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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	}	Chapter 11
ATARI, INC., <i>et al.</i> ,	}	Case No. 13-10176 (___)
<div style="text-align: right;">Debtors.¹</div>	}	Joint Administration Requested

**MOTION OF THE DEBTORS AND
DEBTORS-IN-POSSESSION FOR ENTRY OF AN ORDER
(I) AUTHORIZING, BUT NOT DIRECTING, PAYMENT OF
CERTAIN PREPETITION CLAIMS OF CRITICAL VENDORS; AND
(II) AUTHORIZING AND DIRECTING FINANCIAL INSTITUTIONS
TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

TO THE HONORABLE
UNITED STATES BANKRUPTCY JUDGE:

The debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors”), by and through their proposed undersigned counsel, hereby move (the “Motion”) for the entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), (i) authorizing, but not directing, the Debtors to pay prepetition claims of certain critical game developers, one game licensor, and other third parties who provide services essential to the Debtors’ operations; and (ii) authorizing and directing banks and financial institutions at which the Debtors maintain disbursement and other accounts, to receive, honor, process, and pay, to the

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

extent of funds on deposit, any and all checks or electronic fund transfers in respect of the relief requested herein. In support of the Motion, the Debtors submit the *Declaration of Robert A. Mattes (I) In Support of Chapter 11 Petitions and First Day Motions and (II) Pursuant To Local Bankruptcy Rule 1007-2* (the "First Day Declaration"). In further support of the Motion, the Debtors respectfully represent as follows:

I. Background

A. General 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, §§ 101-1532 (as amended, the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Court"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors have, pursuant to a separate motion, moved the Court for entry of an order authorizing joint administration of these chapter 11 cases.

2. No request for the appointment of a trustee or an examiner has been made in these cases and no statutory committees have been appointed or designated.

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 is set forth in the First Day Declaration, which is being filed contemporaneously with this Motion.

B. The Debtors' Critical Vendors

i. The Developers

4. As explained in the First Day Declaration, a significant portion of the Debtors' business is the development and distribution of games for use online and for video game

consoles. The Debtors cannot provide, through their own resources, all of the essential services and tools necessary to develop a game. Rather, the Debtors rely on outside service providers and vendors throughout the development process. For example, the Debtors regularly utilize external game developers who ultimately are responsible for designing and building a game. A game developer assumes a unique role in the development process and, therefore, it becomes extremely difficult, if not impossible, to replace such developer without critically damaging the viability of the respective title.

5. Game developers provide services under contracts with the Debtors. Nevertheless, the Debtors anticipate that some of the developers will not perform under those contracts if the Debtors are unable to pay immediately the prepetition amounts owing under those contracts. A number of the developers are foreign and may not recognize the effect of the automatic stay. Other developers are small and cannot withstand the effect of non-payment. The developers likely will redirect their resources to developing games for the Debtors' competitors or other parties in the event of nonpayment or, in the case of the smaller developers, could cease to exist. Thus, prepetition payments already made by the Debtors to these developers in connection with unfinished games in various stages of development will have been wasted.

6. While the Debtors believe that almost all of their developers provide invaluable services, the Debtors seek authority to pay the prepetition amounts owed only to those certain foreign and/or small developers (the "Developers") for which, in the Debtors' business judgment, nonpayment presents a substantial risk of immediate and irreparable harm to the Debtors' business. Specifically, the Debtors request authority to pay, in their discretion, the following prepetition claims held by Developers (collectively, the "Developer Claims"), subject to the Conditions to Payment (as defined below):

Developer	Prepetition Claim	Description of Developer
Code Mystics Inc.	\$25,300	Foreign
Escalation Studios Inc.	\$66,000	Small
G Skinner.com Inc.	\$99,000	Foreign
Uab On5	\$43,000	Foreign
Total	\$233,300.00	

7. The Debtors believe that most, if not all, of the Developer Claims arise under agreements that, if executory, the Debtors intend to assume during these cases. Additionally, the games that the Developers are working on are the most significant games in development and are therefore believed to create the most value for the Debtors. Specifically:

- (i) Code Mystics develops “Atari’s Greatest Hits” for mobile devices, which has generated over \$3.5 million dollars of revenue, and currently is generating approximately \$50,000 to \$100,000 per month in revenue for the Debtors. On-going work must be provided in order to maintain and improve the quality of Atari’s Greatest Hits and preserve the revenue stream.
- (ii) Escalation Studios develops “Atari Casino” which is scheduled to be released in a few months. Atari Casino is a genre of games that represents one of the most significant upcoming revenue opportunities in the Debtors’ portfolio. For perspective, as of January 19, 2013, three of the top 15 revenue producing games on the iPad were casino-type games.
- (iii) Gskinner.com developed the “Atari Online Arcade” for the Debtors in connection with a significant partnership with Microsoft. Gskinner.com utilized HTML5 in which Atari classic titles were reimagined for Internet Explorer 10. The Atari Online Arcade was a critical success and is also part of the Atari.com website. The application, which is also available for

mobile devices, has generated significant traffic. Going forward, Gskinner.com would be the right partner to help the Debtors maintain and grow this platform which has the potential to bring the Debtors significant revenues. Gskinner.com also has tremendous potential for making games as the preeminent HTML5 and flash developer in the industry.

- (iv) Uab On5 is creating the Debtors' next launch of the RollerCoaster Tycoon franchise, which is also scheduled to be released in the next few months. RollerCoaster Tycoon is one of the best-selling franchises in PC gaming history, selling over 14 million units worldwide and generating over \$220 million in North American sales alone. The Debtors anticipate significant revenue from the release based on its historical success.

ii. The Licensor

8. The Debtors develop and sell certain games licensed to them by third parties who originally designed and developed those games. One of the most valuable games in the Debtors' portfolio, RollerCoaster Tycoon, is licensed to the Debtors by a foreign licensor, Chris Sawyer (the "Licensor"), under a license agreement (the "RCT License Agreement") which, if executory, the Debtors intend to assume and cure as part of an asset sale or reorganization process. As of the Petition Date, the Debtors owe the Licensor \$250,000 (the "Licensor Claim"). As explained in more detail below, because the postpetition cooperation of the Licensor is critical to the Debtors' business, the Debtors request authority to pay the Licensor Claim, subject to the Conditions to Payment.

iii. Other Vendors

9. The Debtors also work with certain other vendors that are essential to maintaining the going concern value of the Debtors (the "Other Vendors"; together with the Developers and

the Licensor, the “Critical Vendors”). Specifically, the Debtors request authority to pay, in their discretion, the following claims held by Other Vendors (collectively, the “Other Vendor Claims”; together with the Developer Claims and the Licensor Claim, the “Critical Vendor Claims”), subject to the Conditions to Payment:

Other Vendor	Prepetition Claim	Description
American Express	\$40,013	Corporate Expenses
Cinram Group, LLC /Ditan Distribution LLC	\$44,920	Warehouse Lien
Total	\$84,933.00	

As explained in detail below, payments to the Other Vendors will have no effect on creditor recovery.

10. In sum, the Debtors seek authorization to pay up to \$568,233 in Critical Vendor Claims, which constitutes approximately 9.5% of the Debtors’ overall trade debt.

C. Conditions to Payment of Critical Vendor Claims.

11. The Debtors propose to pay, in their sole discretion, the Critical Vendor Claims of each Critical Vendor that agrees, to the Debtors’ satisfaction, to continue to provide services to the Debtors on the normal trade terms, practices, and programs that were most favorable to the Debtors in effect prior to the Petition Date (the “Customary Trade Terms”), or on other such favorable terms as are acceptable to the Debtors.

12. If a Critical Vendor refuses to continue to provide services to the Debtors on the Customary Trade Terms or on such favorable terms as are acceptable to the Debtors, then the Debtors may, in their sole discretion and without further order of the Court, exercise the following rights: (i) declare the payment of the Critical Vendor Claim a voidable postpetition transfer under section 549(a) of the Bankruptcy Code that the Debtors may seek to avoid and recover; and (ii) return the parties to their original positions (*i.e.*, immediately prior to the entry of the order approving the relief sought herein) by reinstating the Critical Vendor Claim and

demanding the immediate return of the Debtors' payment of the Critical Vendor Claims (to the extent that the amounts exceed post-petition amounts owed by the Debtors without giving effect to setoff, recoupment, adjustments, etc.) (collectively, the "Conditions to Payment").

II. Jurisdiction, Venue and Predicates for Relief Requested

13. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.). Venue in this Court 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).

14. The predicates for the relief requested herein are sections 105(a), 363, 1107(a) and 1108 of the Bankruptcy Code and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

III. Relief Requested

15. By this Motion, the Debtors seek entry of an order, substantially in the form of the Proposed Order, (i) authorizing, but not directing, the Debtors to pay all or a portion of the Critical Vendor Claims subject to the Conditions to Payment, and (ii) authorizing and directing banks and other financial institutions to honor and process related checks and transfers.

IV. Basis for Relief Requested

A. Ample Authority Exists to Support Paying the Critical Vendor Claims.

16. Courts in this district generally acknowledge that it is appropriate to authorize the payment of prepetition obligations where necessary to protect and preserve the estate, including an operating business's going-concern value. *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (authority to pay prepetition wages); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, (*In re James A. Phillips, Inc.*), 29 B.R. 391, 398 (S.D.N.Y. 1983) (authority to pay prepetition claims of suppliers); *see also In re CoServ, L.L.C.*, 273 B.R.

487, 497 (Bankr. N.D. Tex. 2002). In so doing, courts rely on several legal theories rooted in sections 105(a), 363(b), 1107(a) and 1108 of the Bankruptcy Code.

17. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors-in-possession are fiduciaries holding the bankruptcy estate and operating the business for the benefit of creditors and, if the value justifies, equity owners. *CoServ*, 273 B.R. at 497. Consistent with such fiduciary duties, courts have authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See Ionosphere Clubs*, 98 B.R. at 175 (section 363(b) gives the court “broad flexibility” to authorize a debtor to expend funds outside the ordinary course so long as the debtor articulates a business justification therefor). Indeed, at least one court has noted that there are instances when a debtor’s fiduciary duty can “only be fulfilled by the preplan satisfaction of a prepetition claim.” *CoServ*, 273 B.R. at 497 (on such occasions “it is only logical that the bankruptcy court be able to use section 105(a) of the Code to authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate.”). *Id.*

18. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court (commonly referred as the “necessity of payment” rule or the “doctrine of necessity”), empowers the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Long-standing precedent in this district has established that the doctrine of necessity stands for the proposition that a bankruptcy court may allow payment outside of a plan of reorganization on account of a prepetition obligations where such payment is critical to the reorganization process. *See, e.g., In re C.A.F. Bindery, Inc.*, 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996); *In re Fin. News Network Inc.*, 134 B.R. 732, 735-36 (Bankr. S.D.N.Y. 1991); *Ionosphere Clubs*, 98 B.R. at 177

(authorizing payment of prepetition debt necessary to facilitate a debtor's rehabilitation is not a novel concept).

19. Allowing a debtor to honor a prepetition obligation pursuant to all or some of the above-referenced provisions is especially appropriate where, as here, doing so is consistent with the “two recognized policies” of chapter 11 of the Bankruptcy Code — preserving going concerns and maximizing property available to satisfy creditors. *See Bank of Am. Nat'l Trust & Savs. Assoc. v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 453 (1999). Indeed, reflecting the recognition that payment of prepetition claims of essential critical trade creditors is, in fact, both critical to a debtor's ability to preserve going-concerns and maximize creditor recovery—thereby increasing prospects for a successful reorganization — courts in this district routinely grant relief consistent to that which the Debtors are seeking herein. *See, e.g., In re Sbarro, Inc.*, Case No. 11-11527 (Bankr. S.D.N.Y. May 4, 2011) (authorizing payment of up to \$5.2 million in critical vendor claims on a final basis, approximately 46% of the debtors' total trade debt); *In re The Great Atl. & Pac. Tea Co.*, Case No. 10-24549, (Bankr. S.D.N.Y. Jan. 12, 2011) (authorizing payment of up to \$62 million in critical vendor claims on a final basis, approximately 29% of the debtors' total trade debt); *In re Uno Rest. Holdings Corp.*, Case No. 10-10209 (Bankr. S.D.N.Y. Jan. 10, 2010) (authorizing payment of certain critical vendor claims on an interim basis); *In re Citadel Broadcasting Corp.*, Case No. 09-17442 (Bankr. S.D.N.Y. Feb. 3, 2010) (authorizing payment of up to \$10 million in critical service provider claims on a final basis); *In re The Reader's Digest Ass'n*, Case No. 09-23529 (Bankr. S.D.N.Y. Sept. 17, 2009) (authorizing payment of up to \$25 million in critical vendor claims on a final basis, approximately 27% of the debtors' total trade debt); *In re Metaldyne Corporation*, Case No. 09-13412 (Bankr. S.D.N.Y. May 29 & Jun. 22, 2009) (authorizing payment of up to \$5.4 million in critical vendor claims on

an interim basis and \$7.1 million on a final basis); *In re Lyondell Chem. Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. Jan. 23, 2009) (authorizing payment of up to \$30 million in critical vendor claims on a final basis).

B. Payment of the Critical Vendor Claims Benefits These Estates.

20. The relief requested herein is appropriate and warranted under each of the above-described standards as to all of the Critical Vendors.

21. The Developers represent the very core of the Debtors' business – game development. If the relief sought in this Motion is not granted, there is a significant risk that the Developers will devote their resources to other games, such as games for the Debtors' competitors. Once a particular game is removed from a Developer's schedule, there is often a long delay before it can return to schedule for development. Moreover, many of the Developers are small and/or foreign. The foreign entities are likely to disregard the effect of the automatic stay, and enforcement of contractual obligations against those entities would be difficult if not impossible. The smaller Developers cannot withstand the effect of non-payment. Even if they could, many likely will stop work on the Debtors' titles until the contracts are assumed and cured, and it would cost the Debtors more to try to enforce the obligation to perform post-petition than the amount at issue.

22. The Developer Claims represent amounts owed in connection with games in various stages of development. Prepetition payments made to the Developers during initial development stages will have been wasted if the process is not completed. Moreover, the Developers' work is critical for key revenue-producing games, and a break in their development speed is likely to cause immediate and irreparable harm that would jeopardize the Debtors' ability to reorganize or sell their business as a going concern. Finally, in the case of Gskinner.com, the foremost developer in an area of potential growth for the Debtors, the Debtors

fear that failure to pay the prepetition amounts owed will cause Gskinner.com to end its working relationship with the Debtors, leaving the Debtors without the proper partner necessary or desired for future products.

23. Likewise, the cooperation of the Licensor is essential to the Debtors' business. The Debtors develop and sell games under the title RollerCoaster Tycoon, one of the crown jewels of the Debtors' portfolio, pursuant to a license granted by the Licensor. Under the RCT License Agreement, the Debtors are required to seek approval from the Licensor on every game milestone, design document, and other materials developed and exploited by the Debtors in connection with RollerCoaster Tycoon games. Thus, the Licensor plays an active role in the development of these games and could slow the development process by withholding various required consents. The Licensor is foreign and enforcement of the RCT License Agreement is anticipated to be difficult. Moreover, the Debtors believe that even while living up to the letter of the RCT License Agreement, the Licensor could devote less time and resources to the Debtors, slowing down the development process to the detriment of the Debtors. Therefore, the Debtors' relationship with the Licensor is of particular importance and it is the Debtors' business judgment that the continuation of a positive relationship with the Licensor, a relationship that can only be maintained through payment of the Licensor Claim, is essential to their continued operations.

24. The Other Vendors provide essential services as well. The successful operation of the Debtors' business requires them to utilize the credit card services of American Express. For instance, some service providers will only accept payment from the Debtors by credit card. In just one example, a current vendor provides needed server hosting but will only do so if the Debtors pay by credit card. Importantly, in the Debtors' case, the American Express account is in the name of one particular employee. This employee shall remain liable if the amounts remain

unpaid. As explained in the First Day Declaration and in the Debtors' motion to approve employee wages and other relief filed contemporaneously herewith, it is critical that the Debtors be permitted to reimburse and continue reimbursement of employees for corporate expenses, which would require reimbursing any employee held liable for corporate expenses owed to American Express.

25. Payment of the Other Vendor Claims owed to Cinram Group, LLC ("Cinram") is equally as critical. Cinram warehouses all of the Debtors' retail inventory and distributes the games to the Debtors' retail customers. Prior to the Petition Date, Cinram represented to the Debtors that it would hold all of the inventory until the Debtors paid amounts owed. The Debtors anticipate that, absent payment of its prepetition claim, Cinram will assert a warehouseman's lien over the Debtors' inventory and may refuse to release the inventory while it seeks to enforce such a lien. The book value of the inventory currently held by Cinram is approximately \$811,000. The Debtors need to monetize their inventory to fund these reorganization efforts.

26. In sum, each of the Critical Vendors is truly "critical" to the Debtors business and authorization to pay the Critical Vendor Claims is essential to the Debtors' restructuring efforts.

C. Paying Certain Critical Vendor Claims Will Not Affect Creditor Recovery.

27. The relief requested herein will not affect the recovery of creditors in these chapter 11 cases. The Licensor Claim and the vast majority of the Developer Claims arise under contracts that, if executory, the Debtors intend to assume and cure as part of either a plan of reorganization or sale of assets as a going concern. Thus, payment of those claims now is a matter only of timing, not whether or what to pay on account of the claims.

28. Similarly, payments on account of the Other Vendor Claims will not affect creditor recovery. As explained above, an employee would be liable for unpaid prepetition

amounts owed to American Express that are on account of corporate expenses. If the Court approves the Debtors' motion to authorize payments of prepetition wage claims, filed contemporaneously herewith, the Debtors would reimburse the designated cardholder for any amounts that he or she was required to pay American Express on account of corporate expenses. The second Other Vendor, Cinram, holds a secured claim on account of any warehouse lien on the Debtors' inventory, which must be paid in full as part of a successful restructuring of the Debtors.

D. Cause Exists to Authorize the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers.

29. Debtors have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to debtor-in-possession financing. Also, under the Debtors' existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment on account of the Critical Vendor Claims. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and that this Court should authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein, solely to the extent the Debtors have sufficient funds standing to their credit with such financial institution, and such financial institution may rely on the representations of such Debtors as to which checks are issued and authorized and which transfers are authorized to be paid in accordance with the Motion without any duty of further inquiry and without liability for following the Debtors' instructions.

E. Requirements of Bankruptcy Rule 6003 Are Satisfied.

30. This Court may authorize the Debtors to satisfy the Critical Vendor Claims under Bankruptcy Rule 6003 because such relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001(c)(2)).

31. As described above and in the First Day Declaration, the continuity and viability of the Debtors' business operations relies heavily on the uninterrupted development and distribution process for the Debtors valuable game titles. The failure of any Critical Vendor to render services to the Debtors would have immediate and detrimental consequences to their business and would decrease value to the detriment and prejudice of all of the Debtors' stakeholders. Moreover, it is the Debtors' business judgment that continuation of their positive relationship with the Critical Vendors is essential to their continued operations and greatly increases the likelihood of a successful reorganization. Accordingly, the Debtors respectfully submit that the relief requested herein is necessary to avoid immediate and irreparable harm and, therefore, Bankruptcy Rule 6003 is satisfied.

V. Notice

32. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the Southern District of New York; (ii) counsel to the Debtors' proposed DIP lender; (iii) 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; (iv) the Internal Revenue Service; (v) the New York State Attorney General; and (vi) 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.

VI. No Prior Request

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

WHEREFORE, the Debtors respectfully request that the Court: (i) enter an order, substantially in the form of the Proposed Order attached hereto as **Exhibit A**, granting the relief requested herein; (ii) grant such other and further relief to the Debtors as the Court may deem just and proper.

Dated: New York, New York
January 21, 2013

Respectfully submitted,

/s/ Peter S. Partee, Sr.

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