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Hearing Date and Time: February 14, 2013 at 10:00 a.m.
Objection Deadline: February 7, 2013 at 4:00 p.m.

Proposed Attorneys for Debtors and Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

**APPLICATION OF THE DEBTORS AND DEBTORS-IN-POSSESSION
TO EMPLOY AND RETAIN PROTIVITI INC. AS THEIR FINANCIAL ADVISOR**

TO THE HONORABLE JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE:

The debtors and debtors-in-possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”) submit this application (the “Application”) to the United States Bankruptcy Court for the Southern District of New York (the “Court”) for entry of an order (the “Proposed Form of Order”), in substantially the form annexed hereto as **Exhibit A**, authorizing the Debtors to employ and retain Protiviti Inc. (“Protiviti”) as their financial advisor effective *nunc pro tunc* to January 21, 2013 (the “Petition Date”) on a final basis. In support of this Application, the Debtors rely on the *Declaration of Guy A. Davis* (including the exhibit, the “Davis Declaration”), a true and complete copy of which is annexed

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

hereto as **Exhibit B**, which is incorporated herein by reference. In further support of this Application, the Debtors respectfully represent as follows:

I. Background

1. On the Petition Date, each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code commencing the above-captioned chapter 11 cases. By an order [Docket No. 27] entered on January 24, 2013, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b).

2. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or an examiner has been made in these cases and no statutory committees have been appointed or designated.

3. A description of the Debtors' businesses, the reasons for filing these chapter 11 cases and the relief sought from this Court to allow for a smooth transition into operations under chapter 11 is set forth in the *Declaration of Robert A. Mattes (I) In Support of Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 16] (the "First Day Declaration"), which was filed on January 22, 2013.

II. Jurisdiction, Venue and Predicates for Relief

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

5. The statutory predicates for the relief requested herein are sections 327(a) and 328(a) of the Bankruptcy Code, Rules 2014(a) and 2016 of the Federal Rules of Bankruptcy

Procedure (the “Bankruptcy Rules”), and Rule 2014-1 of the Local Rules of the United States Bankruptcy Court for the Southern District of New York (the “Local Bankruptcy Rules”).

III. Relief Requested and the Basis for Relief

6. By this Application, the Debtors seek entry of the Proposed Form of Order authorizing the Debtors to employ and retain Protiviti as their financial advisor in the Chapter 11 Cases, on the terms and conditions set forth in this Application and in the Davis Declaration, effective *nunc pro tunc* to the Petition Date.

7. The Debtors seek to retain Protiviti as their financial advisor because an experienced financial advisor such as Protiviti fulfills a critical need that complements the services offered by the Debtors’ other restructuring professionals. The Debtors have selected Protiviti because, among other things, (a) Protiviti and its professionals have considerable experience in providing financial advisory services of the type proposed hereunder; (b) Protiviti has served as financial advisor to the Debtors since January 11, 2013, and in preparing for these Chapter 11 Cases has become familiar with the Debtors’ corporate structures, capital structure, and businesses; (c) Protiviti does not hold or represent any interest adverse to the Debtors or to their bankruptcy estates, as more particularly described below; and (d) Protiviti is a “disinterested person” as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code. Accordingly, the Debtors request that the Court approve the retention of Protiviti on the terms and conditions set forth herein and in the Davis Declaration, which, *inter alia*, provide that Protiviti will be compensated in accordance with Protiviti’s normal hourly rates in effect when services are rendered (discounted by 5%) and normal reimbursement policies.

8. The Debtors anticipate that Protiviti will render financial advisory services to the Debtors as needed through the course of the Chapter 11 Cases. In particular, consistent with the

engagement letter between the Debtors and Protiviti (the "Engagement Letter"), a true and complete copy of which is annexed as Exhibit 1 to the Davis Declaration, it is anticipated that Protiviti will perform, among other things, the following services for the Debtors:

A. Services to be Provided

- a) Assist the Debtors with the administration of their debtor-in-possession financing, including weekly reporting, cash management, and responses to due diligence requests;
- b) provide the Debtors' accounting department with assistance and guidance regarding chapter 11 protocols and policies;
- c) assist with vendor communications and negotiations of post-petition trade terms and utility deposits;
- d) assist with projecting cash flows through a potential sale or plan confirmation.;
- e) interface with creditor groups (e.g., respond to document/information and due diligence requests) and prepare any required/agreed upon flash reporting;
- f) assist with/prepare Monthly Operating Reports;
- g) assist counsel in preparing evidence and rendering testimony as needed to address contested motions;
- h) accumulate, reconcile, and adjudicate claims filed;
- i) assist with claims disbursement; and
- j) provide other analytical support and/or testimony, as required, to facilitate the efficient sale of the Debtors' assets, development and execution of a chapter 11 plan, and possible recovery actions against third parties.

9. The Debtors seek to retain Protiviti because of Protiviti's extensive experience and knowledge in the field of financial advisory services. Protiviti has been actively involved in major chapter 11 cases and has represented debtors-in-possession and official committees of unsecured creditors in many cases, including among others: *Credit-Based Asset Servicing and Securitization, LLC*, Case No. 10-16040 (Bankr. S.D.N.Y. Nov. 13, 2010); *Oriental Trading*

Company, Case No. 10-12638 (Bankr. D. Del. Aug. 25, 2010); *The Glebe, Inc.*, Case No. 10-71553 (Bankr. E.D. Va. Jun. 28, 2010); *Thornburg Mortgage, Inc.*, Case No. 09-17787 (Bankr. Md. May 1, 2009); *LandAmerica Financial Group*, Case No. 08-35995 (Bankr. E.D. Va. Nov. 26, 2008); *Circuit City Stores, Inc.*, Case No. 08-35653 (Bankr. E.D. Va. Nov. 10, 2008); *Uni-Marts, LLC*, Case No. 08-11037 (Bankr. D. Del. May 29, 2008); and *Linen N'Things*, Case No. 08-10832 (Bankr. D. Del. May 2, 2008). Furthermore, Protiviti is familiar with the Debtors' assets and liabilities and affairs and many of the potential issues that may arise in the context of the Chapter 11 Cases. Accordingly, the Debtors believe that Protiviti is both well-qualified and uniquely able to service them in the Chapter 11 Cases in a cost-effective, efficient and timely manner. Should the Court approve the Debtors' retention of Protiviti, Protiviti will continue, without interruption, to perform the services for the Debtors as described herein.

B. Terms of Retention

10. Pursuant to section 328(a) of the Bankruptcy Code, the Court may approve Protiviti's retention on any reasonable terms. The Debtors submit that the most reasonable terms and conditions are those agreed upon by Protiviti and the Debtors, which are substantially similar to those entered into between Protiviti and other clients on a daily basis in a competitive market for financial advisory services for similar comparable complex matters, whether in court or otherwise, regardless of whether a fee application is required. Therefore, the Debtors have agreed that, subject to the Court's approval, Protiviti will be paid its customary hourly rates for professional services rendered that are in effect on the date services are rendered, less a negotiated 5% discount. These rates may change from time to time in accordance with Protiviti's established billing practices and procedures and the Debtors have agreed to pay the rates as adjusted (net of the 5% discount) in accordance with such established practices and

procedures. The hourly rates charged by Protiviti's professionals vary based on, among other things, such professional's work experience, level within the firm and educational background.

11. The initial hourly rates for the professionals at Protiviti who are expected to have primary responsibility for the representation of the Debtors are set forth below:

Position	Rate Range (net of 5% discount)		
	Managing Director	\$532	-
Directors / Assoc. Directors	\$356	-	\$441
Managers	\$251	-	\$342
Sr. Consultants / Consultants	\$142	-	\$247
Administrative	\$90	-	\$90

12. The Debtors also have agreed to reimburse Protiviti, subject to the Court's approval, for all reasonable and actual out-of-pocket expenses incurred by Protiviti on the Debtors' behalf, such as document reproduction, long distance telephone and telecopier charges, mail and express mail charges, travel expenses, overnight courier expenses, computer research, expenses for working meals, transcription costs, and other disbursements. The Debtors understand that Protiviti will charge the Debtors for these expenses in a manner and at rates consistent with expenses charged generally to Protiviti's other clients. Protiviti has stated that it will make every effort to minimize expenses in the Chapter 11 Cases.

13. The Debtors understand that Protiviti intends to apply to the Court for allowance of compensation and reimbursement of expenses in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, the guidelines established by the office of the United States Trustee for the Southern District of New York, and

any other applicable procedures or orders of the Court for services performed and expenses incurred after the Petition Date. In accordance therewith, Protiviti's personnel will keep time records detailing and describing their daily activities, the identities of the persons who performed such tasks, and the amount of time expended, in six minute (1/10th hour) increments, on each activity.

14. The Debtors understand that Protiviti's compensation will be subject to the standard of review provided in section 328(a) of the Bankruptcy Code and will not be subject to the standard of review set forth in section 330 of the Bankruptcy Code; provided, however, that the United States Trustee will retain all rights to object to Protiviti's interim and final fee applications (including expense reimbursement) on all grounds, including but not limited to the reasonableness standard provided for in section 330 of the Bankruptcy Code.

C. Protiviti's Disinterestedness

15. Protiviti has informed the Debtors and to the best of the Debtors' knowledge, information, and belief, and except to the extent disclosed in the Davis Declaration, that Protiviti has (a) no connection with the Debtors, their creditors, their equity security holders, the United States Trustee with supervision over the Southern District of New York, any person employed in the office of the United States Trustee for the Southern District of New York, any parties in litigation with the Debtors or any other party with an actual or a potential interest in the Chapter 11 Cases; (b) Protiviti is not a creditor, an equity security holder or an insider of the Debtors; (c) Protiviti is not and was not, within two years of the Petition Date, a director, officer or employee of the Debtors; and (d) Protiviti does not hold or represent any interest materially adverse to the Debtors' estates or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the Debtors for any other reason.

16. As stated above, the Debtors engaged Protiviti on Friday, January 11, 2013. On Monday, January 14, 2013, the Debtors provided Protiviti with an advance payment retainer in the amount of \$50,000 for financial advisory services to be rendered by Protiviti. This advance payment retainer was replenished with an additional \$68,000 prior to the Petition Date, and Protiviti periodically applied prepetition charges against the balance of the advance payment retainer. Accordingly, the Debtors understand that Protiviti never became, and currently is not, a creditor of the Debtors' estates.

17. As of the Petition Date, Protiviti holds no advance retainer balance to cover post-petition professionals' fees and expenses that may be approved by the Court and may become due in the Chapter 11 Cases.

18. Accordingly, the Debtors believe that Protiviti is a "disinterested person," as that phrase is defined in section 101(14) of the Bankruptcy Code (as modified by section 1107(b) of the Bankruptcy Code), as required by section 327(a) of the Bankruptcy Code, and does not hold or represent an interest adverse to the Debtors' estates.

19. Protiviti has informed the Debtors and to the best of the Debtors' knowledge, information, and belief, and as set forth in the Davis Declaration (i) Protiviti has no agreement with any other entity to share any compensation received in the Chapter 11 Cases; and (ii) unless otherwise disclosed therein, no professional at Protiviti is related to any United States Bankruptcy Judge for the Southern District of New York, any United States District Judge for the Southern District of New York, any United States Magistrate Judge for the Southern District of New York, the United States Trustee with supervision over the Southern District of New York, or any employees of the Office of the United States Trustee for the Southern District of New York.

20. The Debtors' knowledge, information and belief regarding certain of the matters set forth in this Application are based on, and made in reliance upon, the Davis Declaration. The Debtors understand that Protiviti will periodically review its files during the pendency of the Chapter 11 Cases to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new relevant facts or relationships are discovered or arise, the Debtors understand that Protiviti will use reasonable efforts to identify such further developments and will file promptly a supplemental declaration, as required by Bankruptcy Rule 2014(a).

21. The Debtors submit that the retention and employment of Protiviti on the terms and conditions set forth herein, in the Davis Declaration and the Engagement Letter are in the best interests of the Debtors, the Debtors' estates, their creditors and all potential parties in interest. Protiviti is well qualified to perform the financial advisory services described above, and the Debtors know of no reason why Protiviti should not be retained as their financial advisor in these Chapter 11 Cases.

D. Approval of the Retention and Employment of Protiviti Pursuant to Section 328(a) of the Bankruptcy Code is Appropriate

22. Section 328 of the Bankruptcy Code provides, in pertinent part, that a debtor "with the court's approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, *on an hourly basis*, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 328(a) (emphasis added). Thus, section 328(a) of the Bankruptcy Code permits this Court to approve the terms of Protiviti's engagement as set forth in the Engagement Letter, including the Indemnification Provisions (as defined below).

23. As recognized by numerous courts, Congress intended for section 328(a) of the Bankruptcy Code to enable debtors to retain professionals pursuant to specific fee arrangements

to be determined at the time of the court's approval of the retention, subject to reversal only if the terms are found to be improvident in light of "developments not capable of being anticipated at the time of the fixing of such terms and conditions." *Donaldson, Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (In re Nat'l Gypsum Co.)*, 123 F.3d 861, 862-63 (5th Cir. 1997) ("If the most component professionals are to be available for complicated capital restructuring and the development of successful corporate reorganization, they must know what they will receive for their expertise and commitment").

24. The Debtors submit that the terms and conditions of Protiviti's engagement, including the Indemnification Provisions, are reasonable terms and conditions of employment and should be approved under section 328(a) of the Bankruptcy Code. They appropriately reflect the nature of the services to be provided by Protiviti and are consistent with the hourly fee structure and indemnification provisions typically utilized by Protiviti and other leading financial advisory firms. The hourly rate fee provision and the Indemnification Provisions are reasonable, in light of, among other things, (a) industry practice, (b) market rates charged for comparable services both in and out of the chapter 11 context, and (c) Protiviti's substantial experience with respect to financial advisory services. The hourly rate fee provision and the Indemnification Provisions appropriately reflect (i) the nature and scope of services to be performed by Protiviti in these Chapter 11 Cases, and (ii) the fee provision and the Indemnification Provisions typically utilized by Protiviti and other leading financial advisory firms.

E. Proposed Indemnification Provisions

25. As part of the overall compensation payable to Protiviti under the terms and conditions set forth in Engagement Letter, the Debtors have agreed to indemnify the Protiviti Parties (as defined in the Engagement Letter) under certain circumstances in accordance with the

indemnification provisions (collectively, the “Indemnification Provisions”) set forth in Attachment 1 to the Engagement Letter, subject to the modifications described below, and as modified by the Proposed Form of Order. The terms and conditions of Protiviti’s engagement, including the Indemnification Provisions contained in the Engagement Letter, were thoroughly negotiated by the parties at arm’s-length and in good faith.

26. The Debtors understand from their counsel that the Indemnification Provisions are standard provisions, both in the chapter 11 context and outside the chapter 11 context, and reflect the qualifications and limits on such terms that are customary for Protiviti and other similar financial advisors as approved in this and other jurisdictions. In connection with this Application, Protiviti has agreed to certain modifications to the Indemnification Provisions which are reflected in the Proposed Form of Order that is annexed hereto as Exhibit A and summarized as follows:

- a. All requests of the Protiviti Parties for payments of indemnity, contribution or otherwise pursuant to the Indemnification Provisions shall be made by means of application to the Court (interim or final, as the case may be) and shall be subject to the approval of, and review by, the Court to ensure that such payment conforms to the terms of the Indemnification Provisions, the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, and the orders of this Court and is reasonable based upon the circumstances of the litigation or settlement in respect of which indemnification, contribution or other payment is sought; provided, however, that in no event shall a Protiviti Party be indemnified or receive contribution or other payment from the Debtors from and against any actions or claims that a court of competent jurisdiction has determined by final order (that is no longer subject to appeal or review) to have resulted from bad faith, self dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct on the part of that or any other Protiviti Party;
- b. In no event shall a Protiviti Party be indemnified or receive contribution or other payment under the Indemnification Provisions if the Debtors or the representatives of the Debtors’ estates assert a claim for, and a court of competent jurisdiction determines by a final order (that is no longer subject to appeal or review) that such claim arose out of the bad faith, self

dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct of that or any other Protiviti Party; and

- c. In the event that a Protiviti Party seeks reimbursement of attorneys' fees from the Debtors pursuant to the Indemnification Provisions, the invoices and supporting time records from such attorneys shall be attached to Protiviti's own and final fee applications, and such invoices and time records shall be subject to the United State Trustee's guidelines for compensation and reimbursement of expenses and the approval of the Court under the standards of section 330 of the Bankruptcy Code without regard to whether such attorneys have been retained under section 327 of the Bankruptcy Code and without regard to whether such attorneys' services satisfy section 330(a)(3)(c) of the Bankruptcy Code.

27. The Debtors understand from their counsel, and Protiviti believes, that the terms of the Indemnification Provisions are customary and reasonable for financial advisory engagements, both in out-of-court proceedings and in chapter 11 cases. Unlike the market for other professionals that the Debtors may retain, indemnification is a standard term of the market for investment bankers and financial advisors. Moreover, the Debtors and Protiviti believe that terms of the Indemnification Provisions are similar to indemnification terms that have previously been approved by bankruptcy courts in this District. *See In re Joan & David Halpern, Inc.*, 248 B.R. 43, 47 (Bankr. S.D.N.Y. 2000) (approving a financial advisor's retention agreement that contained a provision obligating the debtor to indemnify the financial advisor for liability relating to its engagement excluding only based on bad faith, gross negligence or willful misconduct), *aff'd.*, *U.S. Trustee v. Newmark Retail Fin. Advisors LLC (In re Joan & David Halpern, Inc.)*, Case No. 00-3601, 2000 U.S. Dist. LEXIS 17589, * 4 (S.D.N.Y. Dec. 6, 2000); *see also In re Uno Restaurant Holdings Corp.*, Case No. 10-10209 (MG) (Bankr. S.D.N.Y. Mar. 5, 2010); *In re Reader's Digest Association, Inc., et al.*, Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 24, 2009); *In re U.S. Shipping Partners L.P., et al.*, Case No. 09-12711 (RDD) (Bankr. S.D.N.Y. July 19, 2009); *In re Gen. Growth Props., Inc. et al.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. May 26, 2009); *In re Lexington Precision Corp., et al.*, Case No. 09-

11153 (MG) (Bankr. S.D.N.Y. May 28, 2008). Accordingly, the Debtors respectfully submit that the Indemnification Provisions, with modifications described herein and reflected in the Proposed Form of Order annexed hereto as **Exhibit A**, are reasonable and customary and should be approved in these Chapter 11 Cases.

IV. Notice

28. Notice of this Motion has been provided to: (a) the U.S. Trustee; (b) counsel to Alden Global Distressed Opportunities Master Fund, L.P., Alden Global Value Recovery Master Fund L.P., and Turnpike Limited; (c) the creditors holding the thirty (30) largest unsecured claims against the Debtors' estates on a consolidated basis, as identified in the Debtors' chapter 11 petitions; (d) counsel for Atari, S.A., (e) the Internal Revenue Service; (f) the New York State Attorney General; and (g) all parties that have filed a notice of appearance or have requested service in these chapter 11 cases. In light of the nature of the relief requested herein and the potential harm to the Debtors' estates if the relief requested herein is not granted, the Debtors respectfully submit that no other or further notice need be provided.

V. No Prior Request

29. No prior application for the relief requested herein has been made to this or any other court.

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EXHIBIT A

PROPOSED FORM OF ORDER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

**ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION
OF PROTIVITI INC. AS FINANCIAL ADVISOR TO THE DEBTORS**

Upon consideration of the application (the “Application”)² of the debtors and debtors-in-possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”) for entry of an order, *inter alia*, authorizing the Debtors to employ and retain Protiviti Inc. (“Protiviti”) as their financial advisor effective *nunc pro tunc* to January 21, 2013 (the “Petition Date”), on the terms and conditions set forth in that certain engagement letter between the Debtors and Protiviti (the “Engagement Letter”), a copy of which is annexed to the Declaration of Guy A. Davis (the “Davis Declaration”) as **Exhibit 1**, all as more fully set forth in the Application; and upon consideration of the Davis Declaration; and the Court having held a hearing on February 14, 2013 (the “Hearing”) on approval of the relief requested in the Application and having considered the arguments of counsel made, and the evidence submitted, proffered or adduced at the Hearing; and the Court finding that (i) it has jurisdiction over the matters raised in the Application pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.), (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (iii) venue of the Chapter 11 Cases and the Application is proper pursuant to 28 U.S.C. §§ 1408 and 1409, (iv) the relief requested in the Application is in the best

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

² Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to such terms in the Application.

interests of the Debtors, their estates, their creditors and other parties in interest, (v) proper and adequate notice of the Application and the Hearing has been given and that no other or further notice is necessary, (vi) Protiviti represents and holds no interest materially adverse to the Debtors or their estates and is disinterested under section 101(14) of the Bankruptcy Code (as modified by section 1107(b) of the Bankruptcy Code) and as required by section 327(a) of the Bankruptcy Code, (vii) any objections to the relief requested in the Application have been withdrawn or overruled on the merits, and (viii) good and sufficient cause exists for the granting of the relief requested in the Application after having given due deliberation upon the Application, the First Day Declaration, and the Davis Declaration, and all of the proceedings had before the Court in connection with the Application. Therefore,

IT IS HEREBY ORDERED THAT:

1. The Application is **GRANTED** as set forth herein.
2. Pursuant to sections 327(a) and 328(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016; and Local Bankruptcy Rule 2014-1, the Debtors are authorized to retain and employ Protiviti as their financial advisor effective *nunc pro tunc* to the Petition Date in accordance with the terms and conditions set forth in the Application and in the Engagement Letter, as hereinafter modified.
3. The terms of the Engagement Letter are reasonable terms and conditions of the employment and retention of Protiviti by the Debtors and are approved as hereinafter modified.
4. Protiviti is authorized to render financial advisory services to the Debtors as described in the Application and in the Davis Declaration. Protiviti will render the following financial advisory services:

- a) Assist the Debtors with the administration of their debtor-in-possession financing, including weekly reporting, cash management, and responses to due diligence requests;
- b) provide the Debtors' accounting department with assistance and guidance regarding chapter 11 protocols and policies;
- c) assist with vendor communications and negotiations of post-petition trade terms and utility deposits;
- d) assist with projecting cash flows through a potential sale or plan confirmation;
- e) interface with creditor groups (e.g., respond to document/information and due diligence requests) and prepare any required/agreed upon flash reporting;
- f) assist with/prepare Monthly Operating Reports;
- g) assist counsel in preparing evidence and rendering testimony as needed to address contested motions;
- h) accumulate, reconcile, and adjudicate claims filed;
- i) assist with claims disbursement; and
- j) provide other analytical support and/or testimony, as required, to facilitate the efficient sale of the Debtors' assets, development and execution of a chapter 11 plan, and possible recovery actions against third parties.

5. Protiviti shall apply for compensation for professional services rendered and reimbursement of reasonable and actual expenses incurred in connection with the Chapter 11 Cases in compliance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, the guidelines established by the Office of the United States Trustee for the Southern District of New York, and such other procedures as may be fixed by Order of this Court.

6. Protiviti shall be compensated based on the rates set forth in the Engagement Letter, and Protiviti's compensation shall be subject to the standard of review provided in section 328(a) of the Bankruptcy Code and shall not be subject to the standard of review set forth in

section 330 of the Bankruptcy Code; provided, however, that the United States trustee retains all rights to object to Protiviti's interim and final fee applications (including expense reimbursements) on all grounds including but not limited to the reasonableness standard provided for in section 330 of the Bankruptcy Code.

7. The Debtors are authorized to indemnify and hold harmless the Protiviti Parties (as defined in the Engagement Letter) pursuant to the Indemnification Provisions and subject to the following conditions:

- a. All requests of the Protiviti Parties for payments of indemnity, contribution or otherwise pursuant to the Indemnification Provisions shall be made by means of application to the Court (interim or final, as the case may be) and shall be subject to the approval of, and review by, the Court to ensure that such payment conforms to the terms of the Indemnification Provisions, the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, and the orders of this Court and is reasonable based upon the circumstances of the litigation or settlement in respect of which indemnification, contribution or other payment is sought; provided, however, that in no event shall a Protiviti Party be indemnified or receive contribution or other payment from the Debtors from and against any actions or claims that a court of competent jurisdiction has determined by final order (that is no longer subject to appeal or review) to have resulted from bad faith, self dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct on the part of that or any other Protiviti Party;
- b. In no event shall a Protiviti Party be indemnified or receive contribution or other payment under the Indemnification Provisions if the Debtors or the representatives of the Debtors' estates assert a claim for, and a court of competent jurisdiction determines by a final order (that is no longer subject to appeal or review) that such claim arose out of the bad faith, self dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct of that or any other Protiviti Party; and
- c. In the event that a Protiviti Party seeks reimbursement of attorneys' fees from the Debtors pursuant to the Indemnification Provisions, the invoices and supporting time records from such attorneys shall be attached to Protiviti's own and final fee applications, and such invoices and time records shall be subject to the United States Trustee's guidelines for compensation and reimbursement of expenses and the approval of the Court under the standards of section 330 of the Bankruptcy Code without regard to whether such attorneys have been retained under section 327 of the Bankruptcy Code and without regard to whether such attorneys' services satisfy section 330(a)(3)(c) of the Bankruptcy Code.

8. The Engagement Letter is hereby amended by deleting the Limitation of Liability clause (Paragraph 8) from the Terms and Conditions Attachment which reads as follows:

Notwithstanding anything to the contrary in this Agreement, Client and Protiviti agree that, regardless of the legal theory asserted (including, but not limited to, breach of contract, warranty, negligence or tort): (i) Protiviti's entire liability to Client or any person asserting claims on behalf of or in the name of Client will not exceed in the aggregate, for all claims, liability, losses, damages or expenses, the total amount of fees paid to Protiviti hereunder with respect to the engagement hereunder provided that this subsection (i) shall not apply to Protiviti's indemnification obligations under this Agreement; and (ii) neither party shall be liable to the other party or any person asserting claims on behalf of or in the name of the other party for consequential, indirect, incidental, punitive or special damages of any nature suffered by Client or Protiviti (including, but not limited to, lost profits or business opportunity costs), provided that this subsection (ii) shall not apply to any indemnification obligations under the Agreement.

9. To the extent that there may be any inconsistency between the terms of the Application, the Engagement Letter, the Davis Declaration, and this Order, the terms of this Order shall govern.

10. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
February __, 2013

THE HONORABLE JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE