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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 (RG)
Reorganized Debtors.[1]	:	(Jointly Administered)

MOTION OF ALDEN GLOBAL VALUE RECOVERY MASTER FUND, L.P. TO REOPEN THESE CHAPTER 11 CASES, REQUIRE COMPLIANCE WITH THE CHAPTER 11 PLAN AND CONFIRMATION ORDER, AND ENJOIN FURTHER VIOLATIONS BY THE DEBTORS AND AFFILIATES

Alden Global Value Recovery Master Fund, L.P., through its representative Alden Global Capital LLC ("Alden"), respectfully submits this motion for entry of an order (i) reopening the chapter 11 cases of the above-captioned reorganized debtors (the "Debtors" or "Reorganized Debtors"), (ii) requiring compliance by the Reorganized Debtors, Atari, S.A. (the "Plan

[1] The Reorganized Debtors in these chapter 11 cases are Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California US Holdings, Inc.

Sponsor"), and Atari Europe SAS ("Atari Europe") (with Atari, S.A. the "Atari Obligors") (collectively, the "Atari Entities"), and their officers, attorneys, agents and representatives, to comply with the release and exculpation provisions in the *Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code*, dated September 20, 2013, as amended [Dkt. No. 497-1] (the "Plan") and the *Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code*, entered on December 5, 2013 [Dkt. No. 497] (the "Confirmation Order"), (iii) requiring the Atari Entities to dismiss certain litigation filed against Alden in the Commercial Court of Paris that violates the release and exculpation provisions in the Plan and Confirmation Order, and (iv) enjoining the Atari Entities and their officers, attorneys, agents and representatives from taking any further action to pursue released claims against Alden in violation of the Plan and Confirmation Order.

PRELIMINARY STATEMENT

The Debtors filed these chapter 11 cases in January 2013 after their traditional source of working capital – intercompany loans from Atari, S.A. and Atari Europe that were funded by third-party credit – became untenable due to a lack of third-party interest in lending to the failing Atari businesses. During the chapter 11 cases, Alden provided debtor-in-possession financing to the Debtors and also acquired the secured debt owed by Atari Europe, guaranteed by Atari, S.A., and secured by the Debtors' assets under a pre-petition credit facility agreement that the Atari Obligors originally entered into with an affiliate of Bank of America. The secured credit facility was restructured as part of the Plan sponsored by Atari, S.A. and based on a compromise with Alden and other parties that provided significant debt relief to Atari Europe and Atari, S.A. in addition to the Debtors.

Two years later, neither Atari Europe nor its guarantor Atari, S.A. has made a single payment of interest to Alden under the restructured credit agreement under which they owe

Alden more than €12 million in principal and accrued interest. Instead of making their first post-reorganization interest payment to Alden when it came due on March 31, 2015, the Atari Entities commenced litigation in the Commercial Court of Paris asserting that Alden was actually their debtor because previous lenders under the credit facility agreement allegedly had not properly disclosed the effective global interest rate (*taux effectif global*, or "TEG") for amounts borrowed by Atari Europe in the years before the petition date. This TEG argument is often made by struggling borrowers in France who are seeking a way to avoid paying their debt.

The Atari Entities' French lawsuit alleges that, as a result of the alleged failure to properly disclose the TEG, a *de minimis* French statutory rate must be substituted for the interest rate that was paid by Atari Europe to previous lenders meaning, in the Atari Entities' mistaken view, that Alden is obligated to repay the allegedly resulting interest overpayments to those prior lenders. Setting off those amounts against the amounts owed to Alden, the Atari Entities' therefore contend that Atari Europe owes Alden nothing and, instead, Alden owes Atari Europe up to €5.7 million.

The French lawsuit reflects an obvious attempt to escape obligations that Atari Europe and Atari, S.A. repeatedly have reaffirmed to Alden in amendments to the credit facility agreement and other writings. More directly relevant, however, the lawsuit also flagrantly violates the release provided to Alden in the Plan and Confirmation Order. In the Plan, the Debtors, Atari, S.A. and Atari Europe each granted Alden a broad release of any and all claims "whether known or unknown, foreseen or unforeseen, existing or hereinafter arising" under the credit facility agreement or otherwise. *See* Plan, § 12.9. This Court approved and reiterated the release in its Confirmation Order and found that it was an "integral" and "material" element of the Plan. *See* Confirmation Order, ¶¶ 29-30, 33-35.

In clear violation of the compromise reflected in the Plan and Confirmation Order, the Atari Entities have made it clear that they intend to mire Alden in litigation in French courts for years rather than honoring the obligations that they reconfirmed in the compromise around which the Plan was structured. Indeed, the Atari Entities already have used their spurious TEG argument to obtain a putative two-year grace period from the Paris court to allow them to pursue their baseless TEG claims against Alden in France.

In the Plan and the Confirmation Order, this Court expressly retained jurisdiction to consider disputes such as this one. Alden respectfully requests the Court to exercise that reserved jurisdiction by reopening these chapter 11 cases and entering an order enforcing the release and exculpation provisions of the Plan and Confirmation Order, requiring the Atari Entities to immediately dismiss with prejudice the actions they have filed against Alden in the Commercial Court of Paris in violation of those provisions, and enjoining the Atari Entities and associated persons from taking any further legal action against Alden that would violate the Plan and Confirmation Order.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this motion under 28 U.S.C. §§ 157 and 1334. *See Luan Inv. S.E. v. Franklin Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 230-32 (2d Cir. 2002). The Court expressly reserved the exclusive jurisdiction to issue orders in aid of execution, enforcement, implementation and consummation of the Plan and Confirmation Order. Plan, § 13.1(f); Confirmation Order, ¶ 128. This is a core proceeding under 28 U.S.C. § 157(b)(2).[2]

[2] Because the relief requested is the enforcement of an existing order of this Court, this matter may be heard through a motion rather than an adversary proceeding. *See In re Johns-Manville Corp.*, 534 B.R. 553, 562 (Bankr. S.D.N.Y. 2015) (adversary proceeding not required when relief sought is enforcement of confirmation order); *In re WorldCorp, Inc.*, 252 B.R. 890,

2. Each of the Atari Entities is subject to personal jurisdiction. The principal place of business for each of the Reorganized Debtors (Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California US Holdings, Inc.) is New York, New York. In addition, each of those entities purposefully availed itself of the benefits of this Court's jurisdiction by filing these chapter 11 cases in this Court, and this motion relates to the Plan and Confirmation Order in those cases.

3. Atari, S.A. is the direct or indirect parent of each of the Reorganized Debtors. It regularly engages in business in this District. Upon information and belief, its chairman and chief executive officer Frederic Chesnais resides in this District and regularly conducts business for Atari, S.A. from this District. Atari, S.A. purposefully availed itself of the benefits of this Court's jurisdiction by actively participating in these chapter 11 cases, acting as Plan Sponsor of the Plan, and receiving material financial benefits from the restructuring accomplished pursuant to and in connection with the implementation of the Plan. This motion relates to Atari, S.A.'s actions in and directed to this jurisdiction and concerns enforcement of the Plan and Confirmation Order in these cases.

4. Atari Europe purposefully availed itself of the benefits of this Court's jurisdiction by actively participating in these chapter 11 cases, by negotiating the restructuring embodied in the Plan, and by receiving material financial benefits from the restructuring accomplished pursuant to and in connection with the implementation of the Plan. Upon information and belief, its directeur general Frederic Chesnais resides in this District and regularly conducts business for

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895 (Bankr. D. Del. 2000) ("[A]n adversary proceeding is not necessary where the relief sought is the enforcement of an order previously obtained."); *In re Continental Airlines, Inc.*, 236 B.R. 318, 327 (Bankr. D. Del.1999) (motion to enforce injunction contained in confirmation order was procedurally appropriate).

Atari Europe from this District. This motion relates to Atari Europe's actions in and directed to this jurisdiction and concerns enforcement of the Plan and Confirmation Order in these cases.[3]

5. Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. The basis for the relief requested in this motion under the Bankruptcy Code and the Bankruptcy Rules is 11 U.S.C. §§ 105(a), 350(b), 1141, and 1142, Bankruptcy Rule 5010, and Rule 5010-1 of the Local Bankruptcy Rules for the Southern District of New York.

BACKGROUND

6. On January 21, 2013, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The chapter 11 cases were jointly administered.

7. Atari, S.A. is the ultimate parent of the Debtors and of Atari Europe, a non-debtor subsidiary. Both Atari, S.A. and Atari Europe also were significant creditors of one or more of the Debtors. However, as the disclosure statement and other statements in these cases have made clear, the Debtors' U.S. operations constitute most of the Atari Entities' operating businesses.

A. The Credit Facility Agreement and the Transfer Agreement.

8. Prior to these bankruptcy cases, Atari Europe, as borrower, and Atari, S.A., as guarantor, entered into a Credit Facility Agreement dated as of April 21, 2006 (as amended, the "Credit Facility Agreement"), with Banc of America Securities Limited under which Banc of America agreed to provide a credit facility to Atari Europe while the parent company, Atari, S.A., guaranteed payment and performance of Atari Europe's obligations.

9. In December 2009, Banc of America transferred its rights under the Credit Facility Agreement to Blue Bay Value Recovery (Master) Fund Limited ("Blue Bay"). Then, on February 3, 2013 (after the Debtors commenced these cases), Blue Bay, Alden, Atari Europe and

[3] Both Atari, S.A. and Atari Europe filed proofs of claims in these cases (*see* Proof of Claims No. 172-174).

Atari, S.A. entered into a Transfer Agreement ("Transfer Agreement") under which Blue Bay's rights under the Credit Facility Agreement were transferred to Alden. *See* Declaration of John J. Clarke, Jr. dated October 28, 2015 ("Clarke Decl."), Exh. 1.

10. In the Transfer Agreement, the Atari Obligors agreed and acknowledged that the outstanding principal amount then owed by Atari Europe under the Credit Facility Agreement was €21,978,966.00 and that accrued interest then outstanding was €504,692.02. Atari Europe and Atari, S.A. represented to Alden that these amounts were "true, complete and accurate." Transfer Agreement, § 4.4(iii). They also agreed that they would not:

> take any action which may prejudice, directly or indirectly, the validity or enforceability of the Agreement or the rights of [Alden] under or in connection with this Transfer Agreement and/or the Credit Facility Agreement, or have a material adverse effect upon thereon.

11. Contrary to their position in the recent French litigation that they did not receive proper disclosure of the TEG, in the Transfer Agreement the Atari Obligors represented to Alden that:

> [Atari Europe] received all appropriate letter(s) (as updated or supplemented from time to time) required in connection with the indicative calculation of the effective global rate (taux effectif global), as per Article 10.5 (Effective Global Rate (Taux Effectif Global) of the Credit Facility Agreement, Section L 313-4 of the French Code monetaire et financier and Sections L 313-1 et seq. of the French Code de la consummation.

Transfer Agreement, § 4.3(iv).

12. Similarly, and contrary to their attempt to sue Alden for their alleged overpayment of interest to previous lenders under the Credit Facility Agreement, the Atari Obligors agreed with Alden in the Transfer Agreement that:

> . . . the provisions of this Transfer Agreement constitute the sole cause of action and legal basis as well as the sole recourse of each of the Parties against the other Parties in respect of the performance of any of the obligations of each of the Parties under this Transfer Agreement, and these provisions automatically cancel or replace any other guarantees or other rights which the

> Parties may have in that regard. Save as otherwise agreed in writing between the Parties, the Parties hereby irrevocably waive their rights to any actions whatsoever, which they may have now or in the future in respect of the Parties' obligations provided herein.

Id., § 4.6.

B. The Chapter 11 Plan.

13. On September 20, 2013, the Debtors filed the disclosure statement and the Plan. *See* Clarke Decl., Exhs. 2 & 3 (as subsequently amended). As the disclosure statement described, the Plan was the result of extensive negotiations among the Debtors, their official committee of unsecured creditors, Atari, S.A., Atari Europe and Alden. It embodied a negotiated compromise among those parties that avoided litigation that had been contemplated by the creditors committee concerning substantive consolidation and the recharacterization of intercompany loans to the Debtors from Atari, S.A. and its affiliates (including Atari Europe), ensured a fair recovery to all creditors, and permitted the Debtors to emerge from bankruptcy. *See* Disclosure Stmt. at 3.

14. Under the Plan, Atari, S.A. agreed to contribute cash to the Debtors' estates and to make non-cash concessions that permitted payments to be made to holders of administrative expense claims and unsecured creditors. The Plan also provided for Atari, S.A. and Atari Europe to waive secured intercompany claims against the Debtors. Disclosure Stmt. at 7, 10.

15. Alden had a security interest in some of these intercompany recoveries. *See id.* at 9. In the context of the Plan, Alden agreed to waive its rights to enforce certain liens against the Debtors' assets for a limited period of time (up to the Effective Date) in return for the Atari Entities' agreement that Alden would retain its secured claims under the Credit Facility Agreement and the Debtors' agreement to grant new liens to secure the Atari Obligors' performance under that agreement. *See* Plan §§ 4.2, 7.1.

16. The claims against the Debtors held by Alden, Atari, S.A. and Atari Europe all were deemed to be impaired under the Plan. *See* Disclosure Stmt. at 6, 7.

C. The Plan Release and the Exculpation Clause.

17. As is customary, the Plan provided for a broad release (the "Plan Release") by and among the "Released Parties," which included, *inter alia*, Atari, S.A. (which was the Plan Sponsor), Atari Europe, the Reorganized Debtors, and Alden. The Plan Release released, among other things, any and all claims and "Causes of Action" that may exist among the "Released Parties."[4]

18. The full release, set forth in section 12.9 of the Plan, provides:

> Except as otherwise specifically provided in the Plan, for good and valuable consideration, on and after the Effective Date, to the maximum extent permitted by applicable law, each Released Party shall release and discharge and shall be deemed released and discharged by each of the other Released Parties from any and all Claims, obligations, debts, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever, including any derivative claims asserted on behalf of the Released Party, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, that the Released Party or its Affiliates, as applicable, would have been legally entitled to assert in its own right or on behalf of the holder of any Claim or Interest or other entity or that any holder of a Claim or Interest or other entity would have been legally entitled to assert for or on behalf of the Released Party, based on or relating to, or in any manner arising from, in whole or in part, the Cases, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party excluding any assumed Executory Contract or lease, the restructuring of Claims and Interests prior to or in the Cases, the negotiation, formulation or preparation of the Plan, the Disclosure Statement, the Plan Supplement, or related agreements, instruments or other documents, or upon any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date; *provided, however*, that nothing contained in this paragraph shall (a) release any Released Party from claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct or gross negligence, (b) release any liens and

[4] "Causes of Action" is broadly defined in the Plan to include, among other things, rights, suits, remedies, defenses, setoffs, and recoupments. Plan, § 1.22.

> claims that Alden or its affiliates may have, under or in connection with the Alden Secured Credit Facility, against any of (i) the Sponsor, Atari Europe, or any co-borrower or guarantor under the Alden Secured Credit Facility, (ii) the Debtors, or (iii) the Reorganized Debtors, or (c) preclude enforcement of parties' rights under the Plan and the related documents.

Plan, § 12.9 (emphasis added).

19. The Plan Release covers all claims, defenses, rights, and setoffs that any of the Atari Entities might have had against Alden relating to the Credit Facility Agreement or any related agreements arising on or before the Effective Date of the Plan. At the same time, the proviso at the end of section 12.9 makes clear that the Plan Release did not affect claims or liens that Alden had under those same agreements. As the Confirmation Order later made clear, the Plan Release was an integral part of the Plan and the settlements contained therein among Alden, the Debtors, the Plan Sponsor and Atari Europe.

20. The Plan also included an exculpation provision under which, other than for willful misconduct or gross negligence and to the maximum extent provided by applicable law, none of the "Exculpated Parties" (defined to include the Atari Entities and Alden) would have any liability for "any Claim, cause of action or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of the Cases, the formulation, dissemination, confirmation, consummation or administration of the Plan, property to be distributed under the Plan or any other act or omission in connection with the Cases, the Plan, the Disclosure Statement or any contract, instrument, document or other agreement related thereto . . ." Plan § 12.6 (the "Exculpation Clause")

D. This Court's Confirmation Order.

21. On December 5, 2013, this Court entered the Confirmation Order confirming the Plan and, among other things, approving (a) the settlements and agreements among the Debtors, the official committee of unsecured creditors, the Plan Sponsor, Atari Europe and Alden that

were reflected therein, (b) the Plan Release, and (c) the Exculpation Clause. *See* Clarke Decl., Exh. 4 (Confirmation Order), ¶¶ 27-31.

22. In the Confirmation Order, this Court found that Alden "played an integral role in the negotiation of the compromises embedded in, and in the development and formulation of, the Plan . . . ." It also found that the Plan Release and the Exculpation Clause (a) were within this Court's jurisdiction, (b) were essential to the implementation of the Plan, (c) were integral elements of the transactions incorporated into the Plan, (d) conferred a material benefit on, and were in the best interests of, the Debtors, the estates, and all other stakeholders, (e) were important to the overall objectives of the Plan, and (f) were consistent with applicable provisions of the Bankruptcy Code and other applicable law. *See* Confirmation Order, ¶¶ 33-35.

23. Under both the Plan and Confirmation Order, this Court retained jurisdiction to issue orders in aid of the enforcement and implementation of the Plan and to issue injunctions and take any other actions that may be necessary or appropriate to restrain interference by any person or entity with the implementation or enforcement of the Plan and Confirmation Order. *See* Plan, § 13.1; Confirmation Order, ¶ 128.

E. Restructuring Transactions on the Effective Date.

24. On December 24, 2013, the Effective Date of the Plan occurred. [Dkt. No. 523.]

25. On the Effective Date, the Plan Sponsor, Atari Europe, Alden, and Ker Ventures, LLC, a fund controlled by the chief executive officer of Atari, S.A., Frederic Chesnais, as an additional lender ("Ker"), entered into Amendment No. 16 to the Credit Facility Agreement as part of the overall restructuring contemplated by the Plan and the Confirmation Order. *See* Clarke Decl., Exh. 5.[5]

[5] In connection with and as required by Amendment No. 16, the Reorganized Debtors and Alden, as security agent for the lenders under the Credit Facility Agreement, also entered into a

26. In Amendment No. 16, the Atari Obligors "irrevocably agreed" that as a result of the capitalization of previously accrued interest, the total amount due under the Credit Facility Agreement as of November 30, 2013 was €24,835,872.35, of which €3,884,872.35 represented accrued interest that was being capitalized.

27. Under Amendment No. 16, Alden and Ker agreed to extend the maturity date under the Credit Facility Agreement until September 30, 2015 and allowed Atari Europe to capitalize interest, rather than paying it in cash, for periods through December 31, 2014. Amendment No. 16 also provided for capitalization of all of the interest that had accrued under the Credit Facility Agreement since 2012, including for the nine months since Alden acquired the debt in February 2013. Amendment No. 16 also made clear that "[f]or the interest accruing . . . from and after January 1, 2015, interest shall be payable on the last day of each calendar quarter . . . ."

28. The net effect of the interest deferral and capitalization provisions in Amendment No. 16 was that the Atari Obligors were given a period after the Reorganized Debtors emerged from bankruptcy during which they would make no interest payments to Alden under the Credit Facility Agreement, which was in addition to the period during the Debtors' bankruptcy cases when no interest payments were made. After the restructuring effected through Amendment No. 16, the first interest payment that would ever be paid to Alden under the Credit Facility Agreement was not due until March 31, 2015.

Security Agreement dated as of December 24, 2013 (the "Security Agreement"), pursuant to which, among other things, each Debtor granted to Alden a lien on and security interest in substantially all of its assets, including all owned intellectual property and other intellectual property rights, as security for all of the Atari Obligors' obligations under the Credit Facility Agreement and all related agreements and documents, subject and subordinate only to certain liens granted in favor of general unsecured creditors under the Plan. *See* Clarke Decl., Exh. 6.

F. Entry of the Final Decree Closing the Chapter 11 Cases.

29. On June 27, 2014, this Court entered a final decree closing the Debtors' chapter 11 cases (the "Final Decree"). [Dkt. No. 577.] The Final Decree expressly provides that this Court shall retain jurisdiction as is provided in Article XIII of the Plan and that entry of the Final Decree is without prejudice to the right of any party in interest to seek to reopen these chapter 11 cases. The Final Decree further provides that the closing of these chapter 11 cases did not alter or modify the terms of the Plan, and all provisions of the Plan remain in full force and effect.

G. The Event of Default Under the Credit Facility Agreement.

30. During 2014, the Atari Obligors pressed Alden to further extend the maturity date under the Credit Facility Agreement. Ultimately, Alden agreed to a conditional extension of the maturity date until April 1, 2017 if the Atari Obligors were able to raise sufficient capital to retire €5 million of the debt outstanding under the Credit Facility Agreement by no later than March 31, 2015. This agreement was incorporated into Amendment No. 17 to the Credit Facility Agreement dated as of December 9, 2014. *See* Clarke Decl., Exh. 7.

31. The Atari Obligors were unsuccessful in raising the capital needed to make the €5 million payment called for under Amendment No. 17 by March 31, 2015. As a result, the maturity date was not extended from September 30, 2015. Instead, on March 4, 2015, the Atari Obligors pre-paid outstanding principal in the amount of €418,237.65 representing 50% of the net proceeds of their largely unsuccessful offering of securities, as called for under Amendment No. 17. *See* Clarke Decl., Exh. 8.

32. The Atari Obligors did not make the scheduled interest payment that was due under the Credit Facility Agreement on or before March 31, 2015. Under the Credit Facility Agreement, the failure to make the required interest payment when due was an Event of

Default.[6] In a letter dated April 9, 2015, Alden provided notice to the Atari Obligors that an Event of Default had occurred under the Credit Facility Agreement and also accelerated all remaining amounts due and owing under the Credit Facility Agreement. *See* Clarke Decl., Exh. 9.

33. Notwithstanding that notice, Alden has attempted to negotiate a resolution of the dispute with the Atari Entities that would avoid the need for litigation. Indeed, in May 2015, an Alden representative traveled to Paris for this purpose. However, to date, those efforts have not been successful.

H. Atari's Violations of the Plan Release.

34. In a letter dated March 30, 2015, knowing that they would fail to make the interest payment that was due the next day, the Atari Obligors informed Alden that they had just "realized that the effective global rate (*Taux Effectif Global*) ('TEG') provided pursuant to Section 10.5 of the [Credit Facility Agreement] was wrong." *See* Clarke Decl., Exh. 10. The letter did not explain how the TEG allegedly was wrong or include any calculations with respect to the supposed error. The letter asserted, however, that Atari Europe had made overpayments as a result of this alleged error because under French law the error allegedly meant that a much lower French statutory rate should replace the interest rate provided for under the Credit Facility Agreement.

35. The March 30, 2015 letter was an obvious charade. On numerous occasions, Atari Europe and Atari, S.A. confirmed in writing their agreement with Alden as to the amounts due under the Credit Facility Agreement and, in the Transfer Agreement, they expressly

[6] Atari Europe also failed to make the interest payment due on June 30, 2015, but by that time the entire balance had been accelerated by Alden due to Atari Europe's default in failing to make the March 31, 2015 interest payment.

represented that Atari Europe had received all due and proper notifications of the TEG that had been required under French law. Only now, Atari Europe had reached a point where it was required to actually pay interest – after years of forbearance by Alden with respect to a debt of more than €12 million.

36. The Atari Obligors therefore fabricated an issue with the TEG to avoid the required payment (and notwithstanding a provision in the Credit Facility Agreement that expressly bars set-off by the Atari Obligors). Significantly, even if the Atari Obligors' assertion were correct, and even if the failure of notice could result in a substitution of the interest rate under the agreement for the French statutory rate for any period, Alden itself never received any interest payment at all. Moreover, in the Transfer Agreement the Atari Obligors expressly represented to Alden that they had "received all appropriate letter(s) (as updated or supplemented from time to time) required in connection with the indicative calculation of the effective global rate (taux effectif global) . . . ." Exh. 1 (Transfer Agreement), § 4.3(iv).

37. By a request dated July 16, 2015, the Atari Entities purported to issue a writ of summons compelling Alden to appear before the Commercial Court of Paris on October 15, 2015 with respect to an alleged claim. *See* Clarke Decl., Exh. 10. In the writ, the Atari Entities allege that rather than Atari Europe owing Alden over €12 million in principal and interest under the Credit Facility Agreement, Alden in fact owes Atari Europe roughly €5.7 million as restitution for alleged overpayments by Atari Europe under the Credit Facility Agreement since 2006 (during periods pre-dating the Transfer Agreement when Alden was not the lender) because of alleged miscalculations of the TEG.[7]

[7] This is not the only legal action that the Atari Entities have initiated against Alden. They also have filed a separate action in the Commercial Court of Paris alleging (in error) that a December 2014 letter amounted to a "stand still agreement" that trumped the provisions of the

38. The Atari Entities' allegations and claims are incorrect, and Alden expressly reserves all of its rights and defenses in response to them. But in any event, the claims asserted in the writ plainly violate the Plan Release, which released any and all claims that could have been asserted against Alden by any of the Atari Entities, including claims related to the alleged failure to issue TEG letters or incorrectly calculate the TEG during the years from April 2006, when the Atari Obligors entered into the Credit Facility Agreement with Banc of America, and the Effective Date of the Plan in December 2013.

39. The Plan and Confirmation Order also exculpated Alden for its actions in entering into Amendment No. 16 with Atari because that amendment was an act taken in connection with, or arising out of the cases, and the formulation, dissemination, confirmation, consummation or administration of the Plan, and thus falls squarely within the Exculpation Clause.

40. The Atari Entities compounded their violations of the Plan and Confirmation Order by seeking interim relief from the President of the Commercial Court of Paris in the form of a two-year moratorium on all payments due to Alden under the Credit Facility Agreement in order to permit the Alden Entities to pursue their claims relating to the purported TEG disclosure issue. After an expedited proceeding initiated by the Atari Entities on the eve of a long holiday weekend, the presiding judge of the Commercial Court of Paris granted such relief in an order dated July 23, 2015. *See* Clarke Decl., Exh. 12. Alden has timely appealed from that order. The July 23, 2015 order is predicated on the Atari Entities' request for a two-year period of forbearance to pursue their TEG action against Alden, which similarly violated the Plan Release.

Credit Facility Agreement and somehow excused Atari Europe's failure to pay interest when due on March 31, 2015. Alden similarly denies the claims asserted in that separate action and reserves all of its defenses.

RELIEF REQUESTED

41. By this motion, Alden respectfully requests that this Court enter an order (a) reopening these chapter 11 cases, (b) compelling the Atari Entities and their officers, attorneys, agents and representatives to comply with the Plan and Confirmation Order, including the Plan Release and the Exculpation Clause, (c) ordering the Atari Entities to dismiss the writ within 14 days after entry of an order granting the motion, and (d) enjoining the Atari Entities and their officers, attorneys, agents and representatives from asserting any claims, defenses, rights, or setoffs, or taking any other actions or positions, that are contrary to the Plan Release or the Exculpation Clause. In addition, Alden expressly reserves the right to seek damages from the Atari Entities in this Court for Alden's costs, fees and expenses, including attorneys' fees, arising from the Atari Entities' willful disobedience of this Court's Confirmation Order and the Plan Release.

THE COURT SHOULD GRANT THE REQUESTED RELIEF

I. CAUSE EXISTS TO REOPEN THESE CHAPTER 11 CASES.

42. "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b); *see also* Fed. R. Bankr. P. 5010 ("A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code."). In determining whether to reopen a case under section 350, courts may consider any factors they deem relevant. *See Batstone v. Emmerling (In re Emmerling)*, 223 B.R. 860, 864 (B.A.P. 2d Cir. 1997)); *In re Neil's Mazel, Inc.*, 492 B.R. 620, 628 (Bankr. E.D.N.Y. 2013) ("the determination of whether 'other cause' exists to reopen the case is left to the discretion of the Court, based on the facts of each case.").

43. In considering motions to reopen a bankruptcy case, some courts have looked at "the benefit to the debtor, the prejudice to the would-be defendant in the litigation, and the

benefit to the creditors." *Katz v. I.A. Alliance Corp. (In re I. Appel Corp.)*, 300 B.R. 564, 571 (S.D.N.Y. 2003). Other courts have examined factors such as (a) the length of time that the case was closed, (b) whether a non-bankruptcy forum has jurisdiction to determine the issue that is the basis for reopening the case, (c) whether prior litigation in the bankruptcy court determined that a state court would be the appropriate forum, (d) whether any parties would suffer prejudice should the court grant or deny the motion to reopen, (e) the extent of the benefit to the movant by reopening, and (f) whether it is clear at the outset that no relief would be forthcoming to the movant by granting the motion to reopen. *See, e.g.*, *In re Easley-Brooks*, 487 B.R. 400, 406–07 (Bankr. S.D.N.Y. 2013).

44. In this instance, cause clearly exists to reopen the chapter 11 cases of the Reorganized Debtors. In contravention of the Plan and Confirmation Order, the Atari Entities have engaged in groundless litigation against Alden in France in an attempt to escape the Atari Obligors' previously acknowledged obligations under the Credit Facility Agreement. Alden already has been harmed by the Atari Obligors' failure to make the payments due under the Credit Facility Agreement on March 31, 2015 and as a result of Alden's April 9, 2015 notice of acceleration as a result of that Event of Default.

45. The Atari Entities' debt to Alden was reconfirmed in the Plan, and the claims that the Atari Entities have asserted against Alden were released in the Plan and the Confirmation Order. These cases should be reopened to permit the Court to exercise the jurisdiction it reserved in the Confirmation Order and to enforce the Plan and Confirmation Order to prevent any further violations by the Reorganized Debtors and the other Atari Entities.

46. *First*, these chapter 11 cases have been closed for little more than a year, and the Atari Obligors have only recently asserted their TEG-related claims and defenses under the

Credit Facility Agreement. The fact that these cases have been closed since June 2014 therefore should not be a relevant factor. *See, e.g., In re Celotex Corp.*, 380 B.R. 623, 628-29 (Bankr. M.D. Fla. 2007) (enforcing a confirmation order against foreign creditors that were litigating in a foreign court ten years after a plan and confirmation order were entered).

47. *Second*, "it is well settled that the 'bankruptcy court is undoubtedly the best qualified to interpret and enforce its own orders . . . .'" *U.S. Home Corp. v. Los Prados Community Assoc. (In re U.S.H. Corp. of New York)*, 280 B.R. 330, 335 (Bankr. S.D.N.Y. 2002) (quoting *Texaco Inc. v. Sanders (In re Texaco Inc.)*, 182 B.R. 937, 947 (Bankr. S.D.N.Y. 1995)); *accord Travelers Ind. Co. v. Bailey*, 557 U.S. 137, 139 (2009) ("the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders."). Indeed, the Plan Release and Exculpation Clause were approved in the Confirmation Order after due consideration of all facts and circumstances, and this Court expressly retained jurisdiction to enforce them. This Court is clearly the "proper forum" to address enforcement of the Plan Release and Confirmation Order against the Atari Entities. *In re Residential Cap., LLC*, 512 B.R. 179, 189 (Bankr. S.D.N.Y. 2014).

48. *Third*, Alden would be prejudiced if these cases were not reopened to enforce the Plan and Confirmation Order. Without that relief, the Atari Entities will continue to ignore their agreements and obligations under the Plan and Confirmation Order and manufacture and pursue defenses, claims, and setoff theories under the Credit Facility Agreement that were unconditionally released. If these cases are not reopened, Alden faces significant risk of continued nonperformance by the Atari Obligors under the Credit Facility Agreement and the incurrence of significant fees and expenses in needless litigation of these issues in France.

49. The Atari Entities, on the other hand, will suffer no prejudice because granting the relief requested will only result in the Atari Entities being required to abide by the terms of their own Plan and Confirmation Order, which allowed them to restructure their pre-petition obligations including their obligations to Alden. A consideration of the potential prejudice to the parties and the benefit to be realized by reopening clearly supports an order granting the relief requested.

50. *Finally*, Alden is likely to obtain the underlying relief sought in this motion if these cases are reopened. The mutual release provisions of the Plan and Confirmation Order are clear and unequivocal – the Atari Entities released and discharged all claims, defenses, rights, and setoffs, against Alden, whether known or unknown, relating to the Credit Facility Agreement, while Alden's rights thereunder were expressly preserved. The Atari Entities' claims, defenses, and asserted setoff rights with respect to the TEG issues dating back to 2006 that are raised in the Paris litigation unquestionably fall within the scope of the Plan Release and Exculpation Clause. The Atari Entities' litigation efforts against Alden subvert the Plan and Confirmation Order in a transparent attempt to avoid their payment obligations under the Credit Facility Agreement and therefore obtain a financial windfall. An order compelling compliance with and enjoining further violations of that Plan and Confirmation Order is warranted under the circumstances. *See, e.g., In re Lazy Days' RV Center, Inc*., 724 F.3d 418, 423 (3d Cir. 2013) (cause existed to reopen a bankruptcy case to permit the bankruptcy court to enter an order interpreting and enforcing a plan and confirmation order).

II. AN ORDER IS WARRANTED TO COMPEL THE ATARI ENTITIES TO COMPLY WITH THE PLAN AND CONFIRMATION ORDER AND TO ENJOIN THEM FROM FURTHER VIOLATIONS.

51. Once a chapter 11 plan has been confirmed, the debtor, creditors, and other parties in interest are bound by its provisions. To this effect, section 1141(a) of the Bankruptcy Code provides that:

> the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a); *see Gitlin v. Societe Generale (In re Maxwell Commc'n Corp.),* 93 F.3d 1036 (2d Cir. 1996) (terms of a confirmed plan are binding on the debtor and creditors).

52. Under the Bankruptcy Code, debtors and other parties may be directed to take such action as is necessary to effectuate a confirmed plan. Section 1142(b) of the Bankruptcy Code provides that:

> The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 1142(b). These provisions are consistent with and complement the terms and provisions of the Plan and Confirmation Order.

53. In addition, section 105(a) of the Bankruptcy Code grants bankruptcy courts broad statutory authority to enforce their own orders and the Bankruptcy Code's provisions. It provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be

> construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

54. The Supreme Court, the Second Circuit, and bankruptcy courts in this district all have recognized that bankruptcy courts retain core jurisdiction to interpret and enforce their own prior orders, including confirmation orders. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 139 (2009); *Luan Inv. S.E. v. Franklin Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 230 (2d Cir. 2002) ("A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization."); *In re Charter Commc'ns*, No. 09-11435, 2010 WL 502764, at *4 (Bankr. S.D.N.Y. Feb. 8, 2010) (the bankruptcy court "unquestionably has the authority and discretion" to interpret and enforce its confirmation order).

55. This Court's powers under section 105(a) authorize it to order a party to dismiss a suit filed in violation of a plan and confirmation order and to enjoin such a party from taking actions that violate prior court orders or the restructuring process. *See In re Res. Cap., LLC*, 508 B.R. 838, 846 (Bankr. S.D.N.Y. 2014); *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994) ("Section 105(a) should be 'construed liberally to enjoin [actions] that might impede the reorganization process.'") (citations omitted); *see also Johns-Manville Corp. v. Colorado Ins. Guar. Corp* (*In re Johns-Manville Corp.*), 91 B.R. 225, 228 (Bankr. S.D.N.Y. 1988).

56. Based on these powers and the Atari Entities' disregard for this Court's orders and their own Plan, this Court should enter an order requiring the Atari Entities to comply with the Plan and Confirmation Order by directing them to dismiss the writ within 14 days and enjoining them from asserting any claims, defenses, rights, or setoffs, or taking any other actions or positions against Alden, that are contrary to the Plan Release and the Exculpation Clause. The

injunction against violations of the Plan and Confirmation Order also should encompass any further actions by any of the Atari Entities, or their officers, attorneys, agents or representatives, in the Paris court or in any other tribunal that are contrary to the mutual releases in the Plan and Confirmation Order.

57. In this case, an injunction can be directed to entities that unquestionably submitted to this Court's jurisdiction, and an injunction directed to the Paris courts is not required. But even when an injunction against a foreign court has been required, courts have recognized the authority of bankruptcy courts to issue such an injunction if necessary to protect the integrity of their own orders. *Celotex Corp.*, 380 B.R. at 628-29 (ordering dismissal of and enjoining foreign litigation contrary to a confirmed plan); *see generally China Trade & Development v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (anti-suit injunction with respect to foreign litigation available where (a) the parties are the same in both matters and (b) resolution of the case before the enjoining court would be dispositive of the action to be enjoined); *Travelport Global Distribution Sys. B.V. v. Bellview Airlines Ltd.*, No. 12 Civ. 3483 (DLC), 2012 WL 3925856, at *7 (S.D.N.Y. Sept. 10, 2012).

58. The Atari Entities' disregard of their own Plan and of this Court's Confirmation Order justifies an injunction against those entities, or their representatives, commencing or continuing any foreign proceeding that purports to seek relief that has been released or exculpated in the Plan and Confirmation Order. The Atari Entities' release of all claims, defenses, rights, and setoffs against Alden, as set forth in the Plan and Confirmation Order, is dispositive of any subsequent suit or proceeding by any of them in another forum improperly seeking to assert such released claims, defenses, rights, and setoffs. Moreover, this Court is

better positioned to interpret the Plan and Confirmation Order than the Paris courts for the reasons already discussed.

59. Public policy considerations also overwhelmingly support the issuance of such an injunction because this Court has a vested interest in enforcing and protecting its own orders. *See, e.g.*, *In re Res. Cap., LLC*, 512 B.R. 179, 189 (Bankr. S.D.N.Y. 2014); *In re Texaco Inc.*, 182 B.R. at 944 ("sound considerations of public policy compel the conclusion" that bankruptcy courts have authority to enforce their own orders); *In re Speigel Inc.*, 2006 WL 2577825 at *7 (Bankr. S.D.N.Y. Aug. 16, 2006) (bankruptcy court has the power post-confirmation to "protect its confirmation decree, to prevent interference with the execution of a confirmed plan, and to otherwise aid in its operation.") (citing *In re Chateaugay Corp.*, 201 B.R. 48, 64 (Bankr. S.D.N.Y. 1996)); *Ernst & Young, LLP v. Reilly (In re Earned Capital Corp.)*, 393 B.R. 362, 371 (Bankr. W.D. Pa. 2008) (permanently enjoining the prosecution of a state court action that "amount[ed] to a collateral attack on the Order of Confirmation of the Debtor's Plan of Reorganization").

60. In agreeing to the compromise and settlement embodied in the Plan, which significantly benefitted the estates and led to enhanced recoveries for other creditors, Alden relied on the Plan Release and Exculpation Clause, this Court's approval of those provisions, and its retention of jurisdiction to enforce them. It would be inequitable and offensive to federal bankruptcy law to allow the Atari Entities to intentionally disregard the Plan and Confirmation Order through their actions in the Paris courts.

61. *Finally*, because the release provisions of the Plan and Confirmation Order leave no room for ambiguity, the actions of the Atari Entities in asserting released claims, defenses,

and setoffs in the Paris court and elsewhere obviously tip the balance of equities in Alden's favor. *Res. Cap.*, 512 B.R. at 189-90.

RESERVATION OF RIGHTS

62. Where a party violates an order of a bankruptcy court, the Court has inherent authority under section 105(a) of the Bankruptcy Code to impose a variety of sanctions, including holding the party in contempt. *See Res. Cap.*, 512 B.R. at 191; *see also Solow v. Kalikow (In re Kalikow),* 602 F.3d 82, 96 (2d Cir. 2010) ("The statutory contempt powers given to a bankruptcy court under § 105(a) complement the inherent powers of a federal court to enforce its own orders."); *In re Chief Executive Officers Clubs, Inc.*, 359 B.R. 527, 534 (Bankr. S.D.N.Y. 2007) ("The power to impose civil contempt sanctions applies in Bankruptcy Court as well. Indeed, it is well established that bankruptcy courts have power to enter civil contempt orders."). Alden expressly reserves the right to supplement its request for relief and to seek damages for the Atari Entities' violations of the Plan and Confirmation Order, including Alden's costs, fees, and expenses in defending and responding to the Paris litigation.

NOTICE

63. Notice of this motion has been provided to (a) counsel for the Reorganized Debtors, (b) Atari Europe, Atari, S.A., and their respective counsel, (c) the representative for the General Unsecured Creditors, and (d) the Office of the United States Trustee for the Southern District of New York. Alden submits that such notice constitutes good and sufficient notice of this Motion and that no other or further notice need be given (other than notice of the time, date, and location of a hearing on this Motion once scheduled by this Court).

NO PRIOR REQUEST

64. No prior request for the relief sought herein has been made to this or any other court.

WHEREFORE, Alden respectfully requests entry of an order (i) reopening these chapter 11 cases, (ii) compelling the Atari Entities and their officers, attorneys, agents and representatives to comply with the Plan and Confirmation Order, including the Exculpation Clause and the Plan Release, (iii) ordering that the Atari Entities dismiss the writ in the Paris court no later than 14 days after the entry of an order granting this motion, (iv) enjoining the Atari Entities and their officers, attorneys, agents and representatives from asserting any claims, defenses, rights, or setoffs, or taking any other actions or positions, that are contrary to the Exculpation Clause and Plan Release in the Plan and Confirmation Order, and (v) granting Alden such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October 28, 2015

DLA PIPER LLP (US)

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