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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

OPPOSITION OF ATARI, S.A., ATARI EUROPE, SAS, AND THE REORGANIZED DEBTORS TO 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

[1] The Reorganized Debtors are Atari Inc., Atari Interactive, Inc., Humongous, Inc., and California US Holdings, Inc.

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Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California US Holdings, Inc. (collectively, the "**Reorganized Debtors**"), Atari, S.A., and Atari Europe, SAS ("**Atari Europe**" and together with Atari, S.A., "**Atari**") submit this Memorandum in Opposition (the "**Opposition**") to the Motion of Alden Global Value Recovery Master Fund, L.P. ("**Alden**") 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 (the "**Motion**").

PRELIMINARY STATEMENT

1. By this Motion, Alden seeks to revive the Reorganized Debtors' bankruptcy cases that have been closed for more than a year for the sole purpose of seeking this Court's intervention in foreign proceedings that involve disputes between non-debtor parties, that arise under French law, and that have nothing to do with the Reorganized Debtors' Chapter 11 plan (the "**Plan**") or the confirmation order. Those proceedings, pending before the Commercial Court of Paris, arise out of a credit agreement (the "**Credit Agreement**") to which *none* of the Reorganized Debtors is (or ever was) a party, which is expressly governed by French law, and which includes a forum selection clause requiring the parties' disputes to be resolved in France.

2. Alden, a Cayman Islands-registered hedge fund, is the successor lender under the Credit Agreement with Atari Europe, as principal borrower, and Atari S.A., as guarantor. In or about March 2015, Atari Europe discovered that the effective global rate (Taux Effectif Global ("**TEG**"))—*i.e.*, the interest rate—provided in the Credit Agreement was stated incorrectly and, thus, Atari Europe had made substantial overpayments of interest under that agreement. When Atari Europe notified Alden of the TEG error, Alden responded by claiming an event of default ("**Event of Default**") under the Credit Agreement, and later noticed a non-judicial foreclosure sale of certain U.S. assets that secured the loan.

3. To provide Atari the "breathing room" to address these disputes without harm to its business, Atari commenced an action in the French court seeking entry of a two-year, statutory grace period under French law (the "**Grace Period Action**"). In July 2015, after briefing and a hearing at which Alden appeared, the French court granted Atari's request for such relief. During the two-year grace period granted by the French court, which extends until July 2017, Atari Europe's payment obligations under the Credit Agreement are suspended and any enforcement proceedings are prohibited.

4. Concurrently with the Grace Period Action, Atari also commenced two separate actions on the merits in the French court, in which Atari asserted claims for the return of the interest overpayments (the "**TEG Action**") and for breach of a separate Forbearance Agreement (the "**Forbearance Breach Action**"). Those actions, which were commenced in the Commercial Court of Paris in accordance with the forum selection provisions in the Credit Agreement and the Forbearance Agreement, remain pending before the French court.

5. Although Alden contractually agreed to resolve claims arising out of the Credit Agreement in the Commercial Court of Paris, and has actively participated in proceedings before that court, Alden now asks this Court to reopen the bankruptcy cases and enter an order enjoining non-debtor Atari entities from pursuing the TEG Action in Paris. Alden contends that the TEG claims ("**TEG Claims**") are barred by a general release in the Reorganized Debtors' Plan. But, as explained herein and in the accompanying Declaration of David Malamed, the Plan's general release language is legally insufficient, as a matter of French statutory law, to release the TEG Claims. Under French law (which governs the claims asserted in the TEG Action), the TEG Claims may only be released by a knowing and explicit waiver. The Plan release language—which releases claims to the "maximum extent permitted by *applicable law*"

(here, French law)—does not satisfy these conditions. Atari was unaware of the TEG Claims at the time the Plan was confirmed, and the general release language in the Plan makes no mention of the TEG Claims.

6. But, even before addressing the merits of Alden's request for enforcement of the Plan (through an anti-suit injunction), this Court must first determine whether it is appropriate to reopen the bankruptcy cases to consider that request. Alden has not satisfied, and cannot satisfy, its burden of establishing "cause" to reopen the cases. As explained herein, the claims asserted in the TEG Action (i) relate to debt obligations that are neither owed by any Debtor nor restructured under the Plan, (ii) arise under an agreement (the Credit Agreement) governed by French law as well as French statutes, (iii) do not implicate or require the resolution of any issues of U.S. bankruptcy law, and (iv) are subject to an exclusive forum provision in the parties' agreements that require their adjudication in France. Moreover, Alden has failed to offer any reason as to why the Commercial Court of Paris cannot fairly and competently address its argument that the Plan release bars the TEG Claims. Indeed, *Alden has already raised this argument before the French court* in the Grace Period Action. And, given that the enforceability of the Plan release implicates issues of French law, the French court is naturally the best forum to address that issue.

7. In the alternative to denying the Motion for failure to satisfy the standards of Bankruptcy Code Section 350(b), this Court can also abstain from deciding the Motion in deference to the pending French proceedings because, *inter alia*, the first-filed French proceedings have little connection to the United States, and instead arise out of a Credit Agreement between foreign entities that elected to resolve their disputes in France. Although Alden frames its Motion as a request for enforcement of the Plan, in substance Alden's request is

for an anti-suit injunction enjoining foreign litigation. That request must be denied, as the factors considered by courts in the Second Circuit in this context overwhelmingly weigh against granting injunctive relief. Indeed, Alden's request for an anti-suit injunction should be denied for the simple reason (among others) that Alden cannot identify irreparable harm that would result if the French proceedings continue, as Alden will have every opportunity to defend the French claims in the Commercial Court of Paris—including by arguing that those claims are barred by the general release in the Plan.

8. In sum, this Court should decline to intervene in proceedings pending in the Commercial Court of Paris that arise out of an agreement between foreign, non-debtor entities, that were commenced in France in accordance with the parties' contractual agreements, and that require the resolution of issues under French law. The Motion should be denied in full.

FACTUAL BACKGROUND[2]

I. 2006 Credit Agreement Between Non-Debtor Atari Entities And Banc Of America

9. On April 26, 2006, Atari Europe (along with several co-borrowers later removed from the loan) entered into a €20 million Credit Facility Agreement (the "**Credit Agreement**") with Banc of America Securities Limited ("**Banc of America**"), and with Infogrames Entertainment, SA (renamed "Atari S.A." in 2009) as guarantor. Atari Europe is a subsidiary of Atari, S.A.

10. The Credit Agreement includes a choice of law provision stating that it is to be governed by French law. See Chesnais Decl., Exs. B (Amendment 16 to the Credit Agreement, ¶ 12) and E (Amendment 17 to the Credit Agreement, ¶9).

[2] References to exhibits to the accompanying declarations of David Malamed ("**Malamed Declaration**"), and Frederic Chesnais ("**Chesnais Declaration**"), dated January 21, 2016, shall be as follows, respectively: "Malamed Decl., Ex. __," and "Chesnais Decl., Ex. __."

11. The Credit Agreement also includes a forum selection clause providing that the Commercial Court of Paris has exclusive jurisdiction over any disputes related to the Agreement, as follows:

> *The Tribunal de Commerce de Paris* shall have exclusive jurisdiction over any dispute arising out of or in connection with the Credit Facility Agreement as modified by this Amendment….

Id.

12. On December 10, 2009, Banc of America sold its rights as lender under the Credit Agreement to Bluebay Value Recovery (Master) Fund Limited ("**Bluebay**").

II. 2013 Bankruptcy Of U.S. Subsidiaries And Alden's Purchase Of Loan

13. On January 21, 2013, the Reorganized Debtors (*i.e.*, the Atari U.S. subsidiaries) filed Chapter 11 bankruptcy proceedings in this Court.

14. On February 5, 2013, Alden, a subsidiary of Alden Global Capital LLC, purchased the loan from Bluebay (the "**Bluebay Transfer Agreement**") and assumed the lender's rights under the Credit Agreement.

15. Pursuant to the Bluebay Transfer Agreement, Alden acquired Atari Europe's loan balance of approximately €22.5 million (approximately $29.9 million at the 2013 exchange rate) for a substantially discounted price of approximately €3.5 million (approximately $4.7 million at the 2013 exchange rate).

16. The Bluebay Transfer Agreement provides that it is "governed by French law," and that the "Tribunal de Commerce de Paris shall have jurisdiction in relation to any dispute concerning this Transfer Agreement." Id. at ¶ 13.

17. None of the Reorganized Debtors were parties to the Credit Agreement or the Bluebay Transfer Agreement.

18. During the bankruptcy proceedings of the Atari U.S. subsidiaries (*i.e.*, the Reorganized Debtors), between March 29, 2013 and December 4, 2013, Atari Europe and Alden mutually agreed to extend the maturity date of the Credit Agreement on numerous occasions. These extensions did not require the involvement or approval of this Court.

19. The Plan refers to the obligations under the Credit Agreement as the "Alden Secured Claim."[3] The Plan provides, for "the avoidance of doubt," that "the holder of the Allowed Alden Secured Claim shall retain . . . the Alden Secured Claim following the Effective Date" and that the Alden Secured Claim is not "deemed waived, released or discharged under the Plan." Plan § 4.2(c). The Alden Secured Claim was classified under the Plan only because the Credit Agreement was secured by certain of Atari, Inc.'s intellectual property assets, defined as the "Test Drive Lien." Id. §§ 1.117, 1.118. However, Alden retained that lien under the Plan. Id. § 4.2(c).

20. On December 5, 2013, this Court entered its Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "**Confirmation Order**").

21. The Plan, at Section 12.9, includes a provision entitled "Mutual Releases of Released Parties" (the "**Release**"), which provides as follows:

> 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,

[3] See Plan § 1.8 (defining "Alden Secured Claim" as "the Claim held by Alden on account of the Alden Secured Credit Facility") and § 1.9 (defining "Alden Secured Credit Facility" as "the credit facility established by the Credit Facility Agreement among Atari Europe, the Sponsor and Banc of Americas Securities Limited dated April 21, 2006, as amended from time to time, assigned to Blue Bay Value (Master) Fund Limited, and further assigned to Alden on February 5, 2013").

> 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 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.[4]

22. The Release expressly provides that it does not release claims that Alden may have under the Credit Agreement, but *does not* expressly provide that the Atari entities agreed to release Alden from claims arising out of the Credit Agreement, including the TEG Claims. Rather, the only language in the Release that could pertain to those claims is the "catch all" language at the end of the Release, to wit: claims arising "upon any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date."

23. The Effective Date of the Plan was December 24, 2013. As discussed below, not only before but even after the Effective Date of the Plan, the parties to the Credit Agreement continued to amend that agreement, without any involvement by this Court.

[4] The Plan defines Released Parties as including Alden, Atari, S.A., and Atari Europe. Plan § 1.96.

III. December 2013 Security Agreement Between U.S. Subsidiaries And Alden And Amendment 16

24. On December 23, 2013, following entry of the Confirmation Order, the Atari U.S. subsidiaries (*i.e.,* the Debtors) entered into a Security Agreement with Alden (the "**Security Agreement**"), pledging their assets (the "**U.S. Assets**") as collateral for Atari Europe's obligations under the Credit Agreement. This Security Agreement was executed separate and apart from the Plan.

25. On or about December 24, 2013, (*i.e.*, on the Effective Date) Atari Europe SAS, Atari S.A. and Alden executed Amendment No. 16 to the Credit Agreement, in which the parties agreed to postpone the final maturity date of the Credit Agreement until September 30, 2015.

26. The "Governing Law, Jurisdiction" provision in Amendment 16 to the Credit Agreement states as follows:

> This Amendment No. 16 shall form one and single agreement with the Credit Facility Agreement and shall be governed by and construed in accordance with the laws of France. The *Tribunal de Commerce de Paris* shall have exclusive jurisdiction over any dispute arising out of or in connection with the Credit Facility Agreement as modified by this Amendment No. 16 or this Amendment No. 16 and any amendment to the Transaction Security documents.

Chesnais Decl., Ex. B (Amendment No. 16), ¶ 12.

27. Although Amendment 16 to the Credit Agreement referred to the Plan, the "Governing Law, Jurisdiction" provision did not impose any limitations on the French court's jurisdiction to resolve disputes arising out of the Credit Agreement.

28. On June 27, 2014, this Court entered its Final Decree Closing Cases of the Reorganized Debtors. [Docket No. 577].

IV. The December 9, 2014 Forbearance Agreement

29. On December 9, 2014, nearly one year after the Effective Date and nearly six months after the bankruptcy cases were closed, Alden, Atari S.A., and Atari Europe entered into an agreement (the "**Forbearance Agreement**") to, among other things, suspend all interest and principal payments under the Credit Agreement until September 30, 2015.

30. The Forbearance Agreement includes the following forum and choice of law provision:

> This letter shall be governed by and construed in accordance with the laws of France. The *Tribunal de commerce de Paris* shall have exclusive jurisdiction over any dispute arising out of or in connection therewith.

Chesnais Decl., Ex. D.

31. Concurrently with execution of the Forbearance Agreement, the parties also executed Amendment 17 to the Credit Agreement which, among other things, gave Atari Europe the option of making an early €5 million repayment by March 31, 2015 and extending the maturity date for the balance of the loan until April 1, 2017. Alternatively, if Atari Europe did not exercise the foregoing option, the maturity date of the Credit Agreement would remain unchanged at September 30, 2015.

32. Amendment 17 to the Credit Agreement includes the following forum and choice of law provision reaffirming the parties' agreement to resolve all disputes arising out of the Credit Agreement in the Commercial Court of Paris:

> This Amendment No. 17 shall form one and single agreement with the Credit Facility Agreement and shall be governed by and construed in accordance with the laws of France. The *Tribunal de Commerce de Paris* shall have exclusive jurisdiction over any dispute arising out of or in connection with the Credit Facility Agreement as modified by this Amendment No. 17 or this Amendment No. 17 and any amendment to the Transaction Security documents.

Chesnais Decl., Ex. E (Amendment No. 17) at ¶ 9.

33. Thus, regardless of whether Atari Europe exercised its early repayment option under Amendment 17, the Forbearance Agreement provides that no interest or principal payments were to be due until, at the earliest, September 30, 2015. Pursuant to the Grace Period Order described below, Atari Europe's payment obligations under the Credit Agreement have been deferred until July 2017.

34. Alden's statement in the Motion that Atari Europe has made no post-reorganization interest payments is misleading, as no such payments have yet become due. Moreover, Alden fails to mention, in the Motion, that after the Effective Date of Plan, between February 14, 2014 and March 6, 2015, Atari made total payments to Alden in the amount of € 8,444,331.60, as follows:[5]

- In February 2014, Atari made a payment to Alden in the amount of € 932,472.50 for extension fees by remittance of Atari, S.A. securities.
- On or about February 14, 2014, Atari made a payment to Alden in the amount of € 1,485,823.05 under the Credit Agreement, by remittance of Atari, S.A. securities.
- On or about March 3, 2014, Atari made a payment to Alden in the amount of € 5,607,782.48 under the Credit Agreement, corresponding to the net proceeds above €3 million raised by Atari, S.A. through the issuance of securities.
- On or about September 25, 2014, Atari made a payment to Alden in the amount of € 15.92 under the Credit Agreement.
- On or about March 6, 2015, Atari made a payment to Alden in the amount of € 418,237.65 under the Credit Agreement, corresponding to 50% of the net proceeds raised by Atari, S.A. through the issuance of securities.

Chesnais Decl. at ¶¶27-32.

[5] By way of background, on November 30, 2013, outstanding interest in the amount of € 3,884,872.35 was capitalized (*i.e.* the interest was added to the principal outstanding). All subsequent payments made to Alden, therefore, would apply against the principal outstanding, including the foregoing capitalized interest.

35. Thus, while Alden acquired the loan at a substantially discounted price of approximately € 3.5 million, it has been paid more than € 8.4 million—more than doubling its investment.

V. Atari Discovers That The Effective Global Rate Provided In The Credit Agreement Is Stated Incorrectly

36. In or about March 2015, Atari Europe discovered that the effective global rate (Taux Effectif Global ("**TEG**")) provided in the Credit Agreement was stated incorrectly. Therefore, on March 30, 2015, Atari Europe sent a letter to Alden advising Alden of the error. Chesnais Decl., Ex. F.

37. By letter dated April 7, 2015, Alden responded and stated, among other things, that Alden was "not aware of any basis for" Atari's assertion that the "effective global rate…was wrong." Chesnais Decl., Ex. G.

VI. Alden Asserts That Atari Europe Has Defaulted On Interest Payments

38. Just two days after responding to Atari's March 30, 2015 letter, on April 9, 2015, Alden sent a letter to Atari Europe asserting that Atari Europe had failed to make a scheduled interest payment due "on or before March 31, 2015." Chesnais Decl., Ex. H. Alden further asserted that Atari Europe's failure to make the March 31, 2015 interest payment without valid cause (such as an administrative or technical error) amounted to an Event of Default under the Credit Agreement. Id.

39. Alden's April 9, 2015 letter did not identify the basis for Alden's assertion that an interest payment was due by March 31, 2015, nor did it address the fact that the Forbearance Agreement suspended all interest or principal payments until September 30, 2015. In the following weeks, the parties continued to correspond about the issues raised in Alden's April 9,

2015 letter, with Alden continuing to maintain that an Event of Default had occurred under the Credit Agreement, and Atari continuing to dispute that assertion. Id., Exs. I-K.

VII. Atari Commences French Proceedings

40. On April 13, 2015, based on the evident disagreement between Atari and Alden regarding the applicable interest rate under the Credit Agreement, and at Atari Europe's request, the President of the Commercial Court of Paris appointed Maître Laurent Le Guernevé as special commissioner to assist Atari Europe in negotiating with the company's creditors, including Alden. See Malamed Decl., ¶ 7.

41. Ultimately, the negotiations between Alden and Atari conducted by the special commissioner were not successful. Id., ¶ 8. As a result, Atari requested to be placed in non-judicial conciliation proceedings under French law, whereby a conciliator is appointed by the court for the purpose of negotiating potential settlements with a company's creditors. Id., ¶¶ 8, 9. By two orders dated July 2, 2015 and July 3, 2015, the President of the Commercial Court of Paris granted Atari's request for conciliation. Id., ¶ 10.

A. The Grace Period Action

42. On July 10, 2015, Atari Europe and Atari, S.A. filed an action in the Commercial Court of Paris seeking entry of a two-year, statutory grace period under French law with respect to Atari Europe's obligations under the Credit Agreement (the "**Grace Period Action**"). Id., ¶¶ 11, 12. The Grace Period Action was filed in an effort to protect Atari's business and assets while the disputes with Alden were being addressed. Id.

43. In July 2015, Alden (represented by the Paris office of DLA Piper) submitted an Answer to Pleadings in the Commercial Court of Paris, in which Alden opposed the grace period request. Id., ¶ 13, Ex. B. In its Answer, Alden attached a copy of the Plan and argued, among

other things, that Atari's claim that it had overpaid interest under the Credit Agreement was barred by the Release, as follows:

> The plan stipulates that Atari, Atari Europe and Alden would promise each other that they would waive, and benefit from the waiver of, all requests, obligations, debts, rights, legal action and damages, liability, either known or unknown, current or future, expected or unforeseen, affecting anything related to Litigation and Claims, which include claims made under the Finance Contract . . .
>
> In other words, as a result of that clause, the Atari Companies waived all future claims concerning, for example, a supposedly inaccurate APR . . .
>
> [The Atari Companies] conveniently failed to specify that the parties had waived their right to take action against the others under the plan for restructuring the American Subsidiaries as part of the Chapter 11 arrangement.

See Malamed Decl., ¶ 13, Ex. B.

44. On July 16, 2015, the Commercial Court of Paris held a hearing in the Grace Period Action. Id., ¶ 14. Alden, represented by counsel at DLA Piper, appeared at the hearing and argued the grace period request on the merits, including on the basis that Atari's claims were barred by the Release in the Plan. Id.

45. On July 23, 2015, after argument by the parties and consideration of the parties' written submissions, the Commercial Court of Paris granted the grace period request (the "**Grace Period Order**"). Id., ¶ 15.

46. The effect of the Grace Period Order is that, for a period of twenty-four months after the date on which Alden was officially served with the Order (the "**Grace Period**"), (1) payment of any sums due to Alden by Atari S.A. and Atari Europe are deferred pursuant to Article 1244-1 of the French Civil Code; (2) all such deferred payments shall accrue interest at a reduced rate (*i.e.*, the French legal rate) pursuant to Article 1244-1; (3) all alleged events of default with respect to payments under the Credit Agreement are cured; and (4) any enforcement proceedings by creditors against Atari Europe (the borrower), Atari S.A. (the guarantor) and

Atari's U.S. Subsidiaries (which pledged collateral to secure Atari Europe's loan) are stayed pursuant to Article 1244-2. Id., ¶ 16.

47. The Grace Period does not expire until in or about July 2017.[6] Id., ¶ 17.

B. Concurrent Litigation In The Commercial Court Of Paris

48. Concurrently with the Grace Period Action described above, Atari initiated two parallel litigations in the Commercial Court of Paris relating to the disputes with Alden under the Credit Agreement, by which Atari seeks a determination on the merits of its claims. Id., ¶ 19.

49. First, on or about July 17, 2015, in accordance with the forum selection provisions in the Credit Agreement and Amendments thereto, Atari filed a complaint in the Commercial Court of Paris initiating the TEG Action. Id., ¶ 20. In the complaint, Atari explained that Alden had failed to inform Atari Europe of certain changes to the applicable interest rate. Id. In those circumstances, under French law, the interest rate reverts to a statutory rate. Id., ¶¶ 25-29. As a result, Atari Europe had made substantial overpayments of interest under the Credit Agreement. In the TEG Action, which remains pending in the Commercial Court of Paris, Atari seeks damages in the amount of approximately €14.7 million. Id., ¶ 20.

50. Second, on July 24, 2015, in accordance with the forum selection clause in the Forbearance Agreement, Atari filed a separate suit against Alden in the Commercial Court of Paris (*i.e.*, the Forbearance Breach Action) asserting that Alden had breached the Forbearance Agreement by taking steps to pursue a non-judicial foreclosure sale of Atari's assets based on an interest payment default, notwithstanding that the Forbearance Agreement extended the date to pay interest to September 30, 2015. Id., ¶¶ 22, 30.

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[6] On October 27, 2015, Alden appealed, before the Court of Appeal of Paris, the decision of the Commercial Court of Paris of July 23, 2015 granting the Grace Period. In its brief to the Court of Appeal of Paris, Alden explicitly discussed, as it had done previously, the alleged Chapter 11 Release by the Reorganized Debtors and its importance in light of its appeal. Id., ¶ 18.

VIII. July 2015—Alden Notifies Atari Of Its Intent To Sell U.S. Assets Through A Non-Judicial Foreclosure Sale

51. On July 7, 2015, prior to entry of the Grace Period Order, Alden sent Atari Europe a Notice of Public Sale of Collateral (the "**Sale Notice**") stating that Alden would commence with a public auction of Atari's U.S. assets on July 31, 2015, based on the alleged interest payment default. See Chesnais Decl., ¶ 22, Ex. L. The Sale Notice further stated Alden's intent to sell the U.S. Assets as a block to a single purchaser (though bids for individual components of the U.S. Assets also would be considered) and reserved Alden's right to submit a credit bid to purchase the U.S. Assets itself. Id.

52. By letter dated July 13, 2015, Atari's counsel advised Alden that there was no basis for Alden to claim that an Event of Default had occurred because the Forbearance Agreement had frozen all required payments until September 30, 2015. See id., ¶ 24, Ex. N. Additionally, Atari's July 13, 2015 letter put Alden on notice that any attempted sale of the U.S. Assets would violate provisions of the Uniform Commercial Code as in effect in the State of New York (including Section 9-610, *et seq*.) and that, under the governing law provisions of the parties' agreements, only the French court had jurisdiction to decide any dispute regarding the occurrence of an Event of Default. Id.

53. On July 17, 2015, Alden posted a one-page notice of the proposed foreclosure sale in the *Wall Street Journal*. Id., ¶ 22, Ex. M.

54. After the Commercial Court of Paris entered the Grace Period Order on July 23, 2015, Alden decided not to pursue the non-judicial foreclosure sale. Id., ¶ 26.

55. On October 28, 2015, more than three months after commencement of the TEG Action and entry of the Grace Period Order, Alden filed the Motion.

ARGUMENT

I. Alden Has Failed To Establish Cause To Reopen The Bankruptcy Cases

A. Standard on Motion to Reopen

56. Bankruptcy Code Section 350(b) provides: "[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). Here, Alden does not argue, nor can it argue, that the bankruptcy cases should be reopened "to administer assets" or "to accord relief to the debtor." Alden's Motion is predicated entirely on the "for other cause" prong of Section 350(b).

57. Alden bears the burden of demonstrating that cause exists to reopen these bankruptcy cases. See In re Wilson, 492 B.R. 691, 695 (Bankr. S.D.N.Y. 2013). In deciding whether to reopen a bankruptcy case, courts consider a variety of factors, including "(1) the length of time the case was closed; (2) whether a nonbankruptcy forum has jurisdiction to determine the issue; (3) whether prior litigation in the bankruptcy court determined that a state court would be the appropriate forum; (4) whether any parties would suffer prejudice should the court grant or deny the motion; (5) the extent of the benefit to the debtor by reopening; and (6) whether it is clear that no relief would be forthcoming to the debtor by granting the motion." Id.

58. Moreover, "a closed bankruptcy proceeding should not be reopened where it appears that to do so would be futile and a waste of judicial resources." Redmond v. Fifth Third Bank, 624 F.3d 793, 803 (7th Cir. 2010) (citation omitted); see also In re Mardy, No. 10-73819-AST, 2011 WL 917545, at *3 (Bankr. E.D.N.Y. Mar. 15, 2011) ("[T]his Court will only exercise its discretion to reopen a case in circumstances where relief may ultimately be afforded to a party."). In addition, a motion to reopen is properly denied where "the result cannot possibly have any effect on any estate being administered in bankruptcy." In re Neil's Mazel, Inc., 492

B.R. 620, 629 (Bankr. E.D.N.Y. 2013). For the reasons discussed below, the foregoing factors weigh decisively in favor of denying the request to reopen the bankruptcy cases.

B. A Non-Bankruptcy Forum Has Jurisdiction To Resolve This Dispute

59. Bankruptcy courts "routinely decline to exercise their discretion to reopen bankruptcy cases where the parties are seeking or could seek relief in a competent alternative forum." In re HBLS, L.P., 468 B.R. 634, 640 (Bankr. S.D.N.Y. 2012). Here, there is no dispute that Alden can present its argument that the Release bars the TEG Action to the Commercial Court of Paris, and Alden has not argued or even suggested that the Paris court cannot fairly and competently address that argument.

60. This Court's recent decisions denying a motion—and later, a renewed motion—to reopen the PlusFunds Group Inc. Chapter 11 case are highly instructive. See In re PlusFunds Grp., Inc., 492 B.R. 202, 210 (Bankr. S.D.N.Y. 2013) aff'd, 505 B.R. 419 (S.D.N.Y. 2014), vacated and remanded, 589 F. App'x 41 (2d Cir. 2015); In re PlusFunds Grp., Inc., Case No. 06-10402, 2015 WL 1842224, at *4-7 (Bankr. S.D.N.Y. Apr. 21, 2015) (JLG). In PlusFunds, the trustee of a trust established by PlusFunds' plan of liquidation moved to reopen PlusFunds' bankruptcy case in order to seek an extension of the five-year term of the trust to ensure that the trustee could continue prosecuting pending causes of action. In denying the first motion to reopen, Judge Peck explained, *inter alia*, that "[p]erhaps most importantly, issues relating to the Trust may be decided by a non-bankruptcy court that has jurisdiction to hear and determine both the Causes of Action and questions raised as to the ongoing viability of the Trust. The Causes of Action are pending in the District Court for the Southern District of New York and that court should be in a good position to determine the status of the Trust within the context of that litigation." In re PlusFunds Grp., Inc., 492 B.R. at 210. Upon remand from the Second Circuit with instructions to evaluate the prejudice that might result from granting or denying the motion,

this Court affirmed Judge Peck's decision, concluding that the motion should be denied where there was "a non-bankruptcy forum capable of addressing issues" raised by the motion. In re PlusFunds Grp., Inc., 2015 WL 1842224, at *6.[7]

61. Alden's Motion should be denied for the same reason, as the Commercial Court of Paris—where the parties' dispute is currently pending—is a non-bankruptcy forum capable of addressing the issue raised by the Motion, namely, whether the claims pending in that court are precluded by the Release. In fact, in the Grace Period Action, Alden has made the same argument it makes to this Court in the Motion. As detailed in the Malamed Declaration, in opposing Atari's request for a two-year grace period with respect to Atari's obligations under the Credit Agreement, Alden argued to the Commercial Court of Paris that Atari's TEG Claims are barred by the Release in the Plan. See Malamed Decl., ¶¶ 13, 37, Ex. B. Specifically, in July 2015, Alden (represented by the Paris office of DLA Piper) submitted an Answer to Pleadings in the Commercial Court of Paris, to which Alden annexed a copy of the Plan, and in which Alden argued, *inter alia*, that as a result of the Plan, "the Atari Companies waived all future claims concerning, for example, a supposedly inaccurate APR." See id., ¶ 37, Ex. B.

62. Moreover, Alden cannot legitimately contend that the French court is not an adequate forum in which to resolve this dispute, as Alden repeatedly consented to the exclusive jurisdiction of the Commercial Court of Paris to resolve all disputes arising out of the Credit Agreement. In fact, as noted, even after the Effective Date of Plan and its general release, when

[7] In PlusFunds, the relief sought by the trustee was an extension of the terms of the trust, which was indisputably relief that only the bankruptcy court could grant. See In re PlusFunds Grp., Inc., 2015 WL 1842224, at *1. Nonetheless, the court denied the motion to reopen on the basis that the New Jersey District Court could adjudicate whether the trustee had standing under the governing trust agreement to pursue the pending claims. See id. at *4-7. Here, on the other hand, there is no dispute that the French court may determine the enforceability of the Release. In fact, this Court held in PlusFunds that the District Court could interpret the trust agreement—which was a plan document—just as the French court here can adjudicate the question of whether the Release in the Plan applies to release the TEG Claims. See id. at *6.

the parties executed Amendment 17 to the Credit Agreement, Alden affirmed its agreement to resolve all disputes arising out of the Credit Agreement in the Commercial Court of Paris. See Chesnais Decl., ¶ 12, Ex. E. Alden did not limit the forum selection clause in Amendment 17 to exclude claims that could be adjudicated by this Court. Id. Therefore, Alden consented to submit the instant dispute—which unquestionably arises out of the Credit Agreement—to the Commercial Court of Paris.

63. Importantly, the issue of whether the Release bars the TEG Action does not implicate or require the application of U.S. bankruptcy law. Alden's boilerplate arguments based on this Court's jurisdiction to enforce its own orders are thus entirely off the mark. See, e.g., Matter of Zurn, 290 F.3d 861, 864 (7th Cir. 2002) (affirming decision not to reopen bankruptcy proceedings and explaining that the "federal role" ends with the determination of which liabilities will be "retained rather than abandoned" and other disputes "belong to state tribunals"); In re Elias, 188 F.3d 1160, 1162 (9th Cir. 1999) (affirming decision not to reopen bankruptcy proceedings to consider a fee agreement because the dispute was "ancillary to the bankruptcy court's core function of adjudicating the estate" and where "the state court is fully capable of resolving the fee dispute"); cf. In re Lazy Days' RV Center, Inc., 724 F.3d 418, 423-24 (3d Cir. 2013) (granting motion to reopen where, *inter alia*, dispute at issue involved "claim for relief . . . based on a federal bankruptcy law provision with no common law analogue," namely, whether a lease's anti-assignment provision was unenforceable pursuant to 11 U.S.C. § 365(f)(3)).

64. On the other hand, the applicability of the Release as to claims asserted in the French proceedings will require consideration of French law principles—namely, that a general release is insufficient, under the French Civil Code, to release claims to recover TEG

overpayments. See Malamed Decl, ¶¶ 31-36. Therefore, the French court is undeniably the Court best equipped to adjudicate this issue. The availability of this alternate forum weighs strongly against reopening the bankruptcy case. See In re HBLS, 468 B.R. at 640 (finding that, where alternate forum is available, there is "no need for this Court to inject itself into proceedings that have already been or can be handled in Anguilla"); In re Apex Oil Co., Inc., 406 F.3d 538, 542 (8th Cir. 2005) ("The appellees' claims are already being adjudicated in state court, and the related dischargeability issue could be ruled upon in that forum in light of Apex's assertion of a dischargeability defense in the state court action."); Mid-City Bank v. Skyline Woods Homeowners Ass'n (In re Skyline Woods Country Club), 636 F.3d 467, 472 (8th Cir. 2011) ("[T]he availability of an alternative forum—the second state-court suit in which the Bank and Liberty are parties—was a strong reason not to reopen a closed bankruptcy case.").

65. Notably, there can be no reasonable dispute that the French court is competent to adjudicate the French claims, which not only arise under French law (and not under U.S. bankruptcy law), but which are unrelated to the Reorganized Debtors' Chapter 11 cases. Indeed, the French claims arise out of the Credit Agreement, to which none of the Reorganized Debtors are parties. The debt that is owed by non-debtor Atari Europe under the Credit Agreement was incurred in the ordinary course of business (and not in connection with these Chapter 11 cases), and was not restructured by the Plan. In fact, the Credit Agreement was amended nearly one year after the Effective Date and nearly six months after the bankruptcy cases were closed. See Chesnais Decl., ¶¶ 10, 11. Thus, there is no need for this Court to intervene in the French proceedings, which may properly be adjudicated by the Commercial Court of Paris.

66. Finally, Alden's argument that this Court is best situated to resolve the parties' dispute merely because it relates to the Release approved by this Court is unpersuasive. See

Motion at ¶ 47. As a preliminary matter, Atari commenced the TEG Action and the Forbearance Breach Action pursuant to the parties' repeated and consistent agreements to submit all disputes relating to the Credit Agreement to the Commercial Court of Paris. See Chesnais Decl., ¶ 4. As discussed *supra*, the Credit Agreement includes a forum selection clause providing that the French court has exclusive jurisdiction over any disputes relating to the Agreement, as follows:

> ***The [Commercial Court of Paris] has exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement*** (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").

Chesnais Decl., Exs. B (Amendment 16 to the Credit Agreement), E (Amendment 17 to the Credit Agreement) (emphasis added). Moreover, as noted, application of the Release raises no issues of U.S. bankruptcy law, but entirely hinges on issues of French law.

67. Similarly, the various amendments to the Credit Agreement—including Amendment Nos. 16 and 17, which were executed after the Confirmation Order was entered—provide that they shall be governed and construed under French law, and that the Commercial Court of Paris shall have exclusive jurisdiction "over any dispute arising out of or in connection with" the Credit Agreement. See Id., ¶¶ 8, 11, Exs. B, E. Likewise, the Forbearance Agreement that forms the basis of certain of Atari's claims in France provides that it shall be governed by the laws of France, and that the French court "shall have exclusive jurisdiction over any dispute arising out of or in connection therewith." Id. ¶ 11, Ex. D. Therefore, Alden cannot reasonably contend that the French court is not an adequate forum in which to resolve disputes relating to the applicable interest rate under the Credit Agreement—including whether such claims have been released. See Plan § 13.2 ("If the Bankruptcy Court abstains from exercising, or declines to exercise, jurisdiction or is otherwise without jurisdiction over any matter, arising in, arising under, or related to" the bankruptcy cases, then the retention of jurisdiction provisions of the

Plan "*shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction by any other court have [sic] jurisdiction with respect to such matter*.") (emphasis added).

68. Here, Atari's TEG Claims are being litigated in France and are governed by French law. Alden's argument that Atari's claims have been released has been raised in the Grace Period Action, and can be resolved by the French court. Moreover, the issues raised by Alden's Motion do not implicate any issues of U.S. bankruptcy law. Rather, the resolution of Alden's Motion will involve an analysis of French law governing the French claims. Therefore, the French court provides a competent alternate forum in which the parties' dispute may be resolved, and this factor weighs heavily in favor of denying the Motion.

C. Alden Will Suffer No Prejudice If The Motion Is Denied

69. As noted, Alden has raised its argument that Atari's TEG Claims are barred by the Release in the French court. See Malamed Decl., ¶¶ 13, 37, Ex. B. Alden has not argued that the French court is unwilling to or incapable of addressing that argument. Therefore, Alden will suffer no prejudice if the Motion is denied, as Alden will simply be required to litigate issues relating to the TEG Claims—*including whether those claims are barred by the Release*—before a French court. Because Alden will have the opportunity to make the same arguments in the French courts, it will not be prejudiced by denial of this Motion. See In re PlusFunds Group, Inc., 2015 WL 1842224 at *7.

70. Moreover, Alden argues here that Atari's TEG Claims are barred not only by the Release, but also by the Bluebay Transfer Agreement, in which Atari Europe and Atari, S.A. agreed, *inter alia*, that the outstanding principal and accrued interest owed under the Credit Agreement were "true, complete and accurate" as stated in that Agreement. Motion, ¶¶ 10-11. The Bluebay Transfer Agreement, however, is expressly governed by French law, is entirely unrelated to the bankruptcy cases or the Plan, and provides that the Commercial Court of Paris

shall have jurisdiction over claims arising out of that Agreement. In its Answer to Pleadings filed in the Grace Period Action, Alden made the same argument that it makes here, namely, that the TEG Claims are barred by the Bluebay Transfer Agreement, as follows:

> In addition, as stipulated by clause 4.3(iv) of the Transfer Agreement, Atari Europe expressly recognized that, in its capacity as the original borrower, it had received all of the required letters, as well as the related updates, concerning the calculation of the APR, in accordance with clause 10.5 of the Finance Contract and with the provisions of article L.313.4 of the *Monetary and Financial Code* and articles L.313-1 *et seq.* of the *Consumer Code*.

Malamed Decl., Ex. B.

71. Again, PlusFunds is instructive. In denying the trustee's motion to reopen for the purpose of extending the term of a liquidating trust, Judge Peck highlighted the fact that the trustee maintained that the trust could continue to prosecute pending causes of action even absent an order from the bankruptcy court reopening the PlusFunds case and extending the trust's term. In re PlusFunds Grp., Inc., 492 B.R. at 210 ("Given the arguments of the Trustee regarding the ability to maintain the Causes of Action and to establish grounds for ongoing activities of the Trust, it is difficult to conclude that reopening of the Debtor's case to consider approval of the initial extension of the Trust is needed to protect the beneficiaries of the Trust."). On remand, this Court agreed and explained that there was "no clearly articulated benefit to the Trustee in reopening the case" where the trustee contended that it could pursue the pending causes of action even absent an order reopening the bankruptcy case and extending the term of the trust. In re PlusFunds Group, Inc., 2015 WL 1842224 at *6. Thus, this Court concluded that there was "insufficient cause to reopen the Debtor's case," as follows:

> [A]lthough the Action has been remanded to the New Jersey District Court in the intervening months since this Court issued its Decision, there still is a court that is in a good position to determine the status of the SPhinX Trust within the context of the pending litigation. In addition, the Court's conclusion that the Trustee's alleged ability to prosecute the Action indicates no clear prejudice to the Trustee

> in declining to reopen the case remains unchanged as does its finding that the reopening of the Debtor's case to determine the status of the SPhinX Trust is not essential to preserve the Action.

Id. at *7.

72. So too here, reopening these bankruptcy cases is plainly "not essential" to preserving Alden's right to argue that the TEG Claims have been released, either under the Plan or pursuant to the Bluebay Transfer Agreement.[8]

73. While Alden will suffer no prejudice if the Motion is denied, Atari will be prejudiced if it is forced to litigate in this Court claims that Atari properly asserted in France approximately six months ago pursuant to the forum selection clause in the Credit Agreement. Stated otherwise, granting the Motion would deprive Atari Europe and Atari, S.A. of the benefit of their bargain with Alden, which includes an agreement to resolve disputes arising out of the Credit Agreement in the Commercial Court of Paris. This factor therefore weighs in favor of denying the Motion.

D. The Requested Relief Can Provide No Benefit To The Debtors And Will Have No Impact On The Administration Of The Estate

74. The TEG Action and the Forbearance Breach Action that are pending in France arise out of the Credit Agreement and the Forbearance Agreement, to which none of the Reorganized Debtors are parties. Moreover, all distributions from the Reorganized Debtors' estates have been made. Therefore, the resolution of Alden's Motion, and any determination about the applicability of the Release to the TEG Claims or the Forbearance Breach Action claims, can provide no benefit to the Reorganized Debtors, and will have no impact on the Debtors' estates (which have already been fully administered). See In re Neil's Mazel, Inc., 492

[8] As discussed herein, it is Atari's position that the TEG Claims are not barred by the Release or the Bluebay Transfer Agreement, and reserves all rights to oppose any attempt by Alden to seek dismissal of the French claims.

B.R. at 628-29 (denying motion to reopen where, *inter alia*, the disputes at issue were "almost entirely between [movant] and other entities, none of whom is a debtor in any open bankruptcy case," where "much of the force of [movant's] arguments is directed against…non-debtors," and where "the estate herein has already been fully administered").

E. The Time Elapsed Since The Bankruptcy Cases Were Closed, And Alden's Delay In Filing Its Motion, Weigh Against Reopening These Cases

75. Also weighing against reopening these bankruptcy cases is the time elapsed since these bankruptcy cases were closed, Alden's delay in filing the Motion, and the prejudice that would result to Atari if the Motion were granted. The Reorganized Debtors' bankruptcy cases have been closed since June 27, 2014. Atari advised Alden of the TEG Claims in March 2015. Alden waited more than seven months—until multiple proceedings were pending in France, in which both Alden and Atari have actively participated, and during which time Alden attempted to foreclose on the assets securing the loan—to file the Motion. Alden's delay in seeking to reopen this case has thus caused prejudice to Atari, and the Motion should be denied. See In re Rodriguez, No. 12-12043-BKC-AJC, 2015 WL 4872343, at *3 (Bankr. S.D. Fla. Aug. 13, 2015) ("The doctrine of laches applies and supports denial of the Motion [to reopen].").

F. Alden Is Not Entitled To The Relief Sought, As The Release And Exculpation Clause Do Not Release The Pending French Claims

76. Finally, the cases should not be reopened because it is clear that no relief would be forthcoming by granting the motion to reopen. Specifically, the Release, as well as the exculpation clause in Section 12.6 of the Plan (the "**Exculpation Clause**"), do not release the claims asserted by Atari that are pending before the Commercial Court of Paris.

i. The Release is Insufficient to Release the French Claims Under French Law

77. The Motion should also be denied because the Release does not govern the claims asserted in France. Indeed, the Release acknowledges that it operates only to release claims "to the maximum extent permitted by applicable law." Plan § 12.9. Here, the claims asserted in the TEG Action and the Forbearance Breach Action arise out of the Credit Agreement (including Amendments thereto) and the Forbearance Agreement, all of which are expressly governed by French law. See Malamed Decl., ¶¶ 19-29. Moreover, the claims asserted in the TEG Action and the Forbearance Breach Action are French law claims. Id. ¶ 25.[9]

78. Under applicable French law, the Release is insufficient to release the TEG Claims asserted in the French proceedings. Id. ¶ 31. To release the claims asserted in the French proceedings, including the TEG Claims, Article 1338 of the French Civil Code requires a knowing and explicit waiver. Id. ¶ 33. The Release here fails to satisfy the foregoing requirements under French law. First, the TEG Claims asserted in France were not known to Atari at the time that the Release was executed. See Chesnais Decl., ¶ 14. Second, the Release here does not expressly refer to the TEG Claims. Rather, the Release at issue is a general release that purports to release a variety of claims, including those that were "known or unknown,

[9] To the extent that Alden argues that the New York governing law provision of the Plan, at Section 14.11, precludes the application of French law in determining the enforceability of the Release, that argument is without merit. The Plan states that "the rights, duties, and obligations arising under the Plan" are governed by New York law, but does not provide that the Release is governed by New York law. Moreover, the Release releases certain claims "to the maximum extent permitted by *applicable law*," and the reference to "applicable law" would be entirely superfluous if the Release were governed by New York law in all instances, even where the claim at issue is governed by the law of another jurisdiction (as is the case here). Indeed, the phrase "to the maximum extent permitted by applicable law" has been interpreted to include applicable foreign law, even where the agreement at issue contains a New York choice of law provision. See In re Flag Telecom Holdings, Inc., No. 03-06712, 2006 WL 3053075 (Bankr. S.D.N.Y. Oct. 23, 2006) (where note required debtor to take "all actions to the maximum extent permitted by applicable law" to, *inter alia*, ensure validity and perfection of certain collateral, where collateral was located in Taiwan, court examined whether debtor took all actions "to the maximum extent" possible under Taiwanese law to perfect that collateral). Here, the "applicable law" governing the claims pending in France is French law. Accordingly, the enforceability of the Release as to the French claims should be determined under French law.

foreseen or unforeseen, existing or hereinafter arising…" Malamed Decl., ¶ 35; Plan § 12.9. Therefore, under French law, the Release does not apply to the claims asserted in the French proceedings, and Alden is not entitled to the relief it seeks (*i.e.*, the enforcement of the Release with respect to the French law claims).[10]

ii. The Release Does Not Govern Post-Effective Date Claims or Claims Based on Willful Misconduct or Gross Negligence

79. Alden concedes that the Release in the Plan only applies to claims "*arising on or before the Effective Date of the Plan*." Motion, ¶ 19 (emphasis added). Therefore, the Release cannot operate to bar claims arising after the Effective Date. Although Alden appears to concede that the claims asserted in the Forbearance Breach Action are not governed by the Release (Motion, p. 15, fn. 7), to the extent that Alden contends otherwise, Alden is incorrect because the Forbearance Breach Action arises out of agreements that were not executed until after the Effective Date, and therefore cannot be governed by the Release. Specifically, the Forbearance Breach Action arises out of Alden's breach of Amendment No. 17 to the Credit Agreement and the Forbearance Agreement, which were not executed until December 9, 2014—nearly one year after the Effective Date of the Plan (*i.e.*, December 24, 2013). Therefore, Alden has identified no legitimate basis on which this Court should intervene to require the discontinuance of the Forbearance Breach Action.

80. Moreover, in the TEG Action, Atari seeks the return of payments made under the Credit Agreement for periods up to and including March 31, 2015—*i.e.*, well after the Effective

[10] Similarly unpersuasive is Alden's argument that Atari somehow waived the TEG Claims by acknowledging, in various agreements, that the TEG rate was accurate. Indeed, Atari's acknowledgment that the TEG rate was correct only supports Atari's position that it was unaware of the inaccuracy in the TEG rate until after the Release was executed. To constitute a valid release under French law, Atari would have had to state that it understood the TEG rate was incorrect, but that it nevertheless desired to waive any claims arising out of that error. At no time did Atari do so.

Date of the Plan. To the extent that the French court determines that Atari is entitled to the return of payments made to Alden after the Effective Date, at the very least, Atari's claims for the return of such payments will not be barred by the Release.[11]

iii. The Exculpation Clause Does Not Apply to the French Claims

81. Alden also argues that the Exculpation Clause bars the claims asserted in the French proceeding. That argument is entirely without merit, as the Exculpation Clause, on its face, does not apply. The Exculpation Clause provides as follows:

> Pursuant to the Plan and to the maximum extent permitted by applicable law, none of the Exculpated Parties shall have or incur 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; *provided, however*, that the foregoing shall not affect the liability of any Person that otherwise would result from any such act or omission to the extent such act or omission is determined by a Final Order to have constituted willful misconduct or gross negligence.

Plan § 12.6.

82. Therefore, by its terms, the Exculpation Clause applies only to claims resulting from acts taken "in connection with, or arising out of" the Reorganized Debtors' bankruptcy cases or the Plan, Disclosure Statement, or other related agreements. As explained above, the claims asserted in the French proceedings have no connection to the bankruptcy cases or the Plan, and cannot be characterized as relating to the cases or the Plan. Instead, the French claims arise out of the Credit Agreement, which was executed years before these bankruptcy cases were filed, and the Forbearance Agreement, which was executed nearly six months after the bankruptcy cases were closed. Although Alden contends that the Exculpation Clause governs

[11] It will likewise be for the French court to determine whether the French claims involve gross negligence or willful misconduct such that the Release would not apply for that reason as well.

claims resulting from Amendment 16 to the Credit Agreement, the French claims do not arise out of Amendment 16. Indeed, in the TEG Action, Atari seeks the return of overpayments made during periods both pre-dating and post-dating the execution of Amendment 16, while the Forbearance Breach Action arises out of Alden's breach of the Forbearance Agreement that was signed nearly one year after Amendment 16.

83. Finally, reading the Exculpation Clause to release the French claims would be entirely inconsistent with the statutory basis for such provisions under 11 U.S.C. § 1125(e), which is designed to shield parties from liability for actions taken in connection with soliciting the approval or rejection of a bankruptcy plan, or participating in the transaction of a security offered or sold under a plan. See Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1496 (9th Cir. 1995) ("[T]he plain language of section 1125(e) and its location in the section . . . both suggest that section 1125(e) *only provides a safe harbor for the disclosure and solicitation process of a bankruptcy*." (emphasis added)). Here, the French claims arise out of agreements executed by the parties entirely independently of the bankruptcy process, and are therefore not subject to the Exculpation Clause.

84. In summary, the relevant factors weigh heavily against reopening the cases, as (i) Alden's argument can be addressed by the Commercial Court of Paris, where Atari's TEG Claims are pending; (ii) Alden will not be prejudiced by litigating this issue in France, where the parties contractually agreed to resolve disputes arising out of the Credit Agreement; (iii) this bankruptcy case has been closed for more than a year, during which time the parties have been actively litigating their disputes in France; (iv) the French proceedings arise out of the Credit Agreement, to which no Debtor is a party, and the Motion can therefore have no impact on the

administration of the Debtors' estates; and (v) under French law, the Release is insufficient to release the claims asserted in the French proceedings. Therefore, the Motion should be denied.

II. Even If The Chapter 11 Cases Are Reopened, Alden Is Not Entitled To The Relief Sought

85. Because Alden has failed to establish cause to reopen the bankruptcy cases, this Court need not consider the underlying relief requested: an order enjoining the Atari entities from continuing to pursue the French proceedings, including the TEG Action. However, even if this Court decides to reopen the cases, that relief should be denied. As explained above, the Release and Exculpation Clause do not release the claims asserted in the French proceedings.

86. Moreover, the request for enforcement of the Release is, in actuality, a request for an anti-suit injunction enjoining foreign litigation. It is well settled that "[r]equests for foreign anti-suit injunctions bring to the forefront important considerations of international comity," and district courts "have discretion to issue such injunctions '*only in the most compelling circumstances*.'" In re Vivendi Universal, S.A. Sec. Litig., No. 02 CIV. 5571 (RJH) (HBP), 2009 WL 3859066, at *4 (S.D.N.Y. Nov. 19, 2009) (emphasis added).

87. In the Second Circuit, an anti-suit injunction may only issue if "(1) the parties are the same in both matters, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined." Id. However, even where these factors support the issuance of an injunction, "district courts are directed to consider five factors in determining, in their discretion, whether comity considerations render an injunction against the foreign action appropriate: (1) whether the foreign action poses a threat to the enjoining court's jurisdiction; (2) whether the foreign action would frustrate a policy in the enjoining forum; (3) whether the foreign action would be vexatious; (4) whether the proceedings in the other forum prejudice other equitable considerations; and (5) whether adjudication of the same issues in separate actions would result

in delay, inconvenience, expense, inconsistency, or a race to judgment." Id. at *4 (citing China Trade & Dev. Corp. v. M.V. Chong Yong, 837 F.2d 33, 35-36 (2d Cir.1987)). Moreover, "absent extraordinary circumstances, the Court should only issue such an injunction if the [foreign] litigation presents either a threat to this Court's jurisdiction or a threat to an important domestic policy." MasterCard Int'l Inc. v. Argencard Sociedad Anonima, No. 01 CIV. 3027 (JGK), 2002 WL 432379, at *10 (S.D.N.Y. Mar. 20, 2002).

88. Here, the threshold factors are not satisfied and an anti-suit injunction may not issue because even if this Court were to determine that the Release governs French law claims arising prior to the Effective Date, it is undisputed that the Release cannot bar claims arising after the Effective Date, including those asserted in the Forbearance Breach Action. Therefore, even if the relief sought by Alden was granted by this Court, it would not dispose of the French proceedings. See Vringo, Inc. v. ZTE Corp., No. 14-CV-4988 (LAK), 2015 WL 3498634, at *11 (S.D.N.Y. June 3, 2015) ("The Court at this stage does not have sufficient evidence to find that resolution of this case would dispose of the antitrust case in Shenzhen, China. Accordingly, because Vringo has failed to satisfy the second threshold requirement, it is not appropriate to enjoin the Shenzhen action.").

89. But even if the two threshold factors were satisfied, Alden's request for an anti-injunction suit should be denied on comity grounds for the following reasons.

90. First, the French court's exercise of jurisdiction pursuant to a contractual forum selection clause does not threaten this Court's jurisdiction to interpret its own orders.

91. Second, the French proceedings will not frustrate any policy in this forum, as the French proceedings involve claims asserted under French law and arising out of a Credit Agreement governed by French law. See LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194,

200 (2d Cir. 2004) ("Comity militates strongly against an injunction [where] '[a] question has arisen under Mexican law . . . and that question has been presented to a Mexican court'"); Kismet Acquisition, LLC v. Icenhower (In re Icenhower), 398 B.R. 902, 916 (Bankr. S.D. Cal. 2008) (denying anti-suit injunction because, *inter alia*, "the impact on comity of issuing the requested permanent anti-injunction suit would not be tolerable given the circumstances of this case" where pending action in Mexico involved Mexican nationals and issues of Mexican law).

92. Third, the French proceedings cannot be viewed as vexatious in light of the fact that Alden consented to resolve disputes arising out of the Credit Agreement in France, and affirmed that agreement even after the Plan was confirmed and the Release became effective. See Hamilton Bank, N.A. v. Kookmin Bank, 999 F. Supp. 586, 590 (S.D.N.Y. 1998) ("There is nothing vexatious about the Korean action [where plaintiff], a Korean bank, quite understandably has sought relief from its own courts . . . .").

93. Fourth, Alden has not identified (and cannot identify) any equitable considerations warranting the imposition of an anti-suit injunction. To the contrary, for all of the reasons discussed above, the equities in this case favor allowing the French actions to proceed.

94. Fifth, Atari commenced the French proceedings pursuant to the parties' contractual agreement to resolve disputes in the Commercial Court of Paris. Where, as here, "the existence of the parallel proceedings is simply the result of the agreements the parties executed," the fact that allowing foreign proceedings to continue may result in "some additional costs, delay and vexation is insufficient to outweigh the important international comity interests that arise when foreign and domestic courts have concurrent jurisdiction over the same in personam claim." MasterCard Int'l Inc., 2002 WL 432379 at *12.

95. Finally, to be granted an anti-suit injunction, Alden must satisfy the general standard governing applications for preliminary injunctions. See In re Millenium Seacarriers, Inc., 458 F.3d 92, 98 (2d Cir. 2006). Specifically, Alden must demonstrate "(1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief." Molloy v. Metro. Transp. Auth., 94 F.3d 808, 811 (2d Cir. 1996) (citations omitted).

96. Alden cannot meet this standard. As discussed above, Alden cannot be irreparably harmed by the denial of an anti-injunction suit, as Alden will have the opportunity to raise any defenses to the French claims—including the defense of release—in the pending French proceedings. Nor can Alden demonstrate a likelihood of success on the merits, as, for the reasons explained above, the Release does not govern the claims asserted in France. Therefore, Alden's request for an anti-suit injunction must be denied.

97. Finally, notwithstanding Alden's argument that "public policy considerations" or "the balance of equities" support granting an anti-suit injunction (Motion, ¶¶ 59-61), no such policy or equitable concerns are present where, as here, the Release does not apply to the claims that Alden seeks to enjoin, where the parties contractually agreed to resolve the claims at issue in the Commercial Court of Paris, and where the claims do not implicate questions of U.S. bankruptcy law.

III. In The Alternative, This Court Should Abstain From Deciding Alden's Motion

98. In the alternative to denying the Motion based on the factors described above, this Court may also abstain from granting relief under principles of comity. Indeed, United States courts possess an "inherent, discretionary power to abstain from exercising that jurisdiction in order to extend comity to related proceedings pending in other countries." In re Regus Bus. Ctr.

Corp., 301 B.R. 122, 128 (Bankr. S.D.N.Y. 2003) (citation omitted). This doctrine, pursuant to which United States courts may defer to first-filed foreign proceedings, "recognizes the 'principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency.'" Ole Media Mgmt., L.P. v. EMI Apr. Music, Inc., No. 12 CIV. 7249 (PAE), 2013 WL 2531277, at *2 (S.D.N.Y. June 10, 2013).

99. Moreover, in appropriate circumstances, bankruptcy courts may abstain from reopening a bankruptcy case. See In re Lemoine, No. 12-11152, 2012 WL 5906939, at *5 (Bankr. E.D. Pa. Nov. 26, 2012) (abstaining from reopening bankruptcy case where comity dictated that a state court should hear the matter, and where the matter implicated state law).

100. When determining whether to abstain in favor of a foreign proceeding, courts in the Second Circuit consider the "totality of the circumstances," including, *inter alia*, "the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction." von Spee v. von Spee, 514 F. Supp. 2d 302, 318 (D. Conn. 2007).

101. These factors weigh strongly in favor of abstention. First, the relief sought by the Motion implicates the same Atari entities that are parties to the French proceedings, as Alden seeks an order requiring the "Atari Entities" to "dismiss the writ in the Paris court." Motion, p. 26.

102. Second, the issues raised in the French proceedings are sufficiently similar to the issue raised by the Motion to warrant deference to the French proceedings. Indeed, the question

of the applicability of the Release to the claims asserted in France has been raised by Atari in the Commercial Court of Paris. See Malamed Decl., ¶ 13, Ex. B. Alden will have a full opportunity to litigate that issue in France, and a determination by the French court that the Release does, or does not, govern the French claims will plainly impact any decision by this Court as to that same question. Therefore, deference to the French proceedings is warranted. See Ole Media Mgmt., L.P., 2013 WL 2531277, at *4 (staying action in deference to Canadian proceedings where there was "substantial overlap between the issues, although not complete identity," and where a decision in the Canadian action would "have significant bearing, and res judicata effect, on the dispute" at issue in the New York case).

103. Third, the French proceedings were commenced more than three months before this Motion was filed.

104. Fourth, the Commercial Court of Paris is an adequate forum in which to resolve the parties' dispute. Indeed, Alden contractually agreed to resolve disputes arising out of the Credit Agreement in the Commercial Court of Paris. Notably, by executing Amendment 17 to the Credit Agreement, *even after the Release became effective on the Effective Date,* Alden affirmed its agreement to submit disputes relating to the Credit Agreement to the French courts. This factor therefore weighs in favor of abstention. See Caspian Invs., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991) (deferring to Irish proceedings where movant "has agreed to submit to the jurisdiction of the Irish court and to be bound by any determination by that court").

105. Fifth, there can be no prejudice to either party if this Court abstains and the dispute is resolved in France, where Alden and Atari contractually agreed to resolve all disputes arising out of the Credit Agreement, and where the parties have been litigating their dispute for

more than six months. On the other hand, if Alden's Motion is granted, Atari will be prejudiced by Alden's delay in filing the Motion until more than three months after Atari commenced the French proceedings.

106. Sixth, the heart of the parties' dispute has little connection to the United States. The claims asserted in the French proceedings concern the appropriate rate of interest under the Credit Agreement governed by French law. Both Atari Europe (the borrower) and Atari, S.A. (the guarantor) are French entities. The Alden entity that became the lender under the Credit Agreement pursuant to the Bluebay Transfer Agreement is Alden Global Value Recovery Master Fund, L.P., a Cayman Islands entity. In the Credit Agreement, the parties expressly agreed that French law would apply to claims arising out of the Agreement, and that the Commercial Court of Paris would have exclusive jurisdiction over such disputes. Therefore, this factor weighs in favor of abstention.

107. Also weighing in favor of abstention is the fact that Alden's Motion plainly constitutes forum shopping. The Motion is simply Alden's latest attempt to circumvent its agreement to resolve disputes arising out of the Credit Agreement in the Commercial Court of Paris. Notwithstanding that Atari Europe and Alden had previously entered into a Forbearance Agreement, pursuant to which the parties agreed to suspend all interest and principal payments under the Credit Agreement until September 30, 2015, when Atari Europe notified Alden of the TEG error, Alden responded by fabricating an Event of Default under the Credit Agreement and noticing a non-judicial foreclosure sale of certain U.S. assets that secured the loan. Ultimately, however, Alden was forced abandon the foreclosure sale after the French court granted the two-year grace period. Rather than resolving its dispute in the Commercial Court of Paris as it had

agreed to do, Alden then filed this Motion to ask this Court to intervene in the French proceedings.

108. Alden's forum shopping efforts should be rejected and the Motion denied. Alden agreed from the outset to resolve any disputes arising out of the Credit Agreement in the Commercial Court of Paris. Alden's dissatisfaction with the decisions thus far in the French proceedings plainly does not justify Alden's attempt to involve this Court in a dispute that should be resolved in France. See McMillan v. Barclays Bank PLC, No. 1:13-CV-01095 (ALC)(DF), 2014 WL 4364053, at *5 (S.D.N.Y. Sept. 3, 2014) ("The parties here contracted for an English forum and the application of English law to any disputes regarding the loan. Pursuant to that agreement, a related proceeding was commenced in the English Court before Plaintiff initiated this suit. This factor weighs in favor of abstention.").

109. To the extent that Alden contends that this Court should decline to abstain from enforcing its own orders, a bankruptcy court "need not retain jurisdiction to interpret its own order where the weight of the factors suggests that abstention is warranted in the interests of justice." In re Bay Point Assocs., No. 07-CV-1492 (JS), 2008 WL 822122, at *3 (E.D.N.Y. Mar. 19, 2008) (emphasis added) ("Although a Bankruptcy Court generally has core jurisdiction over interpretation of its own orders, abstention from core proceedings is left to the discretion of the Bankruptcy Court.").

110. Even where a bankruptcy court is asked to interpret its own orders, abstention is particularly appropriate where, as here, (1) the dispute at issue involves parties who are neither debtors nor creditors of the bankruptcy estate; (2) issues of non-bankruptcy law predominate; (3) interpretation of the order at issue would "constitute a core proceeding only in form" insofar as it "would not involve rights created by bankruptcy law or issues unique to a bankruptcy case;" (4)

and a "newly-assigned judge" presides over the bankruptcy case, leaving the bankruptcy court with "no record or recollection of the facts" such that it may be "less qualified" to resolve the dispute than a non-bankruptcy court in which a parallel proceeding is pending. Id.[12]

111. Here, the crux of the dispute that is being litigated in France involves a Credit Agreement governed by French law and involving foreign non-debtor parties. The issues raised in the French proceedings are matters of French law that do not implicate U.S. bankruptcy law or issues unique to the bankruptcy process. The French court is plainly qualified to resolve the parties' disputes. Therefore, abstention in favor of the French proceedings is warranted.

[12] The cases cited by Alden for the general proposition that a bankruptcy court retains jurisdiction to enforce its own orders are distinguishable, insofar as the matters involved core issues of federal bankruptcy law. See, e.g., In re Residential Cap., LLC, 512 B.R. 179 (S.D.N.Y. 2014) (granting motion to enforce plan injunction as to state court action commenced based on same claims that were subject of proofs of claim filed in the Chapter 11 cases and expunged upon the objection of the debtors); In re Lazy Days' RV Center, Inc., 724 F.3d 418 (remanding denial of motion to reopen where, *inter alia*, dispute at issue involved resolving whether a lease's anti-assignment provision was unenforceable under Section 365(f)(3)). Here, interpretation and enforcement of the Release does not require any application of federal bankruptcy law.

CONCLUSION

112. WHEREFORE, Atari Europe, Atari. S.A., and the Reorganized Debtors respectfully request that this Court (i) deny the Motion in its entirety and (ii) grant them such other and further relief as is just and proper.

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Respectfully submitted,

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