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**Proposed Hearing Date and Time: February 14, 2013 at 10:00 a.m.**

*Proposed Attorneys for Debtors and Debtors-in-Possession*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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

**APPLICATION OF THE DEBTORS AND  
DEBTORS-IN-POSSESSION TO EMPLOY AND RETAIN  
PERELLA WEINBERG PARTNERS LP AS THEIR INVESTMENT BANKER**

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

The debtors and debtors-in-possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases submit this application (the “Application”) to the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court” or the “Court”) for entry of an order (the “Proposed Form of Order”), in substantially the form annexed hereto as **Exhibit A**, authorizing the Debtors to employ and retain Perella Weinberg Partners LP (“Perella”) as their investment banker effective *nunc pro tunc* to January 31, 2013 on a final basis. In support of this Application, the Debtors rely on the *Declaration of Joshua Scherer* (including the exhibits thereto, the “Scherer Declaration”), a true and complete copy of which is

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

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

**I. Background**

1. On January 21, 2013 (the "Petition Date"), each of the Debtors filed a Voluntary Petition for relief under chapter 11 of title 11 of the United States Code (as amended, the "Bankruptcy Code") in the Bankruptcy Court. By an order [Docket No. 27] entered on January 24, 2013, the Debtors' chapter 11 cases (the "Chapter 11 Cases") have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

2. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No other statutory committee, trustee, or examiner has been appointed in the Chapter 11 Cases.

3. A description of the Debtors' businesses, the reasons for filing these Chapter 11 Cases and the relief sought from this Court to allow for a smooth transition into operations under chapter 11 of the Bankruptcy Code is set forth in the *Declaration of Robert A. Mattes in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 16], which was filed on January 22, 2013.

**II. Jurisdiction, Venue and Predicates for Relief**

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

5. The statutory predicates for the relief requested herein are sections 327(a) and 328(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016, and Rules 2014-1 and

2016-1 of the Local Rules of the United States Bankruptcy Court for the Southern District of New York (the “Local Bankruptcy Rules”).

### **III. Relief Requested and the Basis for Relief**

6. By this Application, the Debtors seek entry of the Proposed Form of Order authorizing the Debtors to employ and retain Perella as their investment banker in the Chapter 11 Cases, on the terms and conditions set forth in this Application and in the Scherer Declaration, effective *nunc pro tunc* to January 31, 2013.

7. Established in 2006, Perella is a full-service investment banking firm providing investment banking and financial advisory services, including mergers and acquisitions and restructuring advice, to a wide range of industries. Perella has offices located in New York, London, Abu Dhabi, Austin, Beijing, Denver, Dubai, and San Francisco. Perella has extensive experience in and an excellent reputation for handling restructurings, acquisitions, and asset sales. Perella and its professionals have advised debtors, lenders, committees, and acquirers in many complex financial reorganizations.

8. The Debtors seek to retain Perella as their investment banker because an experienced investment banker such as Perella fulfills a critical need that complements the services offered by the Debtors’ other restructuring professionals. The Debtors have selected Perella because, among other things, (a) Perella and its professionals have considerable experience in providing investment banking services of the type proposed hereunder; (b) Perella and its professionals have an excellent reputation for providing investment banking services of the type proposed hereunder; (c) Perella does not hold or represent any interest adverse to the Debtors or to their bankruptcy estates, as more particularly described below; and (d) Perella is a “disinterested person” as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code. Accordingly, the Debtors request that the

Court approve the retention of Perella on the terms and conditions set forth herein and in the Scherer Declaration, which, *inter alia*, provide that Perella will be compensated through payment of a monthly retainer and a “transaction fee” based on the schedule set forth in the Engagement Letter (as defined below).

9. The Debtors anticipate that Perella will render investment banking and financial advisory services to the Debtors as needed through the course of the Chapter 11 Cases. In particular, in accordance with the engagement letter between the Debtors and Perella (the “Engagement Letter”), a true and complete copy of which is annexed as **Exhibit 1** to Scherer Declaration, it is anticipated that Perella will perform, among other things, the following services for the Debtors:

**A. Services to be Provided**

- a) become familiar with the business, operations, properties, financial condition and prospects of the Debtors;
- b) review the Debtors’ financial condition and outlook;
- c) assist in the development of financial data and presentations to the Debtors’ Board of Directors, various creditors, and other parties;
- d) analyze the Debtors’ financial liquidity and evaluate alternatives to improve such liquidity;
- e) evaluate the Debtors’ debt capacity and alternative capital structures;
- f) participate in negotiations among the Debtors and their creditors, suppliers, lessors and other interested parties with respect to any of the transactions contemplated by the Engagement Letter;
- g) advise the Debtors and negotiate with lenders with respect to potential waivers or amendments of various credit facilities;
- h) identify potential purchasers and advise and assist the Debtors in analyzing, structuring, planning, negotiating and effecting any transaction;  
and

- i) provide such other advisory services as are customarily provided in connection with the analysis and negotiation of any of the transactions contemplated by the Engagement Letter as requested and mutually agreed.

10. The Debtors seek to retain Perella because of Perella's extensive experience and knowledge in the field of investment banking. Perella and its professionals have been actively involved in major chapter 11 cases representing debtors or other parties in interest in a number of transactions, including among others: Air Canada, American Color Graphics, American National Power, Atlas Air, Avery Weigh-Tronix, Crusader Energy, Delta Air Lines, Gate Gourmet, Hawker Beechcraft, Hostess Brands, KCS Energy, Mattress Discounters, Muzak, Neff, One Communications, Pathmark Stores, Pierre Foods, Pillowtex, Plainwell, Spectrum Brands, Texas Petrochemicals, Tokheim Corporation, Tropicana Entertainment, US Airways, Vertis Communications, Winn Dixie and Workflow Management. Accordingly, the Debtors believe that Perella both is well-qualified and uniquely able to service them in the Chapter 11 Cases in a cost-effective, efficient and timely manner. Should the Court approve the Debtors' retention of Perella, Perella will continue, without interruption, to perform the services for the Debtors as described herein.

**B. Terms of Retention**

11. Pursuant to section 328(a) of the Bankruptcy Code, the Court may approve Perella's retention on any reasonable terms. The Debtors submit that the most reasonable terms and conditions are those agreed upon by Perella and the Debtors, which are substantially similar to those entered into between Perella and other clients on a daily basis in a competitive market for investment banking services for similar comparable complex matters, whether in court or otherwise, regardless of whether a fee application is required. Therefore, the Debtors have agreed that, subject to the Court's approval, Perella will be paid a monthly retainer fee of

\$100,000 (each, a “Monthly Retainer”), and pro rata for any part of a month, payable on the first day of each month commencing on the date of the Engagement Letter.

12. In addition, the Debtors have agreed to pay a \$1,000,000 Transaction Fee (the “Initial Transaction Fee”) payable upon the consummation of the first Transaction<sup>2</sup>; plus for each Transaction consummated, an additional Transaction Fee (each, an “Additional Transaction Fee”; and together with the Initial Transaction Fee, the “Aggregate Transaction Fee”) based on the Transaction Value (defined below) generated from such Transaction and all prior consummated Transactions according to the schedule below, provided that 50% of Monthly Retainers paid to Perella after the first full three months of Perella’s engagement will be credited, one time against the Transaction Fee, as any portion of the Transaction Fee is paid out. The compensation structure outlined above is referred to herein as the “Fee Structure”.

<b>Transaction Value for applicable Transaction and all prior consummated Transactions</b>	<b>Transaction Fee Percentage</b>
\$30,000,000 to \$50,000,000	3%
Any amount above \$50,000,000 to \$100,000,000	5%
Any amount above \$100,000,000	6%

13. The parties to the Engagement Letter also agreed that in the event the Debtors determine to effect a material transaction not covered by the Fee Structure, the parties will negotiate in good faith and amendment to the Engagement Letter to include compensation terms

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<sup>2</sup> For the purposes of this Application, as defined in the Engagement Letter, “Transaction” means in the context of the Debtors’ Chapter 11 Cases, whether effected in one transaction or series of transactions, the acquisition, directly or indirectly, by another person, of all or any portion of the business, equity and/or assets of the Debtors by way of a negotiated purchaser or otherwise (including, without limitation, by way of a credit bid by the Debtors’ debt holders).

commensurate with the services Perella provides with respect to such transaction, taking into account the nature of Perella's services, its role, its expertise, the complexity of the matter, the intensity and duration of its efforts, the results obtained and the custom and practice among investment bankers acting in similar circumstances.

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

**C. Proposed Indemnification Provisions**

15. As part of the overall compensation payable to Perella under the terms and conditions set forth in Engagement Letter, the Debtors have agreed to indemnify each Indemnified Person (as defined in the Engagement Letter) under certain circumstances in accordance with the indemnification provisions (collectively, the "Indemnification Provisions") set forth in Annex A to the Engagement Letter. The terms and conditions of Perella's engagement, including the Indemnification Provisions contained in the Engagement Letter, were thoroughly negotiated by the parties at arm's-length and in good faith.

16. The Debtors submit that the Indemnification Provisions are standard provisions, both in the chapter 11 context and outside the chapter 11 context, and reflect the qualifications and limits on such terms that are customary for Perella and other similar investment bankers as approved in this and other jurisdictions. In connection with this Application, Perella has agreed

to the following modification to the Indemnification Provisions which is reflected in the Proposed Order:

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

**D. No Duplication of Services**

17. The Debtors intend for Perella's services to complement, rather than duplicate, the services to be rendered by any other professional retained by the Debtors in the Chapter 11 Cases. Perella understands that the Debtors have retained and may retain additional professionals during the term of the engagement, and Perella will work cooperatively, as requested by the Debtors, with these other professionals.

**E. Perella's Disinterestedness**

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



Debtors' estates or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the Debtors for any other reason.

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

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

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

22. The Debtors submit that the retention and employment of Perella on the terms and conditions set forth herein, in the Scherer Declaration and the Engagement Letter are in the best

interests of the Debtors, the Debtors' estates, their creditors and all potential parties in interest. Perella is well qualified to perform the investment banking and financial advisory services described above, and the Debtors know of no reason why Perella should not be retained as their investment banker in these Chapter 11 Cases.

**F. Approval of the Retention and Employment of Perella Pursuant to Section 328(a) of the Bankruptcy Code is Appropriate**

23. The Debtors seek approval of the Fee Structure, the Expense Structure, the Engagement Letter and the Indemnification Provisions pursuant to Section 327(a) and 328(a) of the Bankruptcy Code not subject to Rule 330 of the Bankruptcy Code other than by review of the US Trustee. Section 328 of the Bankruptcy Code provides, in pertinent part, that a debtor "with the court's approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 328(a) (emphasis added). Thus, section 328(a) of the Bankruptcy Code permits this Court to approve the terms of Perella's engagement as set forth in the Engagement Letter, including the Indemnification Provisions. Accordingly, section 328 of the Bankruptcy Code permits the compensation of professionals, including investment bankers, on flexible terms that reflect the nature of their services and market conditions.

24. As recognized by numerous courts, Congress intended for section 328(a) of the Bankruptcy Code to enable debtors to retain professionals pursuant to specific fee arrangements to be determined at the time of the court's approval of the retention, subject to reversal only if the terms are found to be improvident in light of "developments not capable of being anticipated at the time of the fixing of such terms and conditions." *Donaldson, Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (In re Nat'l Gypsum Co.)*, 123 F.3d 861, 862-63 (5<sup>th</sup> Cir. 1997) ("If the most

component professionals are to be available for complicated capital restructuring and the development of successful corporate reorganization, they must know what they will receive for their expertise and commitment”).

25. The Debtors submit that the terms and conditions of Perella’s engagement, including the Fee Structure, the Expense Structure and the Indemnification Provisions, are reasonable terms and conditions of employment and should be approved under section 328(a) of the Bankruptcy Code. They appropriately reflect the nature of the services to be provided by Perella and are consistent with the fee structure and indemnification provisions typically utilized by Perella and other leading investment banking and financial advisory firms. The compensation provisions and the Indemnification Provisions are reasonable, in light of, among other things, (a) industry practice, (b) market rates charged for comparable services both in and out of the chapter 11 context, and (c) Perella’s substantial experience with respect to investment banking services. The Fee Structure and the Indemnification Provisions appropriately reflect (i) the nature and scope of services to be performed by Perella in these Chapter 11 Cases, and (ii) the fee provisions and the Indemnification Provisions typically utilized by Perella and other leading investment banking and financial advisory firms. Moreover, courts in the Southern District of New York have approved similar arrangements that contain reasonable terms and conditions under section 328 of the Bankruptcy Code. *See, e.g., In re AMR Corp.*, Case No. 11-15463 (SHL) (Bankr. S.D.N.Y. Mar. 2, 2012); *In re Penton Business Media Holdings, Inc.*, Case No. 10-10689 (AJG) (Bankr. S.D.N.Y. Mar. 5, 2010); *In re FairPoint Communications, Inc.*, Case No. 09-16335 (BRL) (Bankr. S.D.N.Y. Jan. 11, 2010); *In re Mark IV Indus., Inc.*, Case No. 09-12795 (SMB) Bankr. S.D.N.Y. May 27, 2009); and *In re Charter Communications, Inc.*, Case No. 09-11435 (JMP) (Bankr. S.D.N.Y. Apr. 15, 2009).

26. The Debtors and Perella believe that the terms of the Indemnification Provisions are customary and reasonable for investment banking engagements, both in out-of-court proceedings and in chapter 11 cases. Unlike the market for other professionals that the Debtors may retain, indemnification is a standard term of the market for investment bankers and financial advisors. Moreover, the Debtors and Perella believe that terms of the Indemnification Provisions are similar to indemnification terms that have previously been approved by bankruptcy courts in this District. *See In re Joan & David Halpern, Inc.*, 248 B.R. 43, 47 (Bankr. S.D.N.Y. 2000) (approving a financial advisor's retention agreement that contained a provision obligating the debtor to indemnify the financial advisor for liability relating to its engagement excluding only based on bad faith, gross negligence or willful misconduct), *aff'd.*, *U.S. Trustee v. Newmark Retail Fin. Advisors LLC (In re Joan & David Halpern, Inc.)*, Case No. 00-3601, 2000 U.S. Dist. LEXIS 17589, \* 4 (S.D.N.Y. Dec. 6, 2000); *see also In re Uno Restaurant Holdings Corp.*, Case No. 10-10209 (MG) (Bankr. S.D.N.Y. Mar. 5, 2010); *In re Reader's Digest Association, Inc., et al.*, Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 24, 2009); *In re U.S. Shipping Partners L.P., et al.*, Case No. 09-12711 (RDD) (Bankr. S.D.N.Y. Jul. 19, 2009); *In re Gen. Growth Props., Inc. et al.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. May 26, 2009); *In re Lexington Precision Corp., et al.*, Case No. 09-11153 (MG) (Bankr. S.D.N.Y. May 28, 2008).

27. Accordingly, the Debtors respectfully submit that the Engagement Letter and the Indemnification Provisions, along with the proposed Form of Order annexed hereto as **Exhibit A**, are reasonable and customary and should be approved in these Chapter 11 Cases.

#### IV. **Notice**

28. Notice of this Application has been provided to: (a) the U.S. Trustee; (b) counsel to Alden Global Distressed Opportunities Master Fund, L.P., Alden Global Value Recovery Master Fund L.P., and Turnpike Limited; (c) the creditors holding the thirty (30) largest

unsecured claims against the Debtors' estates on a consolidated basis, as identified in the Debtors' chapter 11 petitions; (d) counsel for Atari, S.A., (e) the Internal Revenue Service; (f) the New York State Attorney General; (g) Peralla; and (h) all parties that have filed a notice of appearance or have requested service in these chapter 11 cases. In light of the nature of the relief requested herein and the potential harm to the Debtors' estates if the relief requested herein is not granted, the Debtors respectfully submit that no other or further notice need be provided.

V. **No Prior Request**

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

WHEREFORE, the Debtors respectfully request that the Court (a) enter the Proposed Form of Order, substantially in the form annexed hereto as **Exhibit A**, authorizing the Debtors to employ and retain Perella Weinberg Partners LP as their investment banker effective *nunc pro tunc* to the January 31, 2013 on a final basis, and (b) grant such other and further relief to the Debtors as the Court may deem just and proper.

Dated: New York, New York  
February 5, 2013

Respectfully submitted,

ATARI, INC.

On behalf of itself and its affiliated Debtors and  
Debtors-in-Possession

/s/ Robert A. Mattes

Robert A. Mattes

Chief Financial Officer of each of the Debtors