is hereby

ORDERED that the Applications(s) is granted in the amount of \$8,940.00.

Dated: New York, New York

JAMES M. PECK
United States Bankruptcy Judge

² The “*Debtors*” are Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California U.S. Holdings, Inc.