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

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In re	:	Chapter 11
	:	
ATARI, Inc., <i>et al.</i> ,	:	Case No. 13-10176 (JLG)
	:	
Reorganized Debtors. <sup>1</sup>	:	(Jointly Administered)
	:	

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**DECLARATION OF DAVID MALAMED IN SUPPORT OF OPPOSITION OF  
ATARI, S.A., ATARI EUROPE, SAS, ATARI, S.A., 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**

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<sup>1</sup> The Reorganized Debtors are Atari Inc., Atari Interactive, Inc., Humongous, Inc., and California US Holdings, Inc.

I, David Malamed, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a partner at the law firm of Brown Rudnick LLP, and resident in the firm's office in Paris, France. This firm represents Atari, Inc., Atari Interactive, Inc., Humongous, Inc., and California US Holdings, Inc. (collectively, the "**Reorganized Debtors**"), Atari, S.A., and Atari Europe, SAS in the above-referenced proceeding. I am familiar with the matters set forth herein, and make this Declaration in support of the Opposition of Atari, S.A., Atari Europe, SAS, and the Reorganized Debtors 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**").

2. The purpose of this Declaration is to advise the Court of the nature and status of certain proceedings pending in France involving the Atari entities and Alden, and to explain certain issues of French law that are relevant to the Motion.

Qualifications

3. I am an attorney licensed to practice in the state of New York and in France. I received my French law degree from Paris II Panthéon Assas University, Paris, France in 1992. I received an L.L.M degree from the Columbia University School of Law, New York, New York in 1994.

4. I have approximately twenty years of experience practicing as an attorney in France, including extensive experience in complex financial transactions and contract disputes under French law. Prior to joining Brown Rudnick, I served as the managing partner of the Banking and Finance practice group of the French law firm August & Debouzy and as co-head of the Banking and Finance practice group of Weil, Gotshal & Manges' Paris office.

5. In my capacity as a partner in the Paris office of Brown Rudnick, I am counsel for the Atari entities with respect to certain ongoing proceedings pending in France, including those described below. I make this declaration based on my personal knowledge and my approximately twenty years of experience practicing under French law.

6. As detailed in the Declaration of Frédéric Chesnais submitted contemporaneously herewith (the “**Chesnais Declaration**” or “**Chesnais Decl.**”), in or about March 2015, a dispute arose between Atari Europe, as borrower, and Alden, as successor lender, under a Credit Facility Agreement originally executed in April 2006 (the “**Credit Agreement**”). This dispute concerned the effective global rate (Taux Effectif Global (“**TEG**”)) provided in the Credit Agreement. See Chesnais Decl., ¶¶ 14-19.

*The French Conciliation Proceedings*

7. Based on the evident disagreement between Atari Europe and Alden regarding the applicable interest rate under the Credit Agreement, on April 9, 2015, as counsel to Atari, I asked the Commercial Court of Paris to appoint a special commissioner (*mandataire ad hoc*) to assist Atari Europe in negotiating with the company’s creditors, including Alden. Under French Law, the special commission (*mandat ad hoc*) is a non-judicial proceeding whereby a special commissioner is appointed by the Commercial Court, without any specific time limit, to foster negotiations between a company in financial difficulty and its main creditors.<sup>2</sup> On April 13, 2015, the President of the Commercial Court of Paris appointed Maître Laurent Le Guernevé as the special commissioner.

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<sup>2</sup> The mission of the special commissioner may vary, but for all practical purposes, a special commission or *mandat ad hoc* is granted by the Commercial Courts for the very purpose of finding financial solutions with a company’s main creditors.

8. Ultimately, the negotiations between Alden and Atari conducted by the special commissioner were not successful. As a result, as counsel to Atari, I requested that Atari Europe be placed in conciliation proceedings under French law.

9. Conciliation under French Law is a non-judicial proceeding whereby a conciliator is appointed by the court for a period of four months (which can be extended to five months) for the purpose of negotiating potential settlements with a company's creditors. Under French law, both the *ad hoc* negotiations and the conciliation proceedings are subject to strict confidentiality requirements under Article L. 611-15 of the French Commercial Code, and I am not permitted to disclose the content of the parties' discussions in the *ad hoc* negotiations or conciliation proceedings.

10. 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.

*The French Grace Period Proceedings*

11. On July 10, 2015, I represented Atari Europe and Atari, S.A. in commencing an action in the Commercial Court of Paris seeking entry of a two-year, statutory grace period under French law with respect to Atari's obligations under the Credit Agreement (the "**Grace Period Action**"). A true and correct certified translation of the Writ of Summons commencing the Grace Period Action is attached as Exhibit A hereto.

12. Under French law, a statutory grace period may be afforded to a company in conciliation proceedings pursuant to Articles 1244-1, *et seq.* of the French Civil Code together with Article L. 611-7 of the French Commercial Code. The effect of the statutory grace period is to, among other things, (1) defer payments that may be due by the debtor for a period of up to two years; and (2) stay "any enforcement proceedings the creditor may have instituted." See

French Civil Code, Articles 1244-1 and 1244-2. The practical purpose of the two-year grace period is to give debtors (a company or an individual) in financial difficulties the necessary “breathing room” to recover and pay back their creditors in full at the expiry of the grace period without resorting to bankruptcy. For companies, the two-year grace period is a meaningful way to avoid disruption of business and reputational harm as long as the company can show to the Commercial Court reasonable grounds that its financial recovery is likely if such “breathing room” is granted.

13. On or about July 15, 2015, Alden (represented by the Paris office of DLA Piper) submitted an Answer to Pleadings in the Grace Period Action in the Commercial Court of Paris, in which Alden opposed the grace period request. In its Answer, Alden argued, among other things, that Atari’s claim that it had overpaid interest under the Credit Agreement was barred by the release in the Reorganized Debtors’ confirmed bankruptcy plan (the “**Release**”). A true and correct certified translation of the Answer the Pleadings in the Grace Period Action is attached as Exhibit B hereto.

14. On July 16, 2015, the Commercial Court of Paris held a hearing in the Grace Period Action. Alden, represented by counsel at DLA Piper, appeared at the hearing and argued the grace period request on the merits.

15. On July 23, 2015, after argument by the parties on the application and consideration of the parties’ written submissions, the Commercial Court of Paris issued a judgment granting the grace period request (the “**Grace Period Order**”). A true and correct certified translation of the Grace Period Order is attached as Exhibit C hereto.

16. 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 from 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; and (3) any enforcement proceedings by creditors against Atari Europe (the borrower), Atari S.A. (the guarantor) and the U.S. Subsidiaries (which have pledged collateral to secure Atari Europe's loan) are stayed pursuant to Article 1244-2. See id. at 5-6.<sup>3</sup>

17. The Grace Period does not expire until July 2017.

18. On October 27, 2015, Alden appealed, before the Court of Appeal of Paris, the decision of the Paris Commercial Court of Paris of July 23rd, 2015 granting the Grace Period. In its brief, Alden explicitly, as it had done previously on July 16, 2015, discussed before the Court of Appeal of Paris the alleged Chapter 11 release by the Reorganized Debtors and its importance in light of its appeal.

Concurrent Litigation In Commercial Court of Paris

19. Concurrently with the Grace Period Action described above, I represented Atari in initiating two parallel litigations in the Commercial Court of Paris relating to the disputes with Alden under the Credit Agreement.

20. First, on or about July 17, 2015, Atari filed a complaint in the Commercial Court of Paris alleging that Alden had failed to inform Atari Europe of certain changes to the applicable interest rate and, as a result, Atari Europe had made substantial overpayments of

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<sup>3</sup> As guarantors under the Security Agreement of the payments that may be due under the Credit Agreement, the Reorganized Debtors also benefit from the protection of the Grace Period pursuant to the application of Articles L. 611-10-2 and L. 611-7 of the French Commercial Code. In addition, in my professional judgment, a French court would find that the Grace Period Order's two-year deferral of payments, pursuant Article 1244-1 of the French Civil Code, means that, as of the date of service on Alden, Atari Europe was not and is not in default of its payment obligations under the Credit Agreement.

interest under the Credit Agreement (the “**TEG Action**”). In the TEG Action, which remains pending in the Commercial Court of Paris, Atari seeks damages in the amount of approximately €14.7 million. A true and correct certified translation of the Writ of Summons commencing the TEG Action is attached hereto as Exhibit D.<sup>4</sup>

21. Like the Grace Period Action, Atari commenced the TEG Action in the Commercial Court of Paris in accordance with the forum selection provisions in the Credit Agreement and amendments thereto.

22. Second, on July 24, 2015, I represented Atari in filing a separate suit against Alden in the Commercial Court of Paris, asserting that Alden had breached the Forbearance Agreement described in the Chesnais Declaration (the “**Forbearance Breach Action**”). Chesnais Decl., ¶¶ 11, 13. A true and correct certified translation of the Writ of Summons commencing the Forbearance Breach Action is attached as Exhibit E hereto.<sup>5</sup>

23. Atari commenced the Forbearance Breach Action in the Commercial Court of Paris in accordance with the forum selection provision in the Forbearance Agreement.

24. The Forbearance Breach Action remains pending.

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<sup>4</sup> The plaintiffs in the TEG Action are Atari Europe, Atari, S.A., and the Reorganized Debtors. However, the claims asserted in the TEG Action arise out of the Credit Agreement, to which the Reorganized Debtors are not parties. Thus, the Reorganized Debtors are not necessary parties to the TEG Action, but were named as plaintiffs in an abundance of caution.

<sup>5</sup> The plaintiffs in the Forbearance Breach Action are Atari Europe, Atari, S.A., and the Reorganized Debtors. However, the claims asserted in the Forbearance Breach Action arise out of the Credit Agreement, to which the Reorganized Debtors are not parties. Thus, the Reorganized Debtors are not necessary parties to the Forbearance Breach Action, but were named as plaintiffs in an abundance of caution.

*The French Law Involved in the Pending French Proceedings*

25. The claims asserted in each of the pending proceedings in the Commercial Court of Paris are governed by French law. Specifically, in the TEG Action, Atari asserts claims pursuant to article 1907 of the French Civil Code; article L. 313-4 of the French Monetary and Financial Code; and article 1147 of the French Civil Code.

26. Article 1907 of the French Civil Code provides as follows:<sup>6</sup>

The interest is legal or contractual. Legal interest is set by law. Contractual interest may exceed the legal interest, whenever the law does not prohibit this.

27. Article L. 313-4 of the French Monetary and Financial Code cites to Article L. 313-2 of that Code and provides, in relevant part, as follows:

The Effective Global Rate, determined as stated in article L 313-1, shall be mentioned in any written document confirming a loan agreement governed by this section.

28. Pursuant to Article 1907 of the French Civil Code, if the TEG is not correctly stated in the credit agreement, the TEG is considered “as null and void” and, by law, the contractual interest rate is replaced by the French legal interest rate. The French legal interest rate is set yearly by the French State.

29. As set forth in the Writ of Summons filed in the TEG Action, “[i]t results from the combined application of article 1907, paragraph 2 of the Civil Code and of article L. 313-4 of the Monetary and Financial Code that the loan or credit agreement shall expressly mention the contractual rate and the EGR . . . . In the case in question, however, the Lender infringed all of its prior notification obligations regarding the Effective Global Rate . . . .” See Ex. D.

30. Likewise, the claims asserted by Atari in the Forbearance Breach Action arise under French law. Specifically, in the Forbearance Breach Action, Atari seeks a ruling that (i)

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<sup>6</sup> The provisions of French law referenced herein are set forth in the French language, and therefore I am providing English translations.

Alden breached its contractual obligations under the Forbearance Agreement when Alden allegedly accelerated the Credit Agreement and (ii) *inter alia*, “pursuant to the exception principle (*exceptio non adimpleti contractus*), no sums were owed by ATARI EUROPE under the Credit Facility Agreement because of the Lender’s failure to carry out its legal obligations (article 1907 of the Civil Code and article L313-4 of the Monetary and Financial Code) and contractual obligations (article 10.4 of the Credit Facility Agreement) with regard to notification of the Effective Global Rate (indicative or applied).” See Ex. E.

*The “Release” Does Not Release the TEG Claims Under French Law*

31. Under French law, the Release in the Reorganized Debtors’ confirmed Plan is insufficient to release the claims that Atari has asserted in the TEG Action or the Forbearance Breach Action. More specifically, pursuant to Article 1338 of the French Civil Code, Atari’s TEG claims cannot be released under French law unless the claims are known and the waiver is intentional and explicit.

32. Article 1338 of the French Civil Code, translated into English, reads as follows:

An act of confirmation or ratification of an obligation against which the law allows an action in nullity or rescission is valid only when it contains the substance of that obligation, an indication of the ground for an action in rescission, and the intention to cure the defect on which the action is based.

In the absence of an act of confirmation or ratification, it is sufficient that the obligation be performed voluntarily after the time when the obligation could be validly performed or ratified.

Confirmation, ratification, or voluntary performance in the forms and at the time prescribed by law amount to the renunciation of the grounds and exceptions that could have been raised against that act, without prejudice, however, to the rights of third parties.

Article 1338 of the French Civil Code applies to the TEG clause because it constitutes what is referred to under French law as a “relative nullity” (*nullité relative*) subject to a five-year statute of limitation pursuant to Article 1304 of the French Civil Code.

33. For a release of the TEG clause to be effective, Alden would have had to follow the stringent criteria of article 1338 of the French Civil Code. The article 1338 criteria are (i) specificity (*i.e.*, the obligation at stake must be specifically cited in the release), (ii) the grantor of the release must have actual knowledge of the claim (*i.e.*, an inference of a claim is insufficient), and (iii) the release or waiver must show the intent to release the known claim. See Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Dec. 13, 1978, JCP G 1981, II, No. 19494 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 29, 1994, Bull civ. IV, No. 134 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 5, 2013, Bull. civ. IV, No. 20 (Fr.).

34. Plainly, 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 included in the Plan. See Chesnais Decl., ¶ 14.

35. 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, “to the maximum extent permitted by applicable law,” a variety of claims, including claims arising out of or relating to “any [] act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date,” that are “known or unknown, foreseen or unforeseen, existing or hereinafter arising...” Plan § 12.9.

36. Third, the Release evidences no intent whatsoever on the part of the Atari entities to release the TEG claims.

37. Moreover, as noted, Alden previously argued before the Commercial Court of Paris that the TEG claims are barred by the Release in the Grace Period Action. Alden will have the opportunity to make the same argument in the pending TEG Action and the Forbearance

Breach Action, and that argument may be addressed by the Commercial Court of Paris on the merits in the pending proceedings.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.<sup>7</sup>

Executed on January 21, 2016

/s/ David Malamed  
David Malamed

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<sup>7</sup> Attached as Exhibit F is the affidavit of Mara Scaglione, who provided certified translations, from French to English, of Exhibits A-E included herein.