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UNITED STATES BANKRUPTCY COURT
THE SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF THE REORGANIZED DEBTORS TO THE THIRD INTERIM AND FINAL FEE APPLICATION OF AKIN GUMP STRAUSS HAUER & FELD LLP FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR THE SERVICES RENDERED DURING THE PERIOD FEBRUARY 6, 2013 THROUGH DECEMBER 24, 2013

To: THE HONORABLE ROBERT E. GROSSMAN
UNITED STATES BANKRUPTCY JUDGE:

The above-captioned reorganized debtors and debtors in possession (collectively, the "***Reorganized Debtors***") hereby submit this Objection to the Third Interim and Final Fee Application of Akin Gump Strauss Hauer & Feld LLP (the "***Akin Final Fee Application***"), and in support hereof state as follows:

[1] The **"Reorganized *Debtors***" are Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California U.S. Holdings, Inc.

PRELIMINARY STATEMENT

1. There is certainly no joy in filing this Objection, as we believe that trust between a company and their legal advisor is important. We value those relationships and it is true that the confirmation of the Chapter 11 plan was achieved against several obstacles with the help of all the advisors involved, Akin included. Throughout the case, Akin has requested approval for fees in excess of $3,300,000.00 and has systematically refused to grant any commercial discount. However, Akin is now even refusing to abide by the terms of fee agreements which they have agreed to, and in particular, fee caps. The Plan was funded by the Plan Sponsor, who infused more than $3,400,000.00, and, in anticipation of confirmation, the Plan Sponsor and Debtors heavily negotiated and determined a fixed budget for professional fees. Akin, despite being allocated a fixed fee amount that it agreed to, exceeded that budget by $61,000.00 during the month of December. In addition, the Debtors' - Akin's client - submit that Akin expended time and money on various tasks and litigation throughout the Chapter 11 Cases that provided no meaningful benefit to the estates or its creditors. Thus, aside from exceeding the budget, a review of the reasonableness of Akin's legal fees from the client's point of view still remains important for this Court to consider.

2. The fact that we are now dealing with a solvent estate does not obviate the need for the professionals to look inward, seriously re-evaluate their applications, and make appropriate reductions. Various other professionals in the Debtors' Chapter 11 Cases have taken voluntary reductions of their fees; Akin, however, has refused to provide the Reorganized Debtors with one iota of a discount or reduction. Yet, prior to the effective date of the Plan Akin did acknowledge that they exceeded the budget previously agreed to. *See Exhibit A* attached hereto. If the reduction will not be done voluntarily (which the Reorganized Debtors have tried to accomplish for months on end and still hope can be accomplished) the Reorganized Debtors

request that the Court make appropriate downward adjustments to Akin's final fee award totaling $226,000.00, which is comprised of $61,000.00 plus a global percentage adjustment of 5% of the fees to reflect the Debtors' concerns raised over results and efficiency of work.

3. Fundamental precepts of reasonableness govern awards of professional compensation in bankruptcy. In fact, perceived excesses have filtered into the national consciousness and the need to monitor potential runaway legal fees continues to be a vital function of the Bankruptcy Court. The Reorganized Debtors recognize that relatively significant compensation should be awarded to Akin, except for the fees sought (i) that exceed budgeted amounts agreed to between Akin and the Debtors and (ii) excessive time expended by Akin on various tasks and litigation during the course of the case – which should be reduced by 5%. One example that illustrates the need for a global adjustment is the work Akin performed associated with the motion seeking approval of a key employee incentive plan, which yielded no benefit to the estates.

4. A review of Akin's fees demonstrates overstaffing, duplication of effort, and a failure to economize. However, the Reorganized Debtors are not asking this Court to evaluate and scrutinize every time entry nor are the Reorganized Debtors seeking to have Akin disgorge the interim fees already paid. However, at no time during the course of the Chapter 11 Cases did Akin provide the Reorganized Debtors with any courtesy discounts – even upon Debtors' requests. Indeed, with respect to the December 2013 fees, Akin negotiated the budgeted amount with the Debtors and Plan Sponsor, knew it exceeded the budget (as noted in the email attached as *Exhibit A*) and then proceeded to ignore that budget by seeking approval of an additional $61,716.59 in fees (pursuant to the Akin Final Fee Application, Akin's December fees and expenses were $217,187.17).

5. In short, Akin has requested approval of $3,374,994.00 of compensation for work preformed over a period of less than eleven (11) months and the Reorganized Debtors are asking this Court to instead approve $3,148,994.00 in fees, which amounts to a realization of approximately 94% of the total fees sought by Akin. The Reorganized Debtors strongly believe that waiver of the $61,000 for December and the global reduction of $165,000 of fees (5%) must be something that is taken seriously given the incredible fees already paid to Akin to date.

BACKGROUND FACTS

6. On January 21, 2013 (the "***Petition Date***"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "***Bankruptcy Code***") with the Bankruptcy Court for the Southern District of New York (the "***Court***"). The Debtors continue to operate their businesses 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.

7. On February 6, 2013, the United States Trustee for the Southern District of New York (the "***U.S. Trustee***") appointed the Official Committee of Unsecured Creditors (the "***Committee***") in the Cases [ECF No. 64].

8. On March 7, 2013, the Court entered a final order (the "***Final DIP Order***") [ECF No. 125] approving the DIP Facility provided by Alden Global Value Recovery Master Fund, L.P. ("***Alden***" or the "***DIP Lender***").

9. Subsequent to the Petition Date, Akin Gump was brought in as Debtors' counsel, and on March 6, 2013, the Court entered the Retention Order approving Akin Gump's retention. The Retention Order authorized Akin Gump to be compensated on an hourly basis and to be reimbursed for actual and necessary out-of-pocket expenses in accordance with Bankruptcy

Code sections 330 and 331, applicable provisions of the Bankruptcy Rules, the Local Bankruptcy, and the Guidelines.

10. On September 20, 2013, the Debtors filed the *Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [ECF No. 379] (the "***Plan***") and corresponding disclosure statement for the Plan (as amended, the "***Disclosure Statement***") [ECF No. 435]. On December 5, 2013, the Court entered the Confirmation Order. On December 24, 2013, the Plan became effective (the "***Effective Date***") and the Debtors filed the *Notice of (I) Entry of Confirmation Order, (II) Occurrence of the Effective Date and (III) Bar Dates for Filing Certain Claims* [ECF No. 523].

11. Akin elected to file one combined application for the Final Fee Period and the Compensation Period on January 24, 2014. The Akin Final Fee Application covers the entire period of February 6, 2013 through December 24, 2013 and requests approval (i) on an interim basis of $709,490.00 in fees for September through December 24 ($213,693.50 of which are for December 1 through December 24) and (ii) on a final basis of all fees in the amount of $3,374,994.00.

LEGAL STANDARDS

12. While undoubtedly this Court is familiar with the legal standards governing review of fee applications, certain basic principles bear re-emphasis before turning to specific objections to the applications.

13. The fee applicant bears the burden of proof on its claim for compensation. *In re West End Financial Advisors, LLC*, 2012 WL 2590613, *3 (Bankr. S.D.N.Y. 2012); *In re CCT Communications, Inc.*, 2010 WL 3386947 *4 (Bankr. S.D.N.Y. 2010); *In re Brous*, 370 B.R. 563, 569 (Bankr. S.D.N.Y. 2007); *In re Keene Corp*., 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997).

Even in the absence of an objection, the Court has an independent duty to scrutinize the fee request. *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994).

14. The criteria for establishing a right to compensation are set forth in the statute, Section 330(a)(1) of the Bankruptcy Code, which requires that the Court consider:

> (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;
> (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) whether the [professional] is board certified or otherwise has demonstrated skill and experience 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).

15. A professional "must generally establish his right to compensation under the 'lodestar' method incorporated into 11 U.S.C. § 330." *In re Brous*, 370 B.R. at 565. Section 330 "authorizes the court to award reasonable compensation to the applicant based on the actual, necessary services, and to reimburse him for his actual, necessary expenses." *Id.* at 569. As this Court previously observed,

> ". . . before determining the reasonableness of the service, the Court must make a threshold inquiry into its necessity. The majority of courts hold that a service is "necessary" if it benefits the estate. The bankruptcy court may reduce or disallow a request if the underlying services conferred no real benefit on the estate. A court should not apply this test through hindsight, as a decision reasonable at first may turn out wrong in the end. Rather, the test is an objective one, and considers 'what services a reasonable lawyer or legal firm would have performed in the same circumstances.'" (internal citations omitted)

In re Keene Corp., 205 B.R. at 696.

16. Most importantly, when the court determines that an adjustment in the requested fee is warranted, the most practical approach is to impose a percentage reduction, rather than a line by line elimination of time entries. We urge that a percentage reduction be considered here, consistent with applicable case law:

> The Second Circuit has stated that a district court is not required to "set forth item-by-item findings concerning what may be countless objections to individual billing items." *Lunday [v. City of Albany]*, 42 F.3d *[131]* at 134 [2d Cir. 1994]. Rather, as already discussed, a court may use a percentage deduction " 'as a practical means of trimming fat from a fee application.' " *McDonald ex rel Prendergast*, 450 F.3d at 96 (*quoting Carey*, 711 F.2d at 1146). "Particularly where the billing records are voluminous, it is less important that judges attain exactitude, than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent." *Alveranga v. Winston*, 2007 WL 595069, at *5 (E.D.N.Y. Feb.22, 2007) (internal quotations and citations omitted); *accord Saunders v. Salvation Army*, 2007 WL 927529, at *3 (S.D.N.Y. Mar.27, 2007) ("Rather than comb through detailed time sheets, a court can "exclude excessive and unreasonable hours from its fee computation by making an across-the-board reduction in the amount of hours."). Case law is replete with instances where courts have made percentage reductions in the amounts requested. See, *e.g., Alveranga*, 2007 WL 595069, at *6 (40%); *Sec. Exch. Comm. v. Goren*, 272 F.Supp.2d 202, 213 (E.D.N.Y.2003) (30*%); Elliot v. Bd. of Educ*., 295 F.Supp.2d 282, 286 (W.D.N.Y.2003) (10%); *Tokyo Electron Ariz., Inc. v. Discreet Indus. Corp*., 215 F.R.D. 60, 64-65 (E.D.N.Y.2003) (10%) *Rotella v. Bd. of Educ*., 2002 WL 59106, at *6 (E.D.N.Y. Jan. 17, 2002) (20%-30%); *Sabatini v. Corning-Painted Post Area Sch. Dist*., 190 F.Supp.2d 509, 522 (W.D.N.Y.2001) (15%); *Quinn v. Nassau County Police Dep't*, 75 F.Supp.2d 74, 78 (E.D.N.Y.1999) (20%-30%); *Perdue v. City Univ*., 13 F.Supp.2d 326, 346 (E.D.N.Y.1998) (20%); *Am. Lung Assn v. Reilly*, 144 F.R.D. 622, 631 (E.D.N.Y.1992) (40%).

Reiter v. Metropolitan Transp. Authority of State of New York, 2007 WL 2775144 *13 (S.D.N.Y. 2007).

17. This Court has endorsed the percentage reduction approach, noting that "`[C]ourts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in

an application [and] have endorsed percentage cuts as a practical means of trimming fat from a fee application.' *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d at 1146." *In re West End Financial Advisors, LLC*, 2012 WL 2590613 at *5; *See also In re GSC Group, Inc.* 502 B.R. 673, 748 (Bankr. S.D.N.Y. 2013) (approving reduction of fees of 20%).

18. Not to mince words, but there is excess in the Akin Final Fee Application, which ought to be eliminated. Notably, even with the requested reductions, Akin stands to receive 92% of the fees it incurred, which more than rewards Akin for its efforts.

SCOPE OF OBJECTIONS

1. Services Exceeded Budgeted Amounts

19. The initial major area of concern is that certain services performed exceeded agreed upon budgeted fees. It is an understatement to state that the budget was a hard cap that was vetted and agreed to by all the professionals. Further, in connection with the funding of the Plan and negotiations surrounding confirmation, virtually all of the professionals on both sides agreed to defer payment of a portion of their fees until a later date. This was memorialized in an agreement with the Debtors providing for such payment deferral. Akin was one of those professionals that agreed to defer payment on the unpaid portion of its compensation. In negotiating the deferred compensation, Akin and the Debtors agreed upon a fixed budget for fees. Pursuant to the Akin Final Fee Application, Akin exceeded that budgeted amount by more than $61,000. Prior to the Effective Date, the Plan Sponsor confirmed with Akin that Akin would not expect payment of fees beyond what was funded into an escrow agreement and deferred in accordance with the deferral agreement. Thus, the first time that the Reorganized Debtors were made aware of the amount of Akin's fees that exceeded the agreed upon budgeted or that Akin expected payment on such excess amount was upon receipt of the *filed* Akin Final Fee Application. Despite an email exchange between the parties prior to the Effective Date– as

noted in *Exhibit A* - Akin never communicated with the Reorganized Debtors nor informed the Reorganized Debtors prior to filing the Akin Final Fee Application that it was seeking payment of fees in excess of the agreed upon budget. Akin had no reason to assume that the excess would be agreed to, but not sharing this information with its client – the Debtors - precluded this from being known.

20. Over the course of the last three months, the Reorganized Debtors have endeavored to negotiate with Akin in good faith with respect to an appropriate reduction of the fees. Failing to reach an accommodation is both disappointing and disconcerting to the Reorganized Debtors given the level of fees incurred. Thus, the Reorganized Debtors are constrained to file this objection and seek the Court's assistance in reducing Akin's fees.

2. Billings that Simply Did Not Provide Benefits to the Estates

21. The second area of concern is the amount of time and fees expended by Akin on certain tasks that failed to provide a benefit to the Debtors' estates or their creditors. Akin staffed this case at a very high level, with Akin's time records including more than forty (40) separate attorneys over the course of the Chapter 11 Cases and nearly 6,000 billable hours. One specific instance is the extensive time Akin devoted to preparing a motion seeking approval of a key employee incentive plan that was intensely contested, litigated and ultimately rejected by the Bankruptcy Court. This Court made very clear that the employee incentive plan did not comply with the Bankruptcy Code. Akin is not new to this area of law and the outcome was contrary to how they counseled the Debtors.

22. The Reorganized Debtors recognize that this is a sensitive area and that Akin received interim approval of Akin's fees, however, those fees are subject to this Court's final

approval and should be viewed critically in light of the exorbitant fees and costs surrounding the failed key employee incentive plan.[2]

23. Rather than provide a detailed breakdown of Akin's fees and excessive spending, The Reorganized Debtors believe that an overall reduction of 5% or $165,000 in connection with work performed that served no benefit would best serve the interest of justice and the Chapter 11 Cases. This amount provides Akin with a fee award in excess of $3.14 million and is in line with the percentage reductions employed by the courts in this Circuit, as well as more than reasonable and appropriate under the circumstances.

24. In light of these concerns, we submit that that the Akin's Final Fee be reduced by a total of $226,000.00 to account for the excess budgeted fees of $61,000.00 for the month of December and $165,000.00 of fees associated with work that did not benefit the estates or creditors.

[2] Section 330(a)(5) specifically permits a court to order disgorgement of interim payments received under section 331, to the extent that they exceed the ultimate amount awarded under section 330. 11 U.S.C. § 330(a)(5). Thus, interim awards to professionals are "subject to re-examination and adjustment" and no professional may claim to be unaware of the inherent risk of disgorgement. *See In Rockaway Bedding, Inc.*, 454 B.R. 592 (Bankr. D.N.J. 2011) (citing *In re St. Joseph Cleaners, Inc.,* 346 B.R. 430 (Bankr.W.D.Mich.2006) (quoting *Specker Motor Sales Co. v. Eisen,* 393 F.3d 659, 663 (6th Cir.2004) ("*Specker Motors II* ")); *see also* 11 U.S.C. § 330(a)(2) ("The court may, on its own motion or on the motion of the United States Trustee ... the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested."); *In re Kids Creek Partners, L.P.*, 236 B.R. 871, 875-78 (Bankr. N.D. Ill. 1999) ("[a]wards of interim attorneys' fees and expenses are not final and can be revisited at any time. . . "); *In re Lochmiller Indus., Inc.,* 178 B.R. 241 (S.D. Cal. 1995) (court may order disgorgement of fees paid as interim compensation under section 331).

WHEREFORE, the Reorganized Debtors respectfully request the entry of an Order consistent with the foregoing.

Dated: New York, New York
May 2, 2014

OLSHAN FROME WOLOSKY LLP

By: /s/ Michael S. Fox
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EXHIBIT A

From: Alberino, Scott L. [mailto:SAlberino@AKINGUMP.com]
Sent: Monday, December 23, 2013 4:23 PM
To: Fred Chesnais
Cc: Dizengoff, Ira; Davis, Gene (External); Schoulder Andrew; Kristen Keller; azyngie@gmail.com; Euvrard Erick
Subject: Re: Fees

Thanks.

Scott Alberino

On Dec 23, 2013, at 4:06 PM, "Fred Chesnais" <fredchesnais@gmail.com<mailto:fredchesnais@gmail.com>> wrote:

Hi

Thank you for the email.
I was just asking for confirmation that there would be no more fees, on top of what is funded today and what is deferred.
Because we have no such budget going forward an that the deal is now done.
I got confirmation, thank you very much and I do appreciate the final effort.
We are going to close hopefully today.
I do believe we all want this behind us as quickly as possible.
Best regards and Happy Holidays.

Fred CHESNAIS

On Dec 23, 2013, at 3:47 PM, "Alberino, Scott L." <SAlberino@AKINGUMP.com<mailto:SAlberino@AKINGUMP.com>> wrote:

Fred, I am getting tired of the nickel and diming especially know that I have realized we are deferring in part so you can pay Dechert, your French lawyers. We will deal with fee crap after closing because I know I have blown the cap keeping this deal together. I would have been under budget if you put in additional capital on your own to run the business. If you don't want to close, the estate will pursue other options.

Scott Alberino