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

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

**RESPONSE OF CLAIMANT, INTERPLAY ENTERTAINMENT CORP.,  
TO THE DEBTORS' FIRST OMNIBUS OBJECTION TO CERTAIN CLAIMS**

Interplay Entertainment Corp. ("Claimant"), by and through its undersigned counsel, hereby submits this response (this "Response") to the *First Omnibus Objection to Certain Claims* (the "First Claim Objection") (Docket No. 363), dated August 26, 2013, filed by Atari, Inc. ("Atari"), and its affiliated debtors listed in footnote 1 of the First Claim Objection, as debtors and debtors-in-possession (each a "Debtor" and, collectively, the "Debtors"). In support of this Response, Claimant respectfully states as follows:

**PRELIMINARY STATEMENT**

1. Claimant filed two (2) proofs of claim, Claim No. 155 (the “Atari Inc. Claim”) (attached to this Response as Exhibit A), and Claim No. 156, (the “Atari Interactive Claim”) (attached to this Response as Exhibit B) (collectively, the “Interplay Claims”). Both of the Interplay Claims were filed on April 30, 2013, prior to the Bar Date.<sup>1</sup> Included with the Interplay Claims was supporting documentation evidencing Claimant’s claims; thus, Claimant satisfied its *prima facie* burden for establishing a claim against the Debtors.

2. Despite the fact that Claimant provided supporting documentation attached to the Interplay Claims and provided a plain statement setting forth the basis for the Interplay Claims, the Debtors lump the Interplay Claims into an “omnibus” objection by summarily stating that the Interplay Claims lack supporting documentation to comply with Bar Date Order Section 8(a). *See* Schedule 2 of Exhibit A to the First Claim Objection. The Debtors also contend that the Atari Interactive Claim is asserted against the wrong Debtor. *See* Schedule 5 of Exhibit A to the First Claim Objection. Claimant, however, complied with the applicable claims requirements set forth in the Bar Date Order and under applicable law.

3. For the reasons stated above and set forth below, the First Claim Objection should be overruled as it pertains to the Interplay Claims.

**APPLICABLE STANDARD**

4. As set forth in the First Claim Objection, a filed proof of claim is deemed allowed unless a party in interest objects thereto. *See* 11 U.S.C. 502(a). Also as set forth in the First Claim Objection, to shift the burden to the claimant to establish validity of the claim, an

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Claim Objection.

objection must refute at least one of the claim's essential allegations. *See, e.g., Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (2d Cir. BAP 2000).

5. Moreover, the Debtors assert that omnibus objections are proper under Bankruptcy Rule 3007(d) in whole or in part, because:

- (1) they duplicate other claims;
- (2) they have been filed in the wrong case;
- (3) they have been amended by subsequently filed proofs of claim;
- (4) they were not timely filed;
- (5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;
- (6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;
- (7) they are interests, rather than claims; or
- (8) they assert priority in an amount that exceeds the maximum amount under § 507 of the Code.

*See* First Claim Objection at ¶ 18.

### **RESPONSE/ARGUMENT**

6. Bar Date Order Section 8(a), which Debtors specifically cite as the basis for their objection, requires the following:

- (a) Each Proof of Claim must: (i) be written in English; (ii) include a Claim amount denominated in U.S. dollars; (iii) conform substantially with the Proof of Claim Form provided by the Debtors or Official Bankruptcy Form 10; (iv) state a Claim against only one Debtor; (v) clearly indicate the Debtor against which the creditor is asserting a Claim; and (vi) be signed by the Claimant or if the Claimant is not an individual, by an authorized agent of the Claimant[.]

*See* Bar Date Order § 8(a).

7. The Interplay Claims satisfy all of the above-listed requirements. Furthermore, to the extent Bar Date Order Section 8(d) requires each claim to include supporting documentation, Claimant attached the relevant documentation in the form of that certain License Agreement dated April 27, 2006 (the "License Agreement") (attached to the Interplay Claims), which forms the basis for the Debtors' liability to Claimant.

8. Claimant timely filed proofs of claim, Claim Nos. 155 and 156, and not only submitted official form B-10, but included documentation to establish and support the basis for its claims. *See Exhibits A and B.* In so doing, Claimant satisfied all of the requirements of a valid claim as set forth in the Bar Date Order. Therefore, Claimant has satisfied its *prima facie* burden under the Bankruptcy Code and the Bankruptcy Rules.

9. In contrast, the Debtors failed to provide any substantive basis or evidence to support their request to expunge the Interplay Claims and have not satisfied their burden. The Debtors provided no “evidence sufficient to negate the *prima facie* validity” of the Interplay Claims; the Debtors merely made a summary statement that documentation is insufficient. Moreover, the Debtors failed to explain how the Interplay Claims do not comply with the Bankruptcy Rules and also failed to aver that the Debtors were “unable to determine the validity of the claim[s] because of the noncompliance.” *See*, Fed. R. Bankr. P. 3007(d)(6). Arguably, on that basis, the Debtors failed to demonstrate that any objections they may have to the Interplay Claims are properly joined in the First Claim Objection. Accordingly, the Interplay Claims should be allowed in full and the First Claim Objection should be overruled as to the Interplay Claims.

10. Despite the sufficiency of the originally filed Interplay Claims, Claimant has submitted, concurrently with this Response, amended Interplay Claims (*See Exhibit C*, the “Amended Atari Inc. Claim” and *Exhibit D*, the “Amended Atari Interactive Claim”; collectively, the “Amended Claims”) to further elucidate the bases for the Interplay Claims and demonstrate that the Debtors had actual knowledge of the bases of the Interplay Claims well in advance of these Chapter 11 cases.

11. The Amended Atari Inc. Claim explains that under the License Agreement, Claimant licensed its intellectual property related to the Earthworm Jim video game franchise to Atari, Inc. *See*, License Agreement. Earthworm Jim is an established game franchise. At the time the parties entered into the License Agreement, Claimant had already released several Earthworm Jim video games, as well as merchandising in the form of a line of action figures, comic books, and an animated television series. Under the License Agreement, Atari, Inc.'s rights were exclusive with respect to development of additional Earthworm Jim video games on certain platforms.

12. The exclusive License Agreement is governed by New York state law, which imposes a duty upon an exclusive licensee to exploit the license for the benefit of the licensor. *See, Wood v. Lady-Duff Gordon*, 222 N.Y. 88, 92 (1917) (Cardozo, J.) (promise to pay percentage of revenues resulting from the exclusive agency and to issue accounting reports “was promise to use reasonable efforts to bring profits and revenues into existence”). This duty to exploit the licensed property arises even when an advance is paid. *See, Reback v. Store Prods., Inc.*, 15 Misc.2d 681 (Sup. Ct. N.Y.Cty. 1958) (licensee had duty to exploit rights despite \$100,000 minimum guaranteed payment). During the five (5) year license term, however, Atari, Inc. never developed or released a single Earthworm Jim video game on any platform. Therefore, Atari, Inc. breached the License Agreement to Claimant's substantial damage according to proof.

13. Claimant is informed and believes that Atari, Inc.'s failure to perform under the License Agreement was due to the influence and interference of Atari Interactive. As acknowledged by insiders, Atari Interactive was to publish Earthworm Jim games that were developed by Atari, Inc. under the License Agreement. *See*, email from Jean-Marcel Nicolai to

Hervé Caen, dated October 31, 2007, attached to Exhibit D (the Amended Atari Interactive Claim) as Exhibit 2. In the interactive entertainment industry, a publisher promotes and places games for sale through distributors or retailers, provides core functions such as marketing and advertising, and oftentimes finances the development in whole or in part. Thus, a publisher significantly influences the developer of a video game title through both its approval process over the games at various stages of development and through financial payments that are usually conditioned upon those approvals.

14. The email attached to Exhibit D further indicates that Atari Interactive's involvement as publisher "complicated" the development of games under the License Agreement between Claimant and Atari, Inc. Atari, Inc. and Atari Interactive reportedly shared several key employees, including at various times, CEO and Chairman of the Board. Through exercise of influence over Atari, Inc. at the executive, financial and other levels, Atari Interactive "complicated" the development process for the licensed Earthworm Jim video games and caused or influenced Atari, Inc. to fail to develop any Earthworm Jim product whatsoever. New York courts recognize a cause of action for tortious interference with a contract, including when, as here, a defendant is alleged to have procured a party's breach of the contract or has interfered with performance of the agreement. *See, e.g., Phillips & Benjamin Co. v. Ratner*, 206 F.2d 372, 376 (2nd Cir. 1953).

15. Claimant reserves and preserves its rights to raise the certain responses/defenses asserted herein, as well as any other defenses to the First Claim Objection at the hearing on the First Claim Objection.

**CONCLUSION**

WHEREFORE, for the reasons set forth herein, Claimant respectfully requests that the Court (i) overrule the relief requested in the First Claim Objection as it pertains to Claimant and the Interplay Claims, (ii) allow the Interplay Claims in full (as amended), and (iii) grant to Claimant such other and further relief as the Court deems just and proper under the circumstances.

Dated: New York, New York  
September 18, 2013

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