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### In Re Skymall: The Crash of SkyMall and the Take Off of 363(b) Sales

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**In Re Skymall: The Crash of SkyMall  
and the Take Off of 363(b) Sales**

**By: Spencer Cook and Garrett Franklyn**

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## I. The Founding and History of SkyMall

At one point, SkyMall, LLC (interchangeably, “SkyMall” and “debtor”) flew as high as the planes its magazines filled. Entrepreneur Robert Worsley founded the company in 1989.<sup>1</sup> Mr. Worsley founded Skymall with the intention of creating an in-flight shopping magazine that centered on airplane passengers utilizing onboard telephones to order items that would be available upon arrival at the gate—travellers would phone in their order and, once their plane hit the tarmac, it would be there waiting for them (unlike their luggage sometimes).<sup>2</sup> This business plan, however, proved to be unwieldy.<sup>3</sup> The logistics of maintaining inventory in each airport proved to be a logistical nightmare,<sup>4</sup> which would eventually force SkyMall to change its business model. By 1993, SkyMall’s original business model operated at a loss—losing \$6 million per year.<sup>5</sup> This required Mr. Worsley to develop a new way for SkyMall to find a financially viable commercial niche.

SkyMall pivoted and created a new business model centering on providing catalog space in its magazines.<sup>6</sup> This newfound business model would eventually prove to be successful.<sup>7</sup> SkyMall offered page space to manufacturing and merchandise companies for them to place advertisements in SkyMall’s magazine that customers could then order through SkyMall and have delivered to their house. With its new strategy, “SkyMall would be responsible to ‘drop ship’ their products directly to the customer. . . . [and] Skymall would be an advertising

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<sup>1</sup> Patrick Hutchison, *The History of Skymall*, PACSAFE BLOG, Oct. 3, 2012, available at <https://www.pacsafe.com/blog/the-history-of-skymall/>.

<sup>2</sup> Roberto A. Ferdman, *Skymall, the wacky in-flight catalogue, is filing for bankruptcy. How did it last this long?*, THE WASHINGTON POST, Jan. 23, 2015, available at <https://www.washingtonpost.com/news/wonk/wp/2015/01/23/skymall-the-wacky-in-flight-catalog-is-filing-for-bankruptcy-how-did-it-last-this-long/>.

<sup>3</sup> Hutchison, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Rohin Ohar, *SkyMall: The Strange Story of America's Most Delightfully Weird Catalogue*, THE ATLANTIC, June 12, 2013, available at <http://www.theatlantic.com/business/archive/2013/06/skymall-the-strange-story-of-americas-most-delightfully-weird-catalogue/276807/>.

<sup>6</sup> Hutchison, *supra* note 1.

<sup>7</sup> *Id.*

company in the vein of Google or eBay rather than [a company] that held inventory like Amazon.”<sup>8</sup> This obviated the necessity for any inventory management by SkyMall, which acted as a go-between for consumers and sellers, and proved to be financially successful business model, at least during the company’s years leading up to the explosion of electronic digital devices. For now, SkyMall began to take off—please make sure your seat back and folding trays are in their full upright position.

SkyMall offered manufacturing companies two different methods for obtaining space in its magazine: (1) An advertising program that allowed companies to advertise in SkyMall, but with higher advertising fees and a transaction fee; or (2) a merchandising program with a lower advertising fee, but requiring participation in a profit/margin share with SkyMall.<sup>9</sup> To advertise on SkyMall in 2013, companies were offered the following options:

Advertising Program Rates		Merchandising Program Rates	
Quarter-Page	\$13,700 per month*	Quarter Page (approx..)	\$5,000 per month* plus margin share
Half-Page	\$23,900 per month*	Half-Page (approx..)	\$9,200 per month* plus margin share
Full Page	\$42,900 per month*	Full Page	\$16,800 per month* plus margin share
*SkyMall is a quarterly publication, requiring a three (3) month minimum for all catalog programs. All products are also included on SkyMall.com.			

<sup>10</sup>

Mr. Worsley continued to develop SkyMall’s business plan and in 1996 the company held its initial public offering.<sup>11</sup> SkyMall held the stock symbol (SKYM) and began trading its stock on NASDAQ.<sup>12</sup> The company would trade its stock for as high as \$27, in 1999, but saw its stock fall precipitously to a low price of \$2.70 in 2001.<sup>13</sup> SkyMall continued as a publicly owned

<sup>8</sup> Ohar, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Hugo Martin, *SkyMall loses its captive audience*, THE LOS ANGELES TIMES, April 25, 2016, available at <http://www.latimes.com/business/la-fi-skymall-20140427-story.html>.

<sup>12</sup> FIND THE COMPANY, SkyMall, Inc, available at <http://ipo.findthecompany.com/l/93/Skymall-Inc>.

<sup>13</sup> Karen Kaplan, *Gemstar to Buy SkyMall Catalog Firm*, THE LOS ANGELES TIMES, May 15, 2001, available at <http://articles.latimes.com/2001/may/15/business/fi-63628>.

company until 2001, when it was purchased by GemStar-TV Guide International Inc.<sup>14</sup> GemStar purchased SkyMall through a stock purchase for approximately \$47.5 million.<sup>15</sup> Mr. Worsley retired from operating SkyMall in 2003 to pursue a career in politics in Arizona.<sup>16</sup> In 2012, SkyMall, again, was purchased, this time by Direct Brands, a company owned by the Najafi Companies—a private investment firm.<sup>17</sup>

Despite being owned by different public and private companies, SkyMall continued on as a staple on commercial air travel in America and “every year, 650 million passengers ha[d] the opportunity to peruse through SkyMall on their flight.”<sup>18</sup> SkyMall, in a survey it commissioned, stated that “over 70% of passengers read SkyMall on every flight.”<sup>19</sup> The company may have kept changing hands, but travellers still took the magazine in their hands and flipped through the pages, passing the time as their planes jetted across long distances.

With the rise of e-commerce, SkyMall sought to adapt, expanding its operation from beyond the seat-back pocket of airlines and on to the digital pocket of the Internet.<sup>20</sup> SkyMall began operating its website, appropriately named SkyMall.com, as early as 1996.<sup>21</sup> Thirteen years later, in 2009, SkyMall’s “website [would] generate[] approximately \$80.5 [million] in revenue,”<sup>22</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (“Gemstar will pay \$2.85 a share for SkyMall--\$1.50 in case and .03759 share of stock for each SkyMall share.”).

<sup>16</sup> Martin, *supra* note 11.

<sup>17</sup> Greg Sexton & Anne Robertson, *Najafi Companies-Owned Direct Brands Acquires Multichannel Specialty Retailer and Loyalty Program Provider, SkyMall*, PR NEWSWIRE, April 4, 2014, available at <http://www.prnewswire.com/news-releases/najafi-companies-owned-direct-brands-acquires-multichannel-specialty-retailer-and-loyalty-program-provider-skymall-146141175.html>.

<sup>18</sup> Ohar, *supra* note 5.

<sup>19</sup> *Id.*

<sup>20</sup> Mike Barish, *SkyMall Monday: An Interview with SkyMall CEO Christine Aguilera*, GADLING, May 18, 2009, available at <http://gadling.com/2009/05/18/skymall-monday-an-interview-with-skymall-ceo-christine-aguilera/>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

which represented approximately 60% of the company's overall sales. During that same year, SkyMall's revenues were approximately \$130 million.<sup>23</sup> Approximately 100 vendors per week would contact SkyMall to sell their products through its catalogs or on its website; SkyMall catalogues were available on thirteen different airlines, as well as Amtrack, and it offered "approximately 2,000 products in [its] in-flight catalog and 15,000 products online."<sup>24</sup> For a short while, SkyMall was flying sky high, the skies looked clear, and there was no sight of any clouds brewing in the distance.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## II. SkyMall Merges with Xhibit Corporation

On May 17, 2013, Xhibit Corporation (“Xhibit Corp.”) merged with SkyMall.<sup>25</sup> Xhibit Corp. “acquired all of the outstanding capital stock of [Nafaji Companies’ ownership of SkyMall] for newly-issued shares of Xhibit common stock representing approximately 40 percent of the total outstanding shares of Xhibit common stock.”<sup>26</sup> The corporation, a self-styled leading provider of digital marketing and advertising solutions, stated that “[it] believe[s] that [its] platform will enhance the shopping experience for SkyMall’s suppliers, customers and members.”<sup>27</sup> The SkyMall CEO at the time, Kevin Weiss, agreed to stay on as Xhibit’s CEO post-merger, stating that the merger “will [provide] SkyMall with significant opportunities to create heightened value for our partners and customers. With the help of Xhibit’s team, we look forward to expanding our industry-leading platforms around the world.”<sup>28</sup>

Xhibit Corporation, at the time of its merger with SkyMall, operated as a corporation by virtue of a reverse takeover transaction.<sup>29</sup> It described itself as a “cloud based technology development company with its primary historical focus on digital advertising, and a recently expanded focus on online and mobile social media, games and CRM (customer relationship management) solutions.”<sup>30</sup> Unsurprisingly, SkyMall’s merger with Xhibit created great skepticism amongst different media outlets.<sup>31</sup> Xhibit retained 60% ownership, while SkyMall obtained 40%, which did not appear to make sense on paper when SkyMall had \$130 million in revenue, but Xhibit had only \$9.2 million.<sup>32</sup> One journalist openly warned that Xhibit Corporation appeared to be a

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<sup>25</sup> Ohar, *supra* note 5.

<sup>26</sup> Greg Sexton & Anne Robertson, *Merger Of SkyMall And Xhibit Creates Next-Generation Merchandising And Relationship Sales Enterprise*, PR NEWswire, May 17, 2013, available at <http://www.prnewswire.com/news-releases/merger-of-skymall-and-xhibit-creates-next-generation-merchandising-and-relationship-sales-enterprise-207839871.html>. See also Appendix Table 1.

<sup>27</sup> Sexton & Robertson, *supra* note 26.

<sup>28</sup> *Id.*

<sup>29</sup> Ohar, *supra* note 5.

<sup>30</sup> *Xhibit Corp.*, CRUNCHBASE, available at <https://www.crunchbase.com/organization/xhibit#/entity>.

<sup>31</sup> See Ohar, *supra* note 5.

<sup>32</sup> *Id.*



“pump and dump” scheme to generate artificial value for its shareholders. At the time of the merger, however, things seemed to have been running smoothly at SkyMall and Xhibit Corp., and there was little to indicate any turbulence. However, storm clouds were brewing, and the company would soon be flying directly into them.

### III. The Triggering Events for SkyMall's Bankruptcy

The crosswinds of financial distress, brought on by the swells of widely available electronic devices, would rattle SkyMall. The company, which once relied upon having a technology-free audience on airplanes, lost its market advantage in 2012 when the Federal Aviation Administration ("FAA") "eased [its] restrictions . . . on the use of portable electronic devices, [which] allowed passengers to keep their smartphones and tablets powered up during takeoffs and landings."<sup>33</sup> This, coupled with airlines providing in-flight WiFi, allowed passengers to peruse through various online retailers, such as Amazon or eBay.<sup>34</sup> Travellers could now entertain themselves with their mobile devices, no longer looking for entertainment between the covers of SkyMall.

But worse winds would soon blow. In 2014, "both Delta Airlines Inc. and Southwest Airlines Co. decided within four months of each other not to carry SkyMall Catalogs going forward."<sup>35</sup> Both Delta and Southwest's decision to remove SkyMall from its flight, coupled with the introduction of WiFi on flights, proved disastrous to SkyMall, and its revenues dropped from 33.7 million in 2013 to 15.8 million through the third-quarter of 2014.<sup>36</sup> SkyMall was buffeted on all sides, with no safe harbor in sight, and running on the fumes of what little operating capital was available to maintain liquidity.

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<sup>33</sup> Martin, *supra* note 11.

<sup>34</sup> *Id.*

<sup>35</sup> Ben Conarck, *SEC Fights SkyMall Assets Sale, Citing Investigation*, LAW360, Mar. 4, 2015, available at <http://www.law360.com/articles/627501/sec-fights-skymall-assets-sale-citing-investigation>.

<sup>36</sup> *Id.*



#### **IV. Commencement of the Case and Initial Steps**

##### **a. The Bankruptcy Petition**

In any other flight, the pilot at this point would have reached over and flipped on the “Fasten Seatbelt” sign. The company would soon file a voluntary petition for Chapter 11 bankruptcy on January 22, 2015,<sup>37</sup> and then shortly thereafter filed for an emergency application under Section 327(a) for entry of an order to employ and retain Quarles & Brady as its general bankruptcy and restructuring counsel.<sup>38</sup> In its motion, the company established the firm’s credentials and experience at representing clients in Chapter 11 cases.<sup>39</sup> No objections or responses were filed. The court would approve the motion January 29, 2015,<sup>40</sup> and attorneys John A. Harris and Lori L. Winkelman of Quarles & Brady LLP would represent the company through its reorganization.<sup>41</sup> Both Harris and Winkelman specialize in the area of bankruptcy litigation and reorganization and are partners of the firm, practicing out of its office in Phoenix, Arizona.<sup>42</sup>

The Official Committee of Unsecured Creditors (“Committee”) filed a motion on February 20, 2015, seeking an order authorizing the retention and employment of Cooley LLP (“Cooley”) as lead counsel pursuant to Section 1103.<sup>43</sup> The court approved. The Committee later filed a

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<sup>37</sup> Chapter 11 Voluntary Petition, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Chapter 11 Petition”) (Skymall Files\37 (Chapter 11 Voluntary Petition).pdf).

<sup>38</sup> Emergency Application for Employment, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Employment Application”) (Skymall Files\38 (Emergency Application for Employment).pdf).

<sup>39</sup> *See generally id.*

<sup>40</sup> Order Granting Emergency Application for Employment, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Employment Order”) (Skymall Files\40 (Order Granting Emergency Application for Employment).pdf).

<sup>41</sup> Conarck, *supra note 35*.

<sup>42</sup> *See generally John A. Harris*, QUARLES & BRADY, LLP, available at <http://www.quarles.com/john-a-harris/>; *Lori L. Winkelman*, QUARLES & BRADY, LLP, available at <http://www.quarles.com/lori-l-winkelman/>.

<sup>43</sup> *See Notice of Hearing on Executory Contracts and Unexpired Leases, Proposed Cure Amounts, Sale Hearing, and Related Matters*, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Hearing Notice”) (Skymall Files\43 (Notice of Hearing on Executory Contracts and Unexpired Leases).pdf); Application to Employ Cooley LLP, SkyMall, LLC, Docket No.

motion to employ Snell & Wilmer LLP as local counsel.<sup>44</sup> The court granted approval on March 2, 2015.<sup>45</sup>

At the time of filing, Skymall, as debtor in possession, listed in its petition that its creditors ranged between 200-299, its assets ranged between \$1,000,001 and \$10 million, and its outstanding liabilities ranged between \$10,000,001 and \$50 million.<sup>46</sup> Scott Wiley, the chief financial officer and chief executive officer of Xhibit, filed a declaration describing the functioning of SkyMall's business when it was a going concern, and the catalysts for its bankruptcy petition.<sup>47</sup> In Mr. Wiley's declaration, the debtor in possession attempted to stave off illiquidity and insolvency by securing additional operating capital and exploring possible avenues to obtain short-term and long-term financing in several financial quarters, specifically in the fourth quarter of 2014, leading up to the company's filing a petition for bankruptcy.<sup>48</sup> Unable to successfully obtain the financial resources it so desperately needed, SkyMall filed for bankruptcy under Chapter 11.

However, rather than engage in a reorganization from which SkyMall would emerge as a going concern that could maintain liquidity and solvency as a continuing business operation, SkyMall instead hoped to sell its assets and properties, banking that they would be worth a substantially greater valuation if marketed and sold while SkyMall could claim itself as a going concern, as opposed to selling those same assets as a defunct business in a straight liquidation

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2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Cooley Employment") (Skymall Files\43 (Application to Employ Cooley LLP).pdf).

<sup>44</sup> Application to Employ Snell & Wilmer, LLP, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Snell & Wilmer Employment") (Skymall Files\44 (Application to Employ Snell & Wilmer, LLP).pdf).

<sup>45</sup> Order Granting Application to Employ Snell & Wilmer, LLP, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Snell & Wilmer Order") (Skymall Files\45 (Order Granting Application to Employ Snell & Wilmer, LLP).pdf).

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* Declaration of Scott Wiley in Support of First Day Motions, LLP, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Wiley Declaration") (Skymall Files\47 (Declaration of Scott Wiley in Support of First Day Motions).pdf).

<sup>48</sup> *Id.* *See also* Motion to Approve Sale, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Motion to Approve Sale") (Skymall Files\48 (Motion to Approve Sale).pdf) ; Master Mailing List, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Master Mailing List") (Skymall Files\48 (Master Mailing List).pdf).

during Chapter 7 bankruptcy.<sup>49</sup> SkyMall would be torn apart, sold piecemeal, but only if it could still be called a financially viable company—anything else would cheapen the assets. In bankruptcy, Mr. Wiley sought to paint a fresh coat of lacquer on SkyMall, giving it all the glitz and glamor of a plane on its maiden flight. But there would be no champagne popped for SkyMall—bankruptcy would be its final flight.

Of the many reasons that propelled SkyMall into bankruptcy, Mr. Wiley noted, in particular, that the company began to stall in a “rapidly evolving and intensely competitive” retail industry, one in which SkyMall neglected to tailor the products it offered in the face of growing and eventually insurmountable competition from more well-financed and well-established online retail outlets; namely, Amazon.com and eBay.com.<sup>50</sup> These outlets—either through shrewd negotiations, an ability to accept a closer profit margin, or simply by possessing greater market clout—could accept better terms from vendors in a way SkyMall was incapable of simulating.<sup>51</sup> SkyMall was the bloated, twin-propeller aircraft of the past struggling against the sleeker, newer turboprop jets of the modern era.

Another problem, as Mr. Wiley also noted, was the growing prevalence of digital media devices for travellers, which cut into SkyMall’s previously hegemonic market.<sup>52</sup> Where once a SkyMall magazine may have been the only recourse for entertainment and enjoyment, aside from sleeping, for those riding aboard a plane, travellers these days can choose from one of among many different electronic devices to pass the time.<sup>53</sup> SkyMall, like all print media before it, began to stagnate as digital media grew in popularity among consumers, and once the FAA allowed electronic devices onboard flights, SkyMall’s exclusivity ran out. As iPads, iPhones, and portable computers became more cheaply available to consumers, and airlines began providing onboard wireless Internet connects, fewer travellers turned to the magazine nestled in the chair before them. Fewer people were reaching for SkyMall, but even among those that did, fewer still would actually be purchasing any of the products listed within.

However, a failure to respond to a developing market and the increase in entertainment devices were not the only precipitating factors to SkyMall’s bankruptcy. While they may have closed the coffin, the economic recession, and the changing vendor-debtor relationships that

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<sup>49</sup> See generally Motion to Approve Sale.

<sup>50</sup> *Id.* at 7-8.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 8.

<sup>53</sup> *Id.*

resulted, ultimately hammered the nail into it. As the recession hit consumer-spending habits, discretionary spending took a plunge, which cut deep into SkyMall's sales.<sup>54</sup> Many of the products listed in SkyMall were ones ineligible for discount or sales that could have accommodated consumers' newfound spending limits, thus compounding the company's reducing sales volume.<sup>55</sup> Moreover, shortly after Xhibit filed its financing statements with the Security Exchange Commission, SkyMall vendors reduced the company's extant credit limits or refused to ship products without prepayment, or sometimes both.<sup>56</sup>

Each factor individually could have been a legitimate propellant for SkyMall's bankruptcy. A company being hedged out of the market by better-financed and more well-established competitors is not unheard of, and if SkyMall became a footnote in corporate history because Amazon and eBay elbowed it into insolvency, few would have thought less of the company. Furthermore, one has only to look at how newspapers and other print publications have been slowly pushed into obsolescence by the growing popularity of digital media. But it was each of those events, plus the economic recession and the merger with Xhibit, that would eventually cause SkyMall to crash.

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<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 9.

**V. SkyMall's Finances and its Schedules and Statements**  
**a. Schedules**

On February 22, 2015, counsel for the debtors filed its Schedules of Assets and Liabilities<sup>57</sup> (“Schedules”) and Statements of Financial Affairs<sup>58</sup> (“Statements”) (collectively “Schedules and Statements”). Pursuant to Rule 9009 of the Federal Rules of Bankruptcy Procedure<sup>59</sup> (“FRBP”), when debtors file a bankruptcy petition, they must fill out and submit the forms required by the Judicial Conference of the United States, which in terms of Schedules require debtors to account for their assets, income, expenses, and third-party claims whether secured or unsecured.<sup>60</sup> The debtor filed Schedules conforming to each of these required forms, denominated A through J seriatim.<sup>61</sup>

In Schedule A, the debtor listed two properties: a “21,560 square foot building and improvements located at 1520 East Pima Street” with attached leasehold interest and “13,122 square foot building and improvements located at 1436 South 16th Street” with attached leasehold interest, both located in Phoenix, Arizona.<sup>62</sup> While the debtor does not own a fee

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<sup>57</sup> Schedules filed by Lori L. Winkelman, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Winkelman Schedules”) (Skymall Files\57 (Schedules filed by Lori Winkelman).pdf).

<sup>58</sup> Statement of Financial Affairs filed by Lori L. Winkelman, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Winkelman Statement”) (Skymall Files\58 (Statement of Financial Affairs).pdf).

<sup>59</sup> Rule 9009 stipulated that “the Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate.” FED. R. BANKR. P. 9009 (Skymall Files\59. Rule 9009.pdf).

<sup>60</sup> See generally Form B 106A/B, for property; B 106C, for exempt property (Skymall Files\60. form\_b106ab (1).pdf); B 106D, for creditors with secured claims (Skymall Files\60. form\_b106d (1).pdf); B 106E/F, for creditors with unsecured claims (Skymall Files\form\_b106ef (1).pdf); B 106G, for executory contracts and unexpired leases (Skymall Files\60. form\_b106g.pdf); B 106H for codebtors (Skymall Files\60. form\_b106h.pdf); B 106I for income (Skymall Files\60. form\_b106i (1).pdf); B 106J for expenses (Skymall Files\60. form\_b106j (1).pdf); B 106J-2 for expenses of other debtor’s household (Skymall Files\60. form\_b106j (1).pdf).

<sup>61</sup> Winkelman Schedules, *supra* note 58.

<sup>62</sup> *Id.* at 1.



interest in the property,<sup>63</sup> the debtor does possess a property interest as owner for the length of its sublease.<sup>64</sup> However, the value of that interest is unknown.<sup>65</sup>

In Schedule B, the debtor listed the value of its personal property at \$10,687,341.59.<sup>66</sup> The debtor's commercial financial bank accounts total \$2,418,963.87, and its security deposits total \$1,920,000.00.<sup>67</sup> The listed accounts receivable are split between Skymall's and Xhibit's, with the former numbering \$873,435.44, and the latter numbering \$1,279,864.28.<sup>68</sup> The debtor also listed a liquidated debt owed to it in the form of a United Postal Service rebate, estimated at \$240,000.00, and contingent, unliquidated claims totaling \$3,900,000.00.<sup>69</sup> The debtor also has a fee simple subject to a condition subsequent to retake 1580 East Pima Street, which it values at \$55,078.00.<sup>70</sup> Other personal property—such as non-household goods, interests in insurance policies, intellectual properties, customer lists, machinery and equipment, and inventory—is listed but without a listed then-current value.<sup>71</sup> The debtor did not claim any exempt property under Schedule C.<sup>72</sup>

In Schedules D and E, the debtor listed creditors with existing secured and priority unsecured claims, respectively.<sup>73</sup> Three creditors possess security interests in the debtor's

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<sup>63</sup> *Id.* at 6

<sup>64</sup> *Id.* at 1.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 3.

<sup>71</sup> *See generally id.*

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.*

property: Paymentech, LLC has a security deposit worth \$400,000 interest; Connexions Loyalty, Inc. has an escrow deposit worth \$1,520,000 interest; and Konica Minolta Premier Finance (“Konica”) has a security interest pursuant a the Premier Advantage Agreement with an unknown and thus unlisted value.<sup>74</sup> Each of these claims, notwithstanding Konica’s, total \$1,920,000 in outstanding obligations.<sup>75</sup> Also unlisted are the dates each claim was incurred, with the debtor claiming that attempting to ascertain those dates “would be unduly burdensome and cost prohibitive.”<sup>76</sup> Additionally, the debtor reserved itself the right to challenge any lien in any asset, as well as the perfection of any security interest and the validity of any secured claim.<sup>77</sup>

In Schedule E, the debtor’s outstanding priority unsecured liabilities are split between taxes and other debts owed to the government, and wages, salaries and commissions.<sup>78</sup> Pursuant to 11 U.S.C. § 507(a)(4),<sup>79</sup> wages, salaries, and commissions take priority status as unsecured claims; pursuant to 11 U.S.C. § 507(a)(8),<sup>80</sup> taxes and debts to the government similarly take a priority status.<sup>81</sup> When Skymall suspended its retail catalog operations, it terminated 47 employees, a number of whom were entitled to severance payments and SkyMall assumed would

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2.

<sup>79</sup> Section 507 lists several types of expenses and claims that take priority over others. For example, domestic support obligations take priority over certain administrative expenses, which themselves would take priority over an employee benefit plan. *See generally* 11 U.S.C. § 507. For SkyMall, and section 507(a)(4) in particular, unsecured claims of up to \$10,000 for each corporation that are earned within 180 days of filing the petition for wages and salaries take priority. *Id.*

<sup>80</sup> Just as certain wages and salaries take priority, so too do certain unsecured government claims; specifically, taxes, property taxes, employment taxes, excise taxes, and customs duties. 11 U.S.C. § 507(a)(8).

<sup>81</sup> *See supra* notes 79 and 80 and accompanying text.

make claims attesting to such,<sup>82</sup> which Skymall estimated as \$262,952.94 in claims, of which \$186,323.66 would be entitled to a priority unsecured status.<sup>83</sup> The debtor's obligations to government entities are substantially more numerous, with obligations to a number of different state and federal agencies that collectively total \$408,937.02, all of which is a priority unsecured status.<sup>84</sup> Between government and employment obligations, the debtor's full priority unsecured obligations number \$595,260.68.<sup>85</sup> Similar to its Schedule D preservation of challenges, the debtor also reserved the right to challenge the amount and priority status of any of its listed unsecured obligations.<sup>86</sup>

In Schedule F, the debtor listed its non-priority unsecured obligations,<sup>87</sup> which is composed of "pending litigation involving . . . [the debtor] . . . [and] also includes potential or threatened legal disputes that are not formally recognized by an administrative, judicial, or other adjudicative forum."<sup>88</sup> The debtor estimated its total non-priority unsecured obligations to be \$11,750,078.86, spread across numerous creditors with widely ranging values.<sup>89</sup>

In Schedule G, the debtor listed its executory contracts and unexpired leases, which is made up of several retention bonus agreements entered into between itself and its former employees, vender agreements with third parties that advertised products in its print catalog, and purchase and service agreements.<sup>90</sup> None of the listings has a stated value.<sup>91</sup>

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<sup>82</sup> Winkelman Schedules, *supra* note 58 at 13.

<sup>83</sup> *Id.* at 3.

<sup>84</sup> *Id.* at 11.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> *Id.* at 6.

<sup>87</sup> *See generally id.*

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 65.

<sup>90</sup> *See generally id.*

<sup>91</sup> *Id.*

According to its complete Schedules, the SkyMall had \$10,687,341.59 in assets and \$12,345,339.54 in obligations.<sup>92</sup> A shortfall of some off two million dollars would be enough to push SkyMall into a slow, financial downward spiral leading to Chapter 11.

**b. Statement of Financial Affairs**

Pursuant to FRBP 9009,<sup>93</sup> debtors are required to fill out a Statement of Financial Affairs, which accounts for their financial history prior to filing for bankruptcy.<sup>94</sup> SkyMall listed its gross revenue from employment or operation of business as \$98,637,582.00 for the period starting from January 1, 2013, to December 28, 2013; \$57,752,213.00 from January 1, 2014, to December 28, 2014; and \$1,228,470.00, estimated, from December 29, 2014, to January 21, 2015.<sup>95</sup> SkyMall listed no other income, but did list the several suits and administrative proceedings commenced against it, encompassing civil suits, patent infringement allegations, and Security and Exchange Commission (“SEC”) investigation—some of which have been dismissed or adjudicated on the merits, while the SEC investigation is listed as ongoing as of the Statement file date of February 23, 2015.<sup>96</sup> Additionally, SkyMall listed a payment of \$500,000 to Quarles & Brady, LLP as an advance retainer for the firm’s representation; after prepetition invoices were paid, that number decreased to \$223,436.90.<sup>97</sup> SkyMall also included all payments to creditors made within 90 days of filing for bankruptcy<sup>98</sup> and all transfers made within two years of the filing.<sup>99</sup>

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<sup>92</sup> *Id.* at 1.

<sup>93</sup> *See supra* note 59 and accompanying text.

<sup>94</sup> *See* Form B207 (Skymall Files\94. b207.pdf).

<sup>95</sup> Winkelman Statement, *supra* note 58, at 17.

<sup>96</sup> *Id.* at 3.

<sup>97</sup> *Id.* at 12.

<sup>98</sup> *Id.* at 9

<sup>99</sup> *Id.* at 5-6.



## **VI. Motions Related to Effectively Reorganizing under Chapter 11 of the Bankruptcy Code**

After the debtor in possession filed its petition, its representing counsel next filed a slew of motions<sup>100</sup> under 11 U.S.C. §§ 105(a),<sup>101</sup> 345,<sup>102</sup> 363,<sup>103</sup> and 366<sup>104</sup> to allow SkyMall to continue functioning within the ordinary course of business—not in an attempt to successfully complete a Chapter 11 reorganization, but only so that SkyMall may continue as a going concern purely to auction off its assets. SkyMall would still fly, but the bolts and tape holding it together grew only more apparent as the months ticked by.

### **a. Utility Motion Under 11 U.S.C. § 105(a) Extending Adequate Assurance to Utilities**

Chief among these motions is the one the debtor filed, pursuant to 11 U.S.C. §§ 105(a) and 366, in which it sought an order determining adequate assurance of future payment to pre-petition utility providers (“Utility Motion”), asserting that the debtors’ ongoing business affairs would require these utilities and that reorganization, even if merely to auction off its property assets, would be seriously impaired by utility shutoff, disruption, or other financial distress.<sup>105</sup>

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<sup>100</sup> See *infra* notes 101, 102, 103, and 104 and accompanying text.

<sup>101</sup> “The court may 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).

<sup>102</sup> See *generally* 11 U.S.C. § 345 (allowing trustees to make deposits or investments).

<sup>103</sup> Section 363 allows trustees and debtors in possession to use, sell, or lease the debtor’s property of the estate other than in the ordinary course of business, provided notice and hearing are satisfied. See 11 U.S.C. § 363(b). If the business is authorized to continue operating under Chapter 11, the trustee or debtor in possession may enter into transactions in the ordinary course of business without the notice and hearing requirements of conducting business outside of the ordinary course of business. See 11 U.S.C. § 363(c).

<sup>104</sup> Section 366 prevents utilities from altering, refusing, or discontinuing service to a debtor for commencing a bankruptcy case. See 11 U.S.C. § 366(a). However, utilities may do so if neither the trustee nor the debtor provides adequate assurance of payment within 20 days after the date of the order for relief.

<sup>105</sup> Emergency Motion to Authorize at 5, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Emergency Motion”) (Skymall Files\105 (Emergency Motion to Authorize).pdf).

Under 11 U.S.C. § 366, utilities are generally prevented from altering, refusing, or discontinuing service on the basis of the debtor’s petition for bankruptcy; however, they may if neither the debtor or trustee provides an adequate assurance of payment.<sup>106</sup>

In support of its motion, the debtor stated that these services were crucial and that it had not been delinquent in any of its prepetition obligations to any of the utility providers.<sup>107</sup> The debtor sought a determination that it had complied with 11 U.S.C. § 366 after having given adequate assurance of payment to those utility providers that provided utility services.<sup>108</sup> Those providers not satisfied with the assurance of future payment could file a Request upon the debtor, after which the debtor would provide the utility provider with a deposit equal to the average of one week’s worth of service provided, and for which the debtor will have satisfied 11 U.S.C. § 366.<sup>109</sup> Providers will then waive their right to seek a modification of its adequate assurance of future payment.<sup>110</sup>

On February 2, 2015, the Arizona Public Service Company (“APS”) filed an objection to the debtor’s Utility Motion, requesting that the court deny it as to APS and grant APS post-petition adequate assurance of payment in the amount and form that it deems satisfactory.<sup>111</sup> APS distinguished between the differing pre-2005 and post-2005 standards in Section 366(c)(2) and (3), stating that “the pre-2005 standard required a court to focus on whether or not to ‘order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment’ and Section 366(c) now requires a court to focus on whether or not to ‘order modification of the amount of an assurance of payment under paragraph (2).’”<sup>112</sup> In its objection, APS stated that “[t]here is nothing in Section 366(c) that allows a debtor to avoid providing a utility with post-petition security or that would require a utility to waive it’s [sic]

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<sup>106</sup> See *supra* note 104 and accompanying text.

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *Id.* at 4.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Arizona Public Service Company Objection at 9, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “APS Objection”) (Skymall Files\111 (Arizona Public Service Company Objection).pdf).

<sup>112</sup> *Id.* at 2.

rights under Section 366(c)(3).”<sup>113</sup> Moreover, APS claimed, the debtor’s Utility Motion did little to actually provide any adequate assurances of future payment: The debtor did not address limiting the deposit to one week, did not explain how it would pay future bills once its assets were continually liquidated, and, at that point in the proceeding, had not yet provided the Court with its Schedules so that the court could make a reasonably informed calculation.<sup>114</sup>

Ultimately, APS and SkyMall agreed that the latter would provide monthly payments and that those payments would satisfy the adequate assurance requirement of payment in 11 U.S.C. § 366.<sup>115</sup> The court would grant SkyMall’s Utility Motion, but expressed concern over the agreement between APS and SkyMall; although the Court would allow the monthly payments, it noted that APS’s request for monthly payments served as burden on the debtor, and that APS, or other utilities in a similar position, could further stress the debtor and have it pay what the utility wants it to—a proposal that ran counter to bankruptcy principles.<sup>116</sup>

**b. Prepetition Motion to Continue Prepetition Insurance Obligations under 11 U.S.C. § 363**

SkyMall also filed an emergency motion requesting the court to grant an order authorizing it to continue prepetition insurance coverage, to maintain its premium financing agreements, and to honor its related prepetition obligations, pursuant to 11 U.S.C. § 363.<sup>117</sup> SkyMall “maintain[s] a number of insurance policies that provide coverage for, among other things, commercial liability, property damage, directors and officers liability, and workers compensation.”<sup>118</sup> These policies,

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<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.* at 5.

<sup>115</sup> Minutes of Hearing at 3, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Minutes Hearing”) (Skymall Files\115 (Minutes of Hearing).pdf).

<sup>116</sup> *Id.*

<sup>117</sup> Emergency Motion for Interim and Final Orders Under 11 U.S.C. §§ 105(a), 345 and 363, Skymall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Emergency Motions for 105, 345, and 363”) (Skymall Files\117 (Emergency Motion for Interim and Final Orders).pdf). *See supra* note 104 and accompanying text. The trustee or debtor in possession can operate within the ordinary course of business; for SkyMall, this would extend to maintaining its prepetition obligations to its employees, either through severance, liability, or compensation. *Id.*

<sup>118</sup> Emergency Motions for 105, 345, and 363, *supra* note 117, at 4-5.



according to SkyMall, are necessary to the debtor’s commercial activities, and their related coverage is also required by certain local non-bankruptcy laws and contracts.<sup>119</sup>

Regarding its premium financing agreement for director and officer liability with First Insurance Funding Corp. (“First Insurance”), the debtor sought a court order play its premiums over a ten-month period, citing that “[i]t . . . [was] not always economically or fiscally advantageous for the Debtors to pay the Premiums on a lump-sum basis.”<sup>120</sup> To secure each payment, the debtor would assign a security interest in return premiums, dividend payments, and loss payments, and First Insurance would be able to cancel the financed policies for nonpayment.<sup>121</sup>

In its motion, SkyMall argued that 11 U.S.C. § 364 “provides that a debtor may incur secured postpetition debt if the debtor has been unable to obtain unsecured credit and the borrowing is in the best interests of the estate.”<sup>122</sup> Unable to secure unsecured insurance premium financing from a finance company, SkyMall sought to make pre-plan payments of its premiums to First Insurance over time, citing “immediate and irreparable harm” under FRBP 6003,<sup>123</sup> lest First Insurance terminate SkyMall’s policies.<sup>124</sup> There were no objections filed, and the Court entered an order granting SkyMall’s motion.<sup>125</sup>

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<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 6.

<sup>121</sup> *Id.* at 7.

<sup>122</sup> *Id.* at 11.

<sup>123</sup> Under Rule 6003, without a showing of immediate and irreparable harm, courts may not, within 21 days after the debtor files a petition for bankruptcy, issue an order granting:

(a) an application under Rule 2014; (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; or (c) a motion to assume or assign an executory contract or unexpired lease in accordance with §365. FED. R. BANKR. P. 6003.

According to SkyMall, the pre-plan payments would cause immediate and irreparable harm, and it should receive relief from them.

<sup>124</sup> Emergency Motions for 105, 345, and 363, *supra* note 117, at 12.

<sup>125</sup> Minutes Hearing, *supra* note 115, 2.

**c. Motion under 11 U.S.C. §§ 1107 and 1108 for Continued Use of Commercial Structure Within Ordinary Course of Business**

In addition, SkyMall sought to resume its financial affairs within the ordinary course of business pursuant to 11 U.S.C. §§ 1107<sup>126</sup> and 1108<sup>127</sup> by requesting that the court grant interim and final orders permitting it the continued use and maintenance of its commercial structure. In particular, SkyMall requested the use of each asset necessary to the ongoing functioning of its corporation; namely, “the continued maintenance and use of the Debtors’ existing bank accounts, cash management system, credit card processing system, and business forms, and waiving certain investment and deposit requirements.”<sup>128</sup> SkyMall intended to use these assets not to emerge from bankruptcy as an ongoing enterprise, but only insofar as it could operate in a limited-scale capacity to successfully market and sell its commercially related assets to interested buyers.

SkyMall’s existing bank accounts comprise what it termed its Cash Management System, which itself is composed of eleven separate bank accounts covering payroll expenditures, flex spending, sweep accounts, and depository accounts.<sup>129</sup> In particular, the debtor sought a waiver from the court allowing it to continue using its post-petition bank accounts, instead of being forced to close its pre-petition bank account pursuant to a requirement instituted by the United States Trustee, the enforcement of which “would cause unnecessary disruption to the Debtors’ business operations, would cause the estates unnecessary expense, and would impair the Debtors’ ability to maximize the value of their estates.”<sup>130</sup>

SkyMall also possessed a credit card processing system that was integral to continuing the company as a going concern; in the debtor’s words, “[m]aintaining the integrity of the Credit Card Processing System post-petition and without interruption is essential to avoid irreparable harm to the Debtors.”<sup>131</sup> This would also include related business forms; namely, accounting

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<sup>126</sup> Under 11 U.S.C. § 1107, a debtor in possession has all the rights and powers of a trustee, except for the right of compensation under 11 U.S.C. § 330. *See* 11 U.S.C. § 1107

<sup>127</sup> Under 11 U.S.C. § 1108, trustees may operate the debtor’s business. 11 U.S.C. § 1108 Combined with 11 U.S.C. § 1107, the debtor in possession may operate the debtor’s business.

<sup>128</sup> Emergency Motions for 105, 345, and 363, *supra* note 117, at 9.

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.* at 7.

<sup>131</sup> *Id.* at 6.

records.<sup>132</sup> By maintaining its credit card processing system, the debtor would be able to continue collections and disbursements and would thereby avoid “disruption that would result from closing the current accounts and opening new accounts[,] [which] could cause vendors to stop payment.”<sup>133</sup> Interrupting either the Cash Management System or the Credit Card Processing System would cause the debtors undue expense, produce unnecessary administrative problems, and be more disruptive than productive, according to SkyMall.<sup>134</sup> All of these business operations to continue, of course, up to the point at which SkyMall’s assets would be bundled together and handed off to the highest bidder.

#### **d. Motion to Continue Pre-Petition Wages**

The debtor also filed a motion, pursuant to Local Bankruptcy Rule 9013-1(h),<sup>135</sup> for an interim order allowing it to continue its accrued, unpaid, pre-petition payroll obligations and to continue to pay or honor future employee benefits plans and programs that were in effect prior to filing a bankruptcy petition.<sup>136</sup> In its motion, SkyMall contended that continuing its employee work force is vital to its continued operations, and “[a]uthorization to pay the amounts requested herein in the ordinary course of business is necessary to maintain morale and to prevent employees from suffering extreme personal hardship from quitting their employment or from seeking other employment.”<sup>137</sup> Although SkyMall suspended its call center operations—and had to terminate 47 employees, each of which would receive no more than \$12,475 in final

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 7.

<sup>134</sup> *Id.* at 8.

<sup>135</sup> Under Rule 9013-1(h) of Arizona’s Bankruptcy Rules, parties may file a “[m]otion[] to accelerate hearings or reduce notice periods,” although the motions are disfavored. ARIZ. BANKR. R. 9013-1(h). (Rule 9013-1 \_ District of Arizona \_ United States Bankruptcy Court) In filing the motion, SkyMall attempted to hasten an order allowing it to continue honoring pre-petition employee plans.

<sup>136</sup> Emergency Motion for Wage Order at 1, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Wage Order Motion”) (Skymall Files\136 (Emergency Motion for Wage Order).pdf).

<sup>137</sup> *Id.* at 14.

paychecks—it continued to operate its remaining business operations and support operations.<sup>138</sup> To continue those operations, SkyMall would retain \$280,000, which would be released from an escrow fund, and would not lay-off or terminate certain employees supporting its support operations or six IT employees.<sup>139</sup>

At the time of the petition, SkyMall employed 87 employees and would continue to pay commission checks to certain terminated sales employees, none of which exceeded \$12,475.<sup>140</sup> In total, SkyMall’s aggregate amount of wages and benefits owed to employees for pre-petition wages amount to \$80,216.68, which includes “the employees’ gross hourly wages or salaries, payroll withholding taxes, and other withholding obligations.”<sup>141</sup> In addition, SkyMall will maintain its pre-petition employee benefit programs, which include regularly recurring benefits, paid time off, and severance.<sup>142</sup>

**e. Sale Motion Under 11 U.S.C. § 363(f)**

While SkyMall would continue operating its business within a Chapter 11 bankruptcy, it would solely be to auction off its remaining assets and intellectual properties, instead of emerging from Chapter 11 as a going concern. To effectuate those sales, the debtor filed a motion (“Sale Motion”) seeking a court order that would authorize it to sell its intellectual properties—e.g., customer lists, accounts receivables, interests in real property, and interests under contracts and unexpired leases, among others (collectively, “Subject Assets”)—during an auction.<sup>143</sup> Significantly, SkyMall requested that the court allow it to sell each of its Subject

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<sup>138</sup> *Id.* at 4.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 6.

<sup>142</sup> *Id.* at 7-8.

<sup>143</sup> Motion to Approve Sale at 3, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Sale Motion”) (Skymall Files\143 (Motion to Approve Sale).pdf). The assets to be sold are collectively termed the “Subject Assets.”

Assets “free and clear of all claims, liens, encumbrances, and other interests”<sup>144</sup> pursuant to 11 U.S.C. § 363(f).<sup>145</sup>

Prior to filing its bankruptcy petition, SkyMall had retained CohnReznick Capital Market Securities, LLC (“CohnReznick”), an investment bank, to maximize the value of SkyMall’s assets.<sup>146</sup> CohnReznick advised SkyMall that its assets would “be substantially more valuable if they can be marketed and sold as a going concern.”<sup>147</sup> To continue retaining CohnReznick after filing its bankruptcy petition, SkyMall filed a motion requesting that the court authorize its post-petition employment and retention of CohnReznick.<sup>148</sup> For Skymall, the ground was fast approaching, and the company sought to salvage as much as it could.

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<sup>144</sup> *Id.* at 8.

<sup>145</sup> *See supra* note 103 and accompanying text.

<sup>146</sup> Sale Motion, *supra* note 143, at 4.

<sup>147</sup> *Id.*

<sup>148</sup> *See generally* Trustee’s Omnibus Objection to Debtor’s First Day Motions, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “First Day Motions Objection”) (Skymall Files\148 Trustee Omnibus Objection to Debtor First Day Motions.pdf).

## VII. Trustee's Response and Objections to the Debtor's First Day Motion

The United States Trustee ("Trustee") filed an omnibus response to the debtor's first day motions.<sup>149</sup> In it, the Trustee did not lodge an objection for the case's joint administration, but did object to certain motions either outright or to certain stipulations within those motions. While the Trustee objected both to motions in whole or in part, the Trustee also sought to place certain stipulations or restrictions on the order that the debtor sought.<sup>150</sup> For example, the Trustee did not object to the debtor employing Quarles & Brady, but did object to any advanced-fee retainers and preserved its right for future objections.<sup>151</sup>

However, the Trustee did outright object to the CohnReznick employment motion and the Utility Motion.<sup>152</sup> In its CohnReznick objection, the Trustee objected to what it claimed was a restriction of the court's review of CohnReznick's proposed fees and costs, as well as objecting to an indemnification in CohnReznick's employment contract.<sup>153</sup> The Trustee also objected to the debtor's Utility Motion, stating that the debtor was not at risk of an immediate loss of utility services because the revised BAPCPA provisions within 11 U.S.C. § 366<sup>154</sup> already forbade a utility from refusing service once the debtor had provided adequate assurance of payment, which SkyMall offered.<sup>155</sup> The Trustee filed no objections to the debtors remaining motions.<sup>156</sup>

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<sup>149</sup> Sale Motion, *supra* note 143, at 8.

<sup>150</sup> *See generally id.*

<sup>151</sup> *Id.* at 2.

<sup>152</sup> *Id.* at 2-5.

<sup>153</sup> *Id.* at 2-3. *Infra* Sale Motion section.

<sup>154</sup> Under 11 U.S.C. § 366:

[A] utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due. 11 U.S.C. § 366

However, utilities may refuse if neither the trustee nor the debtor furnished adequate assurance of payment within 20 days, whether by deposit or other security. *Id.*

<sup>155</sup> First Day Motions Objection, *supra* note 148, at 4.

The Court issued an order<sup>157</sup> granting each of the debtor's motions.<sup>158</sup> However, the court, while granting the motions, mandated certain restrictions on several of them. Regarding the debtor's Sale Motion, the court would grant it, but added the proviso that the court maintained the discretion to conduct a hearing in which it would consider whether to approve the prevailing bid.<sup>159</sup> The court reserved to the debtor the right to disqualify any prevailing bidder, although the debtor must a summary of non-confidential reasons for disqualification.<sup>160</sup> The Official Committee of Unsecured Creditors ("Committee") and trustee, however, may object to the Bankruptcy Court and request a hearing regarding the debtor's reasons for disqualifying a would be bidder.<sup>161</sup> The court approved the bidding procedure on June 29, 2015.<sup>162</sup>

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<sup>156</sup> Agenda for Final Hearing on First Day Motions at 2, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, "First Day Motions Hearing") (Skymall Files\156 Agenda for Final Hearing on First Day Motions.pdf).

<sup>157</sup> Notice of Lodging Proposed Order Establishing Bidding Procedures for Auction Sale, Scheduling Hearing on Sale Motion, and Granting Related Relief, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, "Bidding Procedure Notice") (Skymall Files\157 Notice of Lodging Proposed Order Establishing Bidding Procedures for Auction Sale.pdf).

<sup>158</sup> *See generally id.*

<sup>159</sup> *Id.* at 3.

<sup>160</sup> *Id.* at 3.

<sup>161</sup> *Id.* at 3-4.

<sup>162</sup> Order Establishing Bidding Procedure, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, "Bidding Procedure Order") (Skymall Files\162 Order Establishing Bidding Procedure.pdf).

## VIII. The Confirmation Plan

As might be expected, a confirmation plan dedicated to auctioning off assets tends to be more threadbare than a plan reorganizing a business entity, and the same holds true in SkyMall's bankruptcy. As a preliminary matter, SkyMall's Joint Plan of Liquidation Under Chapter 11<sup>163</sup> ("the Plan") addressed the outstanding claims creditors had against the debtors: secured claims would be unimpaired and deemed to have accepted the plan, and priority non-tax claims would be the same; general unsecured claims would be impaired and entitled to vote, whereas any equity interests would be impaired and deemed to reject.<sup>164</sup>

The SkyMall liquidating trust would pay each holder of secured and priority non-tax claims the full amount of his or her claim as soon as possible after the effective date.<sup>165</sup> On the other hand, holders of general unsecured claims would receive a pro rata share of the liquidating trust fund after the initial distribution date and following any expenses, administrative claims, and other higher priority claims.<sup>166</sup> Holders of equity interests would similarly receive a pro rata share after the initial distribution date, but only from remaining net distributable proceeds from the liquidating trust fund.<sup>167</sup>

SkyMall and the Creditors' Committee would appoint a liquidating trustee and three members to fill the liquidating advisory board, two of which would be holders of general unsecured claims, and one of which would be a restricted equity member of Xhibit Corp.<sup>168</sup> The liquidating trust fund will be comprised of the liquidating fund, which includes all of SkyMall's assets, all proceeds of the sale, all rights under the Asset Purchase Agreement, and the sale order.<sup>169</sup>

### a. Trustee's Objections

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<sup>163</sup> Joint Plan of Liquidation under Chapter 11, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, "Joint Liquidation Plan") (Skymall Files\163 Joint Plan of Liquidation under Chapter 11.pdf).

<sup>164</sup> *Id.* at 9.

<sup>165</sup> *Id.* at 9-10.

<sup>166</sup> *Id.* at 10.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 11.

<sup>169</sup> *Id.* at 9.



The Trustee took issue with SkyMall’s definitions of an “exculpated party,” “releases,” and “representatives”:

“Exculpated Parties” means, collectively, the Debtors, the officers and directors of the Debtors that served in such capacity at any time from and after the Petition Date, the Creditors’ Committee and individual members thereof (solely in their capacity as such), the Equity Committee and the individual members thereof (solely in their capacity as such), the Liquidating Trustee, the Liquidating Trust Advisory Board and its individual members thereof (solely in their capacity as such) and each of the respective Representatives (each of the foregoing in its individual capacity as such).

. . .

“Releasees” [sic] means, collectively, the Debtors, officers and directors of the Debtors that served in such capacity at any time from and after the Petition Date, the Creditor’s committee and the individual members thereof in their capacity as such, the Equity Committee and the individual members thereof in their capacity as such, and each of their respective Representatives.

. . .

“Representatives” means, with regard to any Entity, its officers, directors, employees, advisors, attorneys, professionals, accountants, investment bankers, financial advisors, consultants, agents and other representatives (including their respective officers, directors, employees, members and professionals).<sup>170</sup>

The Trustee similarly took issue with the Release and Exculpation clauses, stating that they were “overbroad and contrary to the Ninth Circuit Court of Appeal’s standard, which is based upon 11 U.S.C. § 524(e) and disfavors the proposed releases, indemnifications, or injunctions of independent third party claims of creditors and other parties in interest against non-debtors through a plan of reorganization.”<sup>171</sup> However, the court did not find the Trustee’s objections determinative and ruled that the debtor satisfied the legal and factual requirements of 11 U.S.C. § 1129(a).<sup>172</sup>

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<sup>170</sup> United States Trustee’s Objection to Disclosure Statement for Joint Plan of Reorganization at 2, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Trustee’s Disclosure Statement Objection”) (Skymall Files\170 United States Trustees Objection to Disclosure Statement for Joint Plan.pdf).

<sup>171</sup> *Id.* at 4.

<sup>172</sup> Minute Entry Granting Joint Plan at 1, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Entry Granting Joint Plan”) (Skymall Files\172 (Minute Entry Granting Joint Plan).pdf). Section 1129 requires that a plan comply with the Bankruptcy Code and be proposed in good faith. *See generally* 11 U.S.C. § 1129. *See also* Dani Meyer, *US Trustee, Skymall Trade Barbs Over Liquidating Plan*, LAW360, available at <http://www.law360.com/articles/690898/us-trustee-skymall->

## IX. The Section 363 Sale of SkyMall’s Assets

A growing number of companies have started utilizing the provisions of 11 U.S.C. 363(b) (“Section 363(b)”) to effectuate an asset sale after filing a Chapter 11 petition.<sup>173</sup> Section 363(b) allows for a debtor in possession to sell property of the estate outside the ordinary course of business after a notice and hearing.<sup>174</sup> Strategically, this allows the debtor in possession to “not only ‘cherry pick’ advantageous protections from chapter 11 but also to achieve a quick approval for the sale of all or substantially all of its assets without complying with chapter 11 requirements for plan confirmation.”<sup>175</sup> Practically, Section 363(b)’s provisions allows for Chapter 11 debtors in possession to sell off all, or substantially all, of its assets prior to plan confirmation and in lieu of the liquidation process.<sup>176</sup> Chapter 11—initially conceived of as a tool used by companies to restructure and reorganize into a solvent, going concern—could be

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trade-barbs-over-liquidating-plan; Matt Chiappardi, *SkyMall Gets OK For Ch. 11 Auction Plan*, LAW360, available at <http://www.law360.com/articles/616156/skymall-gets-ok-for-ch-11-auction-plan>.

<sup>173</sup> Elizabeth B. Rose, Chocolate, Flowers, and S 363(b): *The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 249 (2006) (Skymall Files\173. CHOCOLATE FLOWERS AND 363(B) THE OPPORTUNITY FOR SWEETHEART DEALS WITHOUT CHAP.pdf). *See also* Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 261 (2012) (Skymall Files\173. RETHINKING 363 SALES.pdf); Evan F. Rosen, A New Approach to Section 363(f)(3), 109 MICH. L. REV. 1529, 1532 (2011) (“The way in which Chapter 11 practice has developed over the last twenty or so years indicates a clear demand for a process of reorganization by nonplan sale. Debtors and their counsel have sought it, the courts have allowed it when possible (arguably in derogation of the plan focused original intent of Chapter 11.)” (Skymall Files\173. A NEW APPROACH TO SECTION 363(F)(3).pdf). *See also* George W. Kuney, *Let’s Make It Official: Adding an Explicit Preplan Sale Process As an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1269 (2004) (Skymall Files\173. LETS MAKE IT OFFICIAL ADDING AN EXPLICIT PREPLAN SALE PROCESS AS AN ALTERNATIVE.pdf).

<sup>174</sup> Under 11 U.S.C. § 363(b):

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person[.] 11 U.S.C. § 363(b)

<sup>175</sup> Rose, *supra* note 173, at 249 (2006).

<sup>176</sup> *Id.* at 259.

used by skillful debtors—or, perhaps, nefarious debtors—to dispose of their assets entirely, in a manner not unlike a straight Chapter 7 liquidation.

Furthermore, a 363(b) sale is bolstered by another section in the Bankruptcy Code, 11 U.S.C. § 363(f) (“Section 363(f)”), which states that:

[t]he trustee may sell property under subsection (b) . . . of this section free and clear of any interest in such property of an entity other than the debtor of the state, only if—(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.<sup>177</sup>

If a debtor in possession can justify one of the five requirements of Section 363(f) as having been met, then any buyer acting in good faith pursuant to 11 U.S.C. § 363(m) “can take the assets with knowledge that the sale cannot be reversed on appeal.”<sup>178</sup> The provisions of 11 U.S.C. § 363 clearly provide debtors with a process for expediently selling their assets to a good-faith purchaser, free from any interests, while extinguishing any debts through the Chapter 11 process.<sup>179</sup>

Companies who choose to pursue a Section 363 sale as an alternative to the typical plan, confirmation, and liquidation process typically follow a standard process to complete the sale.<sup>180</sup> Initially, the debtor in a Chapter 11 must petition to the court for a Section 363(b) and provide notice to its creditors.<sup>181</sup> Upon filing a petition for a Chapter 363 sale, the typical procedure for accomplishing a Section 363 involves the debtor in possession proposing procedures for bidding and a sale.<sup>182</sup> The court then permits any creditors to object to the procedures.<sup>183</sup> Any objections

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<sup>177</sup> 11 U.S.C. § 363(f)

<sup>178</sup> Jared A. Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591, 596 (2012) (Skymall Files\178. DEFENDING THE CURRENT STATE OF SECTION 363 SALES.pdf).

<sup>179</sup> *Id.* at 595.

<sup>180</sup> *Id.*

<sup>181</sup> *See supra* note 161 and accompanying text.

<sup>182</sup> Wilkerson, *supra* note 178, at 596.

<sup>183</sup> *Id.*

as to the bidding and sale procedures are heard and disposed of by a court hearing.<sup>184</sup> The debtor in possession is then responsible for “fix[ing] deadlines for the submission of qualified bids and objections to the sale motion.”<sup>185</sup> The last step in the Section 363 process is for the debtor in possession to conduct [the] sale auction, approve the prevailing bid at a hearing, and close the sale.”<sup>186</sup> This entire process is often done with great expediency while in the early stages of the Chapter 11 reorganization process.<sup>187</sup> In the race for a quick liquidation of corporate assets, Chapter 11 is the hare—Chapter 7, the tortoise.

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* See also Kling, *supra* note 173, at 262. (“363 sales are often pursued shortly after the filing of a bankruptcy petition . . . . Perhaps the most obvious benefit of 363 sales is that they are fast.”).



## X. SkyMall's Motion to Authorize 363(b) Sale

SkyMall, following a growing trend of companies seeking to sell off assets within Chapter 11, filed a motion to perform a Section 363(b) sale. In its motion, SkyMall proposed the sale of substantially all of its Subject Assets, “which include[d], without limitation SkyMall’s (i) intellectual property, (ii) furniture, fixtures, and equipment, (iii) inventory, (iv) customer lists, (v) accounts receivable, (vi) interests under contracts and unexpired leases, (vii) interests in real estate and fixtures, and (viii) other assets comprising SkyMall’s going concern business.”<sup>188</sup> SkyMall—through suggestion of its investment bank, CohnReznick Capital Market Securities, LLC (“CRCMS”)—chose to pursue a Chapter 11 bankruptcy while simultaneously marketing its assets, and the greater SkyMall brand, as an ongoing concern in an attempt to receive a greater valuation during its sell off. Consequently, it was important for SkyMall to attempt to sell its assets in the Section 363(b) sale as quickly as possible to prevent a potential diminution of sale value as a result of a potentially protracted and harmful sale process during which the valuation of its assets may become eroded over time.<sup>189</sup> Moreover, after Delta and Southwest ceased carrying SkyMall, SkyMall may have feared that other airlines would similarly stop carrying the magazine, and SkyMall’s assets would continue to contract.

SkyMall sought to sell its assets “free and clear of all claims, liens, encumbrances, and other interests pursuant to [Section 363(f)].”<sup>190</sup> In its motion, SkyMall asserted that the “expected purchase price far exceed[ed] the amount of any liens encumbering any of the Subject Assets,” and, as such, the proposed sale satisfied Section 363(f)(3).<sup>191</sup> Further, SkyMall sought the bankruptcy court to make a finding that any purchaser resulting from the proposed Section 363(b)(1) sale is a “‘good faith’ purchaser under Bankruptcy Code § 363(m).”<sup>192</sup> SkyMall proposed that the court consider the Ninth Circuit definition of “a lack of good faith,” which is “fraudulent conduct during the sale proceedings that ‘involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other

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<sup>188</sup> Motion for Orders (I) Authorizing Bidding Procedures and Auction, (II) Scheduling Sale Hearing and Approving Notice Thereof, (III) Authorizing Sale of Assets, and (IV) Granting Related Relief, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Motion to Authorize 363 Sale”) (Skymall Files\188 (Motion for Orders).pdf).

<sup>189</sup> *Id.* at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 10-11.

<sup>192</sup> *Id.* at 10.

bidders.’’<sup>193</sup> The finding of good faith in a Section 393 Sale is essential as it “supports the ‘policy of finality’ encouraged by bankruptcy courts and protects the finality of the sale.’’<sup>194</sup>

SkyMall proposed certain procedures for the bidding and auction process in its Motion to Authorize 363 Sale.<sup>195</sup> As noted earlier, SkyMall and CRMCS intended to perform the Section 363 sale as expediently as possible; SkyMall, therefore, proposed to hold the auction on March 24, 2015, a mere two months from the date of the Motion to Authorize 363 Sale.<sup>196</sup> The Motion to Authorize 363 Sale further included a proposed timeline for the sale process, auction, and hearing as follows:<sup>197</sup>

Deadline for Debtors to Identify Any Stalking Horse Bid	March 12, 2015
Deadline for Prequalification Submissions by Bidders	March 17, 2015
Deadline for Submissions of Bids	March 19, 2015
Auction Date	March 24, 2015
Sale Hearing	March 26, 2015 (subject to Court’s calendar)
Sale Closing	April 15, 2015

<sup>193</sup> *Id.* at 12 (quoting *In re Suchy*, 786 F.2d 900, 902 (9th Cir. 1985).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 5.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

SkyMall, at the time it filed its Motion to Authorize 363 Sale, did not have a Stalking Horse bid<sup>198</sup> in place. As a result, the proposed sale process involved a prequalification submission, bid, and auction process.<sup>199</sup>

The proposed prequalification stage of the sales process required potential bidders to present certain information to SkyMall “to demonstrate the financial wherewithal to consummate the potential transaction under the terms and conditions of [the] [s]ale [p]rocedures.”<sup>200</sup> In order to make the prequalification determination, SkyMall proposed that it would require financial statements, documentation regarding third-party funding, or miscellaneous documents that could establish an “entity’s financial wherewithal to timely close the transactions contemplated thereunder.”<sup>201</sup> Additionally, SkyMall required that any potential bidders be responsible for conducting its own due diligence prior to submitting its bid.<sup>202</sup> SkyMall agreed that Jeffrey R. Manning, of CRCMS, would handle all inquiries and document production necessary for due diligence determinations.<sup>203</sup> SkyMall required, however, that any information provided by Jeffrey

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<sup>198</sup> A Stalking-Horse Bid is a term of art used in Section 363 Sales. One commentator describes the term as follows:

In the bankruptcy setting, a “stalking-horse” bidder is an interested buyer of a debtor’s assets that agrees to certain protections or incentives from the debtor in order to be the first initial bidder for those assets. As the initial bidder, the stalking-horse bidder sets the ‘minimum’ floor price for assets and generally the other initial terms of the sale and bidding and auction process by the drafting of an initial asset purchase agreement.

Mathew W. Kavanaugh, et al., § 37:31. *Stalking-Horse Bidding Protections and Incentives in Bankruptcy Asset Sales—Stalking Horse Bidders*, 37 BUSINESS WORKOUTS MANUAL 37:31 (Dec. 2015) (Skymall Files\198. 3731Stalking-horse bidding protections and incentives in bankruptcy asset sale.pdf).

<sup>199</sup> Motion to Authorize 363 Sale, *supra* note 188, at 5. SkyMall reserved the right for CRMCS to continue marketing SkyMall in hopes of obtaining a Stalking Horse bidder. *Id.*

<sup>200</sup> *Id.* As in the right to determine the winning bid at auction, discussed *infra*, SkyMall and the Official Committee of Unsecured Creditors (if appointed) have discretion to determine prequalification status. *Id.*

<sup>201</sup> *Id.* at Ex. 1, 5.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*



R. Manning in response to due diligence requests be subject to non-disclosure agreements.<sup>204</sup>

Upon determination of prequalification status, all potential purchasers are required to submit bids that are subject to approval of the bankruptcy court.<sup>205</sup> Any prequalified bidder is required to submit a deposit and “an executed Asset Purchase Agreement based on a template that will be provided by [SkyMall].”<sup>206</sup> After a bid submission of a prequalified bidder, SkyMall, in consultation with CRCMS and the Official Committee of Unsecured Creditors (if one is appointed), would determine whether the bid is sufficient to be labeled as a “Qualified Bid.”<sup>207</sup>

In the event that two or more bids are considered qualified, then an auction will be held to determine the prevailing bidder with the second-place bidder reserved as a backup bid.<sup>208</sup> SkyMall proposed that itself along with the Official Committee of Unsecured Creditors (should one be appointed) should have sole authority to determine the “highest and best bid.”<sup>209</sup> The factors to be considered when examining the highest bid included (1) the purchase price, (2) the bidder’s financial condition and ability to close, (3) any proposed modifications made by the debtor to the asset purchase agreement, and (4) the probability of a prompt closing.<sup>210</sup> After the auction and SkyMall’s selection of a prevailing bidder, the proposed plan requires a sale hearing in order to field any objections.<sup>211</sup>

On January 29, 2015, the court entered an Order Establishing Bidding Procedures for Auction Sale, Schedule Hearing on Sale Motion, and Granting Related Relief (“Order

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 6.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 5.

<sup>211</sup> *Id.* at 7.

Establishing Bidding Procedures”).<sup>212</sup> In its order, the Court found that SkyMall’s proposed “[s]ale Procedures are fair, reasonable and appropriate for the proposed sale, and are designed to maximize the recovery with respect to the Subject Assets,” and thereby adopted SkyMall’s proposed plan for conducting the sale process, auction, and sale hearing.<sup>213</sup> Upon issuance of its order, the court set March 4, 2015, as a “Sale Objection Deadline” to oppose the SkyMall’s Motion to Authorize 363 Sale.<sup>214</sup>

**a. Objections to the Motion to Authorize 363 Sale**

After the Order Establishing Bidding Procedures, SkyMall received four main objections to the Motion to Authorize 363 Sale from The United States Securities and Exchange Commission (“SEC”); Connexions Loyalty, Inc. (“Connexions”) and SkyMall Ventures, LLC (“Ventures”); the Official Committee of Restricted Equity Security Holders’ of Xhibit Corp.; and the United States Trustee.<sup>215</sup> The SEC filed its Limited Objection to Sale of Assets on March 3, 2015.<sup>216</sup> The SEC’s basis for objecting to

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<sup>212</sup> See Bidding Procedure Order, *supra* note 162.

<sup>213</sup> *Id.* at 2.

<sup>214</sup> *Id.* at 3.

<sup>215</sup> See U.S. Securities and Exchange Commission’s Limited Objection to Sale of Assets, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “SEC Limited Objection”) (Skymall Files\215 (U.S. Securities and Exchange Commission).pdf); Limited Preliminary Objection to the Sale Motion and Cure Notice and Reservation of Rights, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Preliminary Objection”) (Skymall Files\215 (Limited Preliminary Objection to the Sale Motion and Cure Notice).pdf) ; Official Committee of Restricted Equity Security Holders’ of Xhibit Corp.’s Objection to Debtors’ Motion for Order Authorizing Sale of Assets, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Committee Sale Objection”) (Skymall Files\215 (Official Committee of Restricted Equity Security Holders.pdf); United States Trustee’s Objection to Sale Motion and Reservation of Rights, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Trustee’s Sale Objection”) (Skymall Files\215 (UST Objection to Sale Motion).pdf). In the docket, many holders of executory contracts and expired leases filed objections to the cure amounts for those contracts and leases, which are tangentially effected by the Motion to Authorize 363 Sale. See *infra* for greater discussion regarding Cure Notice and Objections. Debtors’ Omnibus Response to Cure Amount Objections, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Debtor’s Omnibus Response”) (Skymall Files\215 (Debtors Omnibus Response).pdf).

<sup>216</sup> SEC Limited Objection, *supra* note 215, Order Authorizing Sale of Certain Assets by Debtor SkyMall, LLC Free and Clear of Claims, Liens, Encumbrances, and Other Interests, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Order Authorizing Sale”) (Skymall Files\216 (Order Authorizing Sale of Certain Assets).pdf).

SkyMall’s proposed plan for bidding procedures and sale of assets predominately centered around an ongoing investigation regarding SkyMall’s parent corporation, Xhibit.<sup>217</sup> The SEC limited its objection “to the extent that certain items to be sold are subject to an outstanding subpoena issued by the [SEC].”<sup>218</sup> The SEC additionally filed, in the alternative, that the bidding procedures for auction sale failed to state with the requisite specificity the items to be sold at auction.<sup>219</sup>

The Connexions and Venture Objection—filed by the now owner (Connexions) of a former SkyMall subsidiary, SkyMall Ventures, LLC—presented objections to the Motion to Authorize 363 Sale.<sup>220</sup> In the objection, Connexions sought to preliminarily oppose the Motion to Authorize 363 Sale in order to prevent “any attempt by SkyMall to strip away or impair the Connexions Interests in connection with such sale.”<sup>221</sup> Connexions, similarly to the SEC, asserted that the Motion to Authorize 363 Sale did not list the assets to be sold with sufficient specificity.<sup>222</sup> Without sufficient notice of the assets to be sold in the 363 Sale, the Connexions and Ventures Motion sought to protect any interests that may be sold.<sup>223</sup>

The Official Committee of Restricted Equity Security Holders of Xhibit Corp. (“Equity Committee”) preliminarily objected to the Motion to Authorize 363 Sale on two

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<sup>217</sup> SEC Limited Objection, *supra* note 215, at 2.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* In SkyMall’s Motion to Authorize 363 Sale, SkyMall listed broad categories of assets to be sold as part of the Subject Assets—e.g., intellectual property, furniture, fixtures, equipment. *See* Motion to Authorize 363 Sale, *supra* note 188, at 3-4.

<sup>220</sup> Preliminary Objection, *supra* note 215, at 5 (“SkyMall Ventures was a wholly-owned subsidiary of SkyMall, and operated a loyalty business as a provider of merchandise, gift cards and rewards programs for program members in various corporate and other loyalty programs.”). SkyMall Ventures was sold, in its entirety, to Connexions. In connection with the sale of SkyMall Ventures to Connexions, SkyMall entered into an agreement with Connexions to provide support services to Connexions’ acquisition of SkyMall Ventures. *See* Debtor’s Omnibus Response, *supra* note 215, at 6.

<sup>221</sup> Preliminary Objection, *supra* note 215, at 5.

<sup>222</sup> *Id.* at 6.

<sup>223</sup> *Id.*

bases.<sup>224</sup> First, the Equity Committee asserted that SkyMall “failed to fully explore other options available to them which proposals were communicated prepetition, to [SkyMall’s] management by certain shareholders.”<sup>225</sup> The Equity Committee asserted that a Section 363 stood to “wipe out the millions of dollars of investments by [its] 149 shareholders.”<sup>226</sup> For this reason, the Equity Committee objected to the Motion to Authorize 363 Sale to petition the court for a sit-down amongst themselves, SkyMall, and the Official Committee of Unsecured Creditors to present an alternative reorganization plan in lieu of the Section 363(b) sale.<sup>227</sup> The Equity Committee asserted that it was “confident that such an approach [would] ensure that all creditors, equity holders[,] and interested parties [would] be better served than through a rushed auction.”<sup>228</sup>

The Equity Committee’s second basis for filing a preliminary objection was concern regarding “significant causes of action against current prior officers, directors[,] and insiders for their prepetition conduct and asset transfers manipulations.”<sup>229</sup> The Equity Committee wished to ensure that a Section 363 Sale would not extinguish any rights it may have to investigate and prosecute the alleged actions of the officers, directors, and insiders.<sup>230</sup> The Equity Committee asserted that the Section 363 sale was no more than “an attempt by [SkyMall] and prior management and insiders to do a quick sale, pay off creditors through a liquidating Plan, wash their hands of any further liability, and walk away.”<sup>231</sup> Allowing this “rushed” Section 363 Sale to occur, the Equity Committee

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<sup>224</sup> Committee Sale Objection, *supra* note 215, at 2-3.

<sup>225</sup> *Id.* at 2.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 2-3.

<sup>228</sup> *Id.* at 2.

<sup>229</sup> *Id.* at 3.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

asserts, “would be financially devastating to the innocent, good faith investor shareholders of SkyMall/Xhibit who would lose multiple millions of dollars.”<sup>232</sup>

The United States Trustee filed the last objection to the Motion to Authorize 363 sale.<sup>233</sup> Similar to the SEC Objection and the Connexions and Ventures Objection, the Trustee was concerned that SkyMall had failed to state with any specificity the assets to be sold in the Section 363 Sale.<sup>234</sup> SkyMall’s failure to state the assets to be sold if not extend solely to the Motion to Authorize 363 Sale either. For instance, “[w]hen questioned specifically as to what assets [SkyMall] were going to sell at the upcoming auction during the initially held 11 U.S.C. § 341 meeting of creditors . . . Mr. Wiley stated that he could not identify the assets to be sold.”<sup>235</sup> At a later date, Mr. Wiley was asked by a Trustee trial attorney to identify the assets to be sold, again, and Mr. Wiley instructed the Trustee trial attorney that any questions regarding specific assets to be sold at auction should be directed to CRCMS.<sup>236</sup> For these reasons, the Trustee objected to the Motion to Authorize 363 Sale in order for SkyMall to amend “the SOFAs and Schedules . . . to ensure that [SkyMall’s] creditors, shareholders, and other interested parties have meaningful financial information to properly determine whether the proposed sale is in their best interests.”<sup>237</sup> Further, the Trustee, like the SEC and Connexions, wished for SkyMall to “provide a detailed list identifying the assets subject to the proposed sale.”<sup>238</sup>

In addition, to better help facilitate the sales in the Sale Motion, the United States Trustee for the District of Arizona (“Arizona Trustee”) filed a motion requesting that the court levy an order directing the Arizona Trustee to appoint a disinterested person to

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<sup>232</sup> *Id.*

<sup>233</sup> Trustee’s Sale Objection, *supra* note 215, at 2-3.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 2.

<sup>236</sup> *Id.* at 3.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

serve as a consumer privacy ombudsman (“Ombudsman”).<sup>239</sup> Skymall collected personal information from its customers with each purchase that would “be shared with merchant partners who will fulfill your merchandise orders,” according to Skymall’s privacy policy, which was still in effect on the petition date.<sup>240</sup>

In SkyMall’s Omnibus Response to Sale Objections, SkyMall addressed the concerns presented by the SEC, Connexions, the Equity Committee, and the UST.<sup>241</sup> SkyMall asserted to the Court that, “[f]or the most part, the Sale Objections do not object to the Sale itself; rather they seek additional information regarding the Sale, confirmation of [SkyMall’s] books and records will be preserved, and/or reserve rights if certain assets are subject of the Sale.”<sup>242</sup> In response to the SEC’s Objection, SkyMall asserted to the court that it, in conjunction with the Unsecured Committee, were in process of retaining an e-discovery consultant in order to ensure the preservation of SkyMall’s records and books to comply with any SEC subpoenas.<sup>243</sup> Further, SkyMall asserted that it would provide the Court notice of any and all steps necessary to preserve its records and books after the proposed sale.<sup>244</sup> SkyMall incorporated its response to the SEC objection in with its response to the UST Objection, as it felt they addressed the same or similar issues.<sup>245</sup>

SkyMall, in response to the Connexions objections, replied that it did not know if any interest of Connexions would be affected in the proposed Section 363 Sale, but that it would “work with Connexions/Ventures and any applicable bidder to resolve any issues

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<sup>239</sup> U.S. Trustee Motion to Appoint / Motion for Order Directing the Appointment of a Consumer Privacy Ombudsman at 1-2, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Trustee Order for Ombudsman”) (Skymall Files\239 Consumer Privacy Ombudsman.pdf).

<sup>240</sup> *Id.* at 2.

<sup>241</sup> Debtors’ Omnibus Response to Sale Objections at 6, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “SkyMall’s Omnibus Response”) (Skymall Files\241 (Response to Sale Objections).pdf).

<sup>242</sup> *Id.* at 2.

<sup>243</sup> *Id.* at 5-6.

<sup>244</sup> *Id.* at 6.

<sup>245</sup> *Id.* at 6-7.

prior to the Sale Hearing.”<sup>246</sup> Lastly, SkyMall responded to the Equity Committee’s objection to the proposed Section 363 Sale.<sup>247</sup> Through the objections process, SkyMall continued in discussions with the Equity Committee that resulted in an agreement to provide the Equity Committee participation the sale process.<sup>248</sup> In exchange for allowing the Equity Committee participation in the sales process, counsel for the Equity Committee stated, “it is the consensus of the Equity Committee that the Committee will not oppose or hinder the auction from proceeding on March 26. However, we reserve our rights to address any concerns that may arise from the auction and raise any such issues with the Court at the March 27 hearing.”<sup>249</sup> In response to the Equity Committee’s request to require a sit-down meeting to discuss a reorganization plan proposed by the Equity Committee, SkyMall asserted that the Equity Committee’s proposal is not “even remotely realistic or feasible under the existing circumstances.”<sup>250</sup>

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<sup>246</sup> *Id.* at 7-8.

<sup>247</sup> *Id.* at 8.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 8-9.

## **XI. Bidding, Auction, and Sale of SkyMall to C&A Marketing**

Jeffrey R. Manning, the “group head of the Special Situations Practice at [CRMCS],” submitted a declaration in support of the Motion to Authorize 363 Sale.<sup>251</sup> The Manning Declaration outlined CRCMS’s efforts in marketing the sale of SkyMall and progress in completing the bidding, auction, and sale of SkyMall’s assets.<sup>252</sup> As of March 27, 2015, SkyMall, with the help of CRCMS, had completed the majority of the bidding, auction, and sale process.<sup>253</sup> The Manning Declaration’s purpose was to provide the court with a complete record of SkyMall’s sale and how CRCMS’s efforts aided in completing the court-approved sales procedures.<sup>254</sup>

In conjunction with the sale, CRCMS sent out an informational “eBlast” e-mail to:

approximately 4,000 professionals on a proprietary data base [*sic*], shared the mandate with the 300+ partners of CohnReznick LLP, posted the summary with the Nexia Network (an international alliance of accounting firms), and shared the executive summary through a proprietary CRCMS list of 185+ family offices of high net worth individuals.<sup>255</sup>

These marketing efforts yielded approximately 177 interested parties that requested information that required CRCMS to distribute a non-disclosure agreement (“NDA”).<sup>256</sup> Of those 177 interested parties, 70 individuals executed the NDA. As part of the due diligence process for prospective buyers, “[Jeffrey R. Manning] facilitated conference calls and site visits for potential investors with senior management. Sixty-three (63) Confidential Information Memoranda [“CIM”] were distributed.”<sup>257</sup> Of the 63 potential investors who received a CIM, 41 participated

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<sup>251</sup> Declaration of Jeffrey R. Manning in Support of Motion for Orders (I) Authorizing Bidding Procedures and Auction; (II) Scheduling Sale Hearing and Approving Notice Thereof; (III) Authorizing Sale of Assets; and (IV) Granting Related Relief, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015) (hereinafter, “Manning Declaration”) (Skymall Files\251 (Manning Declaration).pdf).

<sup>252</sup> *Id.* at 3.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*



in an “Online Data Room” created by CRCMS to conduct due diligence research prior to the prequalification stage.<sup>258</sup>

In accordance to the Order Establishing Bidding Procedures, all potential purchasers of SkyMall entered the prequalification stage.<sup>259</sup> The deadline for potential purchasers to pre-qualify for the bidding and auction occurred on May 19, 2015.<sup>260</sup> Jeffrey R. Manning, in association with SkyMall’s Financial Advisors and the Official Committee of Unsecured Creditors, coordinated the pre-qualification process, which required bidders “to provide CRCMS [with] financial information to confirm financial wherewithal and adequate assurance.”<sup>261</sup> At the conclusion of the pre-qualification deadline, “[s]even (7) parties formally pre-qualified.”<sup>262</sup>

CRCMS, in conjunction with SkyMall and the Official Committee of Unsecured Creditors, proceeded to create a “scorecard” to adjudge the pre-qualified bids submitted by the interested purchasers.<sup>263</sup> The scorecard’s purpose was “to aid transparency by analyzing different bids to bring each proposal down to a projected Net Consideration from the Transaction.”<sup>264</sup> The findings of the scorecard was reviewed and approved by CRCMS, the pre-qualified bidders, the Official Committee of Unsecured Creditors, and SkyMall.<sup>265</sup> At the conclusion of scorecard’s creation and review process, there remained two qualified bidders—C&A Marketing, Inc. (“C&A”) and FSG.<sup>266</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 4.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 4-5.

Both C&A and FSG participated in the auction on March 25, 2015, with C&A ultimately finishing with the prevailing bid.<sup>267</sup> During the course of the auction, both C&A and FSG participated in several rounds of bidding.<sup>268</sup> Each bid by C&A or FSG was measured by CRCMS utilizing the aforementioned scorecard.<sup>269</sup> At the conclusion of each round of bidding, CRCMS, SkyMall, the Official Committee for Unsecured Creditors, and the auction participants would engage in break-out room discussions.<sup>270</sup> At the conclusion of the auction, SkyMall, the Creditors Committee, and Equity Committee “determined that [C&A] was the Prevailing bidder based on the terms and conditions of its bid as set forth in the Asset Purchase Agreement.”<sup>271</sup> C&A’s bid was determined to be the prevailing bidder because “it was fair and reasonable; financially well backed, had substantially fewer contingencies than the FSG bid, and was in the best interests of [SkyMall], [its] Estates, [its] creditors and all other parties in interest.”<sup>272</sup> With CRCMS’s determination that C&A had the prevailing bid, FSG’s bid was therefore considered the backup bid.<sup>273</sup>

The court, after review of the Manning Declaration, issued the Order Authorizing the Sale of SkyMall on March 27, 2015.<sup>274</sup> In the Order Authorizing the Sale of SkyMall, the court found that SkyMall complied “in all aspects with the Sale Procedures Order.”<sup>275</sup> Further, the

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<sup>267</sup> *Id.* at 5.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* (“[R]epresentatives and advisors of [SkyMall], the Official Committee of Unsecured Creditors (the “Creditors Committee”), the Official Committee of Restricted Security Holders of Xhibit Corp. (the “Equity Committee”), and Connexions Loyalty, Inc. (“Connexions”), and a representative of the [UST] (among others) attended the Auction.”). Order Authorizing Sale, *supra* note 216, at 3.

<sup>272</sup> Manning Declaration, *supra* note 251, at 5.

<sup>273</sup> *Id.*

<sup>274</sup> Order Authorizing Sale of SkyMall, *supra* note 216, 1-2.

<sup>275</sup> *Id.* at 1-2.

Order Authorizing the Sale of SkyMall found that SkyMall, in conjunction with CRCMS, “adequately and appropriately marketed the [Subject Assets];” conducted the sale auction in a “diligent, non-collusive, fair and good faith manner;” and, “the Auction process set forth in the Sales Procedures Order afforded a full, fair and reasonable opportunity for any person or entity to qualify as a bidder, participate in the Auction and to make a higher or otherwise better offer to purchase the [Subject] Assets.”<sup>276</sup>

The Order Authorizing the Sale of SkyMall held that SkyMall’s determination that the C&A bid at auction was the highest and best offer constituted “valid and sound exercise of [SkyMall’s] business judgment.”<sup>277</sup> SkyMall, during the sales process, acted within full compliance of its fiduciary status in performing the sale and auction procedures. The court found that the entire bid, auction, and sale process occurred at an arm’s length, satisfying the good faith requirement pursuant to Section 363(m).<sup>278</sup> The court’s finding that C&A satisfied the good faith requirement of Section 363(m) makes the sale of SkyMall’s assets to C&A marketing a valid, non-appealable, and non-modifiable transaction.<sup>279</sup> Additionally, the court held that any holder of a lien, claim, encumbrance, or other interest was deemed to consent to the sale of SkyMall’s assets, thus making C&A’s purchase free and clear of any liens, claims, encumbrances, and other interests.<sup>280</sup>

Pursuant to the Asset Purchase Agreement approved by the court order, C&A purchased substantially all of SkyMall’s assets for \$1.9 million.<sup>281</sup> According to the Asset Purchase Agreement, the assets acquired by C&A included the following:

- (a) all licenses, permits, franchises and other authorizations of any Governmental Authority relating to the Purchased Assets, and all pending applications therefor (collectively, the “Permits”), but specifically excluding any Excluded Permits (the “Acquired Permits”), to the full extent, if any, that such Acquired Permits are transferable or assignable;

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<sup>276</sup> *Id.* at 3.

<sup>277</sup> *Id.* at 4.

<sup>278</sup> *Id.* at 4.

<sup>279</sup> 11 U.S.C. § 363(m); Order Authorizing Sale of SkyMall, *supra* note 216, at 4. <sup>280</sup> 11 U.S.C. § 363(f) (2); Order Authorizing Sale of SkyMall, *supra* note 216, at 5. <sup>281</sup> Order Authorizing Sale of SkyMall, *supra* note 216, Ex. 1, at 13.

- (b) all Inventory of Seller as of the Closing Date, wherever located, whether in the possession of Seller, in transit, in storage, or in the possession of any third parties and all warranties licenses, releases and agreements, if any, express or implied existing for the benefit Seller in connection therewith, but specifically excluding any Excluded Inventory (the “Acquired Inventory”);
- (c) all furniture, equipment, supplies and other tangible personal property owned by Seller, other than Excluded Equipment, together with all warranties, licenses, releases, service agreements and contractual commitments, if any, express or implied, existing for the benefit of Seller in connection therewith or for operation of the Seller’s business (collectively, the “Acquired Equipment”);
- (d) all accounts receivable of Seller and all other “Accounts” (as defined in the UCC) of Seller (“Accounts Receivable”) generated in the ordinary course of Seller’s business as of the Closing Date, but specifically excluding Avoidance Actions, Excluded Claims and other Excluded Assets described herein and any amounts that represent sales taxes, use taxes or similar taxes that must be remitted by Seller to any taxing authority.
- (e) the Intellectual Property and licenses . . . and any accrued claims or causes of action to enforce or protect any such Intellectual Property, but specifically excluding the Excluded Intellectual Property (the “Acquired Intellectual Property”);
- (f) Telephone numbers, the Website, email addresses and listings;
- (g) any and all of Seller’s advertising materials and related designs, patterns, drawings and specifications, pricing and cost documentation, and marketing materials, including historical or archival materials held by Seller in inventory;
- (h) the Customer Lists (subject to the privacy policies of Seller relating to the information in such lists in effect as of the Petition Date), and all rights and liabilities relating to the Customer Lists (the “Acquired Customer Lists”), but specifically excluding the Excluded Customer Lists;
- (i) to the extent assignable or transferrable, all rights of Seller under all warranties (expressed or implied), representation, indemnities, or guaranties made by third parties to or for the benefit of Seller with respect to the Purchased Assets; and
- (j) all goodwill related to the foregoing.<sup>282</sup>

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<sup>282</sup> *Id. at* Ex. 1, at 9.

The Asset Purchase Agreement set forth all of SkyMall's excluded assets from the Section 363(b) Sale.<sup>283</sup> The assets of SkyMall that were excluded from the sale are as follows:

- (a) all cash and cash equivalents as of the Closing Date (including credit card receivables and checks received prior to the Closing, whether or not deposited or cleared prior to the Closing);
- (b) all land, real property, real property improvements, real property fixtures and appurtenances, and real property leasehold and other real property interests;
- (c) all of Seller's books and records;
- (d) all furniture and equipment deemed by Seller to be necessary: (i) to preserve, access, and maintain all of Seller's and Seller's affiliates' books and records, including without limitation the information and records of Seller and Seller's affiliates' subject to the Subpoena issued by the Securities & Exchange Commission to Seller and/or Seller's affiliates; and (ii) to perform the services and provide access contemplated by the Transition Services Agreement described below (collectively, the "Excluded Equipment"). For the avoidance of doubt, the equipment deemed necessary for the purposes described in the foregoing clauses (i) and (ii) shall include without limitation (x) all computers, computer servers, back-up systems and other electronic data storage and retrieval systems and devices, computer networking equipment and all associated software, programs and licenses for the same, (y) physical records storage furnishings, equipment and systems and (z) telephone, Internet and other communications equipment and related software, programs and licenses for the same;
- (e) all Contracts other than the Acquired Intellectual Property;
- (f) [all Permits set forth on Schedule 2.2 ("Excluded Permits");]
- (g) all of Seller's bank accounts, lockboxes, marketable or other securities, commercial paper, certificates of deposit and other bank deposits and treasury bills;
- (h) all Insurance Policies, including all proceeds thereof and claims in connection therewith;
- (i) all Avoidance Actions and all Claims arising prior to the Closing date (collectively, the "Excluded Claims"), including without limitation, all Claims which Seller may have against (i) any of Seller's Affiliates in respect to intercompany transfers, receivables, guarantees or indemnities, (ii) any Person to the extent related to any Excluded Assets (whether arising before or after the Closing Date), and (iii) any Person (including Governmental Authorities)

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<sup>283</sup> *Id.* Ex. 1 at 10-12.

- for refund or credit of any type with respect to any Taxes paid or accrued with respect to periods ending on or prior to the Closing Time;
- (j) all escrowed funds, security deposits, prepaid deposits or reserves with any vendor, utility or other third party, including, without limitation, funds held in escrow pursuant to that certain Indemnity Escrow Agreement dated as of September 8, 2014 between Seller and Connexions Loyalty, Inc. (“Connexions”);
  - (k) all receivables, rights and Claims from or against Connexions and/or SkyMall Ventures, LLC (“Ventures”) related to: (i) the Membership Interest Purchase Agreement dated as of September 8, 2014 by and among Seller, Connexions and Ventures (the “Ventures Purchase Agreement”); and (ii) the Transition Services Agreement dated as of September 8, 2014 by and between Seller and Connexions, as amended from time to time (“Transition Services Agreement”);
  - (l) all personal records and other records that Seller is required to retain in its possession pursuant to any Applicable Law or is not permitted under Applicable Law to provide to Buyer or that do not exclusively relate to the Business;
  - (m) all rights of Seller under this Agreement or any agreement executed in connection with or relating to this Agreement;
  - (n) the company seal, minute books, charter documents, stock or equity record books and such other records as pertain to the organization, existence or capitalization of Seller;
  - (o) Seller’s directors and officers’ liability insurance policy, executive or incentive compensation, bonus, deferred compensation, pension, profit sharing, savings, retirement, stock option, stock purchase, group life, health or accident insurance, or other employee benefits plan of any kind;
  - (p) all Intellectual Property that is specifically identified on Schedule 2.2 or that is described in Section 2.2(d) (the “Excluded Intellectual Property”);
  - (q) [all Customer Lists that are specifically identified on Schedule 2.2 (the “Excluded Customer Lists”);]
  - (r) The rights of Ventures under the Trademark License Agreement dated as of September 8, 2014 by and between Seller and Ventures, but only for the period ending 90 days after the closing date;
  - (s) The rights of Connexions under the perpetual, royalty-free, fully-paid up license to copy, modify, distribute, install, access, display and otherwise use the proprietary software developed by the Seller, as described in . . . the Ventures Purchase Agreement described above;

- (t) all rebates, price adjustments, adjustments to accounts payable, customer programs, discounts or promotions, and related rights to payment owed to Seller which accrued on or before the Closing date; and
- (u) all equity interests of Seller, including any options, warrants or other securities exchangeable or convertible into equity interests of Seller.<sup>284</sup>

Among the excluded items from the sale, it is notable that the Asset Purchase Agreement provided safeguards to Connexions in order to satisfy its concerns raised in the Connexions and Ventures Objection.<sup>285</sup> Sections 2.2(j-k), (r-s) each provides a safeguard to ensure that Connexions will receive the full benefit it bargained for when it purchased Ventures from SkyMall in 2014.

The Asset Purchase Agreement further provided safeguards to protect the interests of objectors to the Motion to Authorize 363 Sale.<sup>286</sup> The Asset Purchase agreement, as provided above, offered, in complete detail, an accurate listing of all assets to be included and excluded in the Section 363(b) Sale of SkyMall's assets.<sup>287</sup> This detailed accounting of all the assets to be included in the sale satisfies part of the objections brought by the SEC, Connexions, and the Trustee.<sup>288</sup> The Asset Purchase Agreement further provided safeguards in Section 2.2(d) to ensure that SkyMall, after the Section 363(b) Sale, would be in a position to provide all information requested in the subpoena issued by the SEC.<sup>289</sup> Lastly, it appears that the purpose for inclusion of Section 2.2(h) and (o) was to

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<sup>284</sup> *Id.* at Ex. 1, at 10-12.

<sup>285</sup> *Id.* at 10-12; Preliminary Objection, *supra* note 215, at 5-6.

<sup>286</sup> Order Authorizing Sale of SkyMall, *supra* note 216, at Ex. 1, at 10-12. *See* Preliminary Objection, *supra* note 213, at 5-6; SEC Limited Objection, *supra* note 213, at 2; Trustee's Sale Objection, *supra* note 215, 3; Committee Sale Objection, *supra* note 215, 3.

<sup>287</sup> Order Authorizing Sale of SkyMall, *supra* note 216, at Ex. 1, at 10-12.

<sup>288</sup> Preliminary Objection, *supra* note 215, at 5-6; SEC Limited Objection, *supra* note 215, 2; Trustee's Sale Objection, *supra* note 215, 3.

<sup>289</sup> Order Authorizing Sale of SkyMall, *supra* note 215, Ex. 1, at 10-12; SEC Limited Objection, *supra* note 215, 2.

provide the Xhibit Security Holders' some means to recover in the event they chose to pursue an action against the officers or directors of SkyMall.<sup>290</sup>

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<sup>290</sup> Order Authorizing Sale of SkyMall, *supra* note 216, Ex. 1, at 10-12; Preliminary Objection, *supra* note 215, 3. It does appear, however, that the main purpose for inclusion of Section 2.2(0) was to comply with Title I and II of ERISA (the Employee Retirement Income Security Act of 1974, 29 U.S.C. Ch. 18 § 1001 *et seq.*).





## **XII. Payment of CohnReznick Capital Market Securities, LLC**

SkyMall filed an emergency application to employ CRCMS as an investment banker during the course of its Chapter 11 proceeding on January 23, 2015.<sup>291</sup> SkyMall wished to hire CRCMS to perform “financial services and advice primarily [for the purpose of] arranging a potential expedited sale of essentially all of SkyMall’s assets under Section 363 of the Bankruptcy Code.”<sup>292</sup> SkyMall anticipated that CRCMS would be able to provide the following services to help in accomplishing a successful Section 363 Sale:

- a. identify opportunities for the sale of the Debtors’ assets and business;
- b. pursue the sale of [SkyMall];
- c. advise [SkyMall] concerning opportunities for such sales;
- d. as request by [SkyMall], participate in negotiations concerning such sale; and
- e. advis[e] [SkyMall] on other matters that may arise from time to time during this engagement.<sup>293</sup>

As part of the proposed engagement agreement between SkyMall and CRCMS, SkyMall proposed to the court to pay CRCMS fees that included (1) an “Initial Retainer” in the amount of \$50,000; (2) a “Second Retainer” in the amount of \$25,000; and a “Transaction Fee”, whereby SkyMall agreed to pay CRCMS the greater of \$200,000 or 5% of the first \$5 million of consideration involved in the Section 363 Sale with a further three percent (3%) of all consideration in excess of \$5 million.<sup>294</sup> The proposed engagement agreement additionally included that SkyMall would pay any of CRCMS’ out-of-pocket expenses incurred during the sales process that are direct and reasonable—as well as subject to court review and approval.<sup>295</sup>

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<sup>291</sup> Emergency Application for Entry of an order Authorizing the Employment and Retention of CohnReznick Capital Market Securities, LLC as Investment Banker Pursuant to 11 U.S.C. §§ 327 and 328, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “Emergency Application to Employ CRCMS”) (Skymall Files\291 (Emergency Application to Employ CRCMS).pdf).

<sup>292</sup> *Id.* at 4-5.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 5.

<sup>295</sup> *Id.* at 5-6.

Most notable in the proposed engagement agreement between CRCMS and SkyMall, however, is an indemnification provision.<sup>296</sup> In the proposed indemnification provision, SkyMall agreed to:

indemnify and hold harmless CRCMS from and against all claims, direct damages, losses and actual out-of-pocket reasonable expenses, including court costs and reasonably attorneys' fees (collectively, a "Claim") and, at CRCMS' option will defend CRCMS against any Claim, due to CRCMS' provision of services under the agreement other than Claims arising from the gross negligence, bad faith, or willful misconduct of CRCMS or its affiliates.<sup>297</sup>

The Trustee, in its Omnibus Response to First Day Motions, preliminarily objected to the employment of CRCMS.<sup>298</sup> The basis of the UST's preliminary objection rest on two arguments.<sup>299</sup> First, the Trustee asserted that the proposed engagement agreement between SkyMall and CRCMS sought "to restrict the Court's review of [CRCMS'] proposed fees and costs subject to the 11 U.S.C. § 328 improvident standard."<sup>300</sup> Second, the Trustee objected to the inclusion of an indemnification provision contained within the proposed engagement letter.<sup>301</sup> Indemnification provisions, according to the Trustee, are disfavored by the Ninth Circuit Court of Appeals because they are considered prohibited pursuant to 11 U.S.C. § 524(e).<sup>302</sup>

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<sup>296</sup> *Id.* at Ex. 1, at 5-6.

<sup>297</sup> *Id.* at Ex. 1, at 5-6.

<sup>298</sup> First Day Motions Objection, *supra* note 148.

<sup>299</sup> *Id.* at 2-3.

<sup>300</sup> *Id.* at 3.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* (citing 11 U.S.C. § 524(e), *Resorts Int., Inc. v. Lowenschuss*, 67 F.3d 1394, 1402 (9th Cir. 1995), *In re American Hardwoods*, 885 F.2d 621, 626 (9th Cir. 1989), *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985)). In support of its objection, the Trustee cited *In re Pacific Gas & Electric Company*, a decision that held:

This court is bound by, and does not question, the legal principle set forth in *Lowenschuss*, in *In re American Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989), and in *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) that liabilities of nondebtors cannot be discharged.

First Day Motions Objections, *supra* note 148, at 3 (citing *In re Pacific Gas & Electric Company*, 304 B.R.395, 418 n. 26 (Bankr. N.D. Cal. 2004)).

The court on February 2, 2015 entered an interim order approving the employment and retention of CRCMS to act as an investment banker for SkyMall during the course of the Chapter 11 proceeding.<sup>303</sup> In its order, the Court reserved final approval of the employment and retention of CRCMS pending “(i) whether the indemnification provision set forth in Section 6 of the CRCMS Engagement Agreement will be approved; and (ii) whether CRCMS’s proposed compensation structure will be subject to a “reasonableness” standard under 11 U.S.C. § 330 rather than the “improvident” standard under 11 U.S.C. § 328.”<sup>304</sup> Pursuant to 11 U.S.C. § 328, courts in bankruptcy are “expressly granted the power to award compensation different from the terms previously approved if it finds that the original terms ‘prove to have been improvident in light of developments not capable of being anticipated at the time of fixing such terms and conditions.’”<sup>305</sup> On the other hand, the Trustee asserted that CRCMS should be paid pursuant to 11 U.S.C. § 330’s (“Section 330”) “reasonableness” standard.<sup>306</sup> Section 330 requires courts to review compensation using a “reasonableness” standard, which is best exemplified by “the so-called [*Lodestar*] approach—reasonable hours expended multiplied by reasonable hourly rates.”<sup>307</sup>

SkyMall, in response to the UST’s Omnibus Response to First Day Motions, filed a brief to support that employment of CRCMS.<sup>308</sup> In its brief, SkyMall contested the Trustee’s

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<sup>303</sup> Interim Order Approving Emergency Application for Entry of an Order Authorizing the Employment and Retention of CohnReznick Capital Market Securities, LLC as Investment Banker Pursuant to 11 U.S.C. §§ 327 and 328, Dkt. No. 63, *In re SkyMall*, 2:15-bk-00679-BKM (Bankr. D. Ariz. Feb. 3, 2015) (hereinafter, “Interim Order Approving Employment of CRCMS”) (Skymall Files\303 Interim Order Approving Employment of CRCMS.pdf).

<sup>304</sup> *Id.* at 3.

<sup>305</sup> James W. Giddens, *Compensation of Investment Bankers in Bankruptcy Proceedings: Just or Unjust Enrichment?*, 23 ANN. REV. BANKING L. 485, 485 (2004) (Skymall Files\305. COMPENSATION OF INVESTMENT BANKERS IN BANKRUPTCY PROCEEDINGS JUST OR UNJUST ENRI.pdf).

<sup>306</sup> 11 U.S.C. § 330 (file:///Volumes/SkyMall/Skymall%20Files/306.%2011%20U.S.pdf); First Day Motions Objection, *supra* note 148, at 3.

<sup>307</sup> Giddens, *supra* note 305, at 495.

<sup>308</sup> Debtors’ Brief in Support of CohnReznick Capital Market Securities, LLC’s Employment Application, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, “SkyMall’s Brief in Support of CRCMS”) (Skymall Files\308 SkyMall's Brief in Support of CRCMS.pdf).

objections on two grounds.<sup>309</sup> First, SkyMall provided precedent that contradicts the Trustee’s objection in that the indemnification are not *per se* unreasonable, but do require close scrutiny by bankruptcy courts.<sup>310</sup> SkyMall provides six factors that bankruptcy courts commonly use when scrutinizing indemnity provisions in agreements with similar professionals in bankruptcy.<sup>311</sup>

Those factors are:

- (1) The nature of the professional’s services and risk of claims arising from such services.
- (2) The importance to the debtor and the estate of the services to be performed by the professional.
- (3) Whether the provision is standard or common in the applicable industry or market.
- (4) Does the professional ordinarily require such a provision
- (5) The scope of the provision (in particular, are gross negligence, willful misconduct, bad faith excluded).
- (6) Is the indemnity provision consistent with applicable non-bankruptcy law.<sup>312</sup>

SkyMall asserted that its engagement agreement with CRCMS satisfies all of the aforementioned factors.<sup>313</sup>

SkyMall additionally responded to the Trustee’s Objection that requested application of the Section 330 “reasonableness” standard.<sup>314</sup> In response to the Trustee’s objection that CRCMS’s fees should be subject to a “reasonableness” standard pursuant to 11 U.S.C. § 330, SkyMall’s argument focused on Ninth Circuit precedent that permitted contingency fees for investment bankers “so long as the fee (and other terms and conditions of the retention) are reasonable.”<sup>315</sup> Contingency fees, as a matter of law, remain subject to the improvident standard

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<sup>309</sup> *Id.* at 3-8.

<sup>310</sup> *Id.* at 3.

<sup>311</sup> *Id.* at 3-4.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 4-5.

<sup>314</sup> *Id.* at 6.

<sup>315</sup> *Id.*

of Section 328 once approved under Ninth Circuit precedent.<sup>316</sup> SkyMall asserted that the engagement letter and transaction fees between itself and CRCMS are reasonable and therefore do not require review under the Section 330 reasonableness standard.<sup>317</sup>

The Court, taking into consideration the Trustee's reply brief that reiterated the same argument presented in the Trustee's objection, issued its Final Order Authorizing the Employment and Retention of CRCMS as Investment Banker Pursuant to 11 U.S.C. §§ 327 and 328.<sup>318</sup> In essence, the Final Order Authorizing Employment of CRCMS approved the engagement agreement between SkyMall and CRCMS as written.<sup>319</sup> Both the objected-to indemnification agreement and contingency fee model were approved by the court under the 11 U.S.C. § 328 "improvident" standard.<sup>320</sup> Upon conclusion of CRCMS's work in completing the Section 363 Sale, the court approved all of CRCMS's fees—totaling in the amount of \$239,153.51.<sup>321</sup>

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<sup>316</sup> *Id.* at 7 (citing *In re Reimers*, 972 F.2d 1127, 1129 (9th Cir. 1992)).

<sup>317</sup> *Id.* at 6.

<sup>318</sup> United States Trustee's Response to Debtors' Brief in Support of CohnReznick Capital Market Securities, LLC's Employment Application, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "UST's Reply Brief in Opposition to CRCMS' Employment") (Skymall Files\318 UST Reply Brief in Opposition.pdf); Final Order Authorizing Employment and Retention of CohnReznick Capital Market Securities, LLC as Investment Banker Pursuant to 11 U.S.C. §§ 327 and 328, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (hereinafter, "Final Order Authorizing Employment of CRCMS") (Skymall Files\318 Final Order Authorizing Employment of CRCMS.pdf). In the UST's Reply Brief in Opposition to CRCMS' Employment, the UST reiterated that Ninth Circuit precedent establishes that indemnification provisions are generally disfavored and must be reasonable. Further, the UST provided a recent Ninth Circuit case in which a CRCMS competitor agreed to employment without use of an indemnification agreement.

<sup>319</sup> Final Order Authorizing Employment of CRCMS, *supra* note 318, at 3-4.

<sup>320</sup> *Id.* at 3-4.

<sup>321</sup> Order Approving First and Final Fee Application of CohnReznick Capital Market Securities, LLC, as Investment Banker for Allowance and Payment of Compensation and Reimbursement of Expenses, SkyMall, LLC, Docket No. 2:15-bk-00679 (Bankr. D. Ariz. Jan 22, 2015), Court Docket (Skymall Files \321 Order Approving First and Final Fee Application.pdf).



### **XIII. Analysis of *In re SkyMall***

#### **a. The Pros and Cons of a Section 363(b) Sale**

SkyMall's Section 363(b) Sale is another example of the "increasingly us[ed] [Section] 363 [Sale] as an alternative exit from bankruptcy to minimize the expense and duration of the process."<sup>322</sup> Scholars, while recognizing the growing trend of Section 363 Sales in Chapter 11 bankruptcies, criticize the process, stating that "[Section] 363 sales are 'fraught with potential for abuse' or it 'hijack[s] [C]hapter 11' or 'side-step[s] creditor protections'."<sup>323</sup> Despite its criticisms, the Section 363(b) sale does clearly have its benefits to troubled companies forced to file a Chapter 11.<sup>324</sup> Because Section 363 Sales can be accomplished with expediency, "[Section] 363 [S]ales offer a number of advantages over a traditional reorganization."<sup>325</sup> Moreover, a sale in Chapter 11, for debtor's hard pressed by asset-valuation losses the longer the sale continues, may be a more effective way at liquidating assets to receive a greater value than if the debtors had filed for a Chapter 7.

The ability for bankrupt companies to expediently accomplish a Section 363 Sale is beneficial in that it reduces the time and costs necessary to accomplish a full reorganization under Chapter 11.<sup>326</sup> In the instant case, SkyMall proposed and accomplished the sale of substantially all of its assets in the time between January 23, 2015, and March 27, 2015.<sup>327</sup> A Chapter 11 sell-off can also benefit the court as well by lowering the additional expenses related

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<sup>322</sup> Elizabeth B. Rose, *Chocolate, Flowers, and S 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 249 (2006) (Skymall Files\173. CHOCOLATE FLOWERS AND 363(B) THE OPPORTUNITY FOR SWEETHEART DEALS WITHOUT CHAP.pdf).

<sup>323</sup> *Id.* at 249 (citing Admin. of Large Bus. Bankr. Reorganizations: Has Competition for Big Cases Corrupted The Bankruptcy System?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 108th Cong. 15 (2004); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 25 (2004) (Skymall Files\323. HIJACKING CHAPTER 11.pdf); Craig A. Sloane, *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 EMORY BANKR. DEV. J. 37, 45 (1999)) (Skymall Files\323. THE SUB ROSA PLAN OF REORGANIZATION SIDE-STEPPING CREDITOR PROTECTIONS IN CHAPTE.pdf).

<sup>324</sup> Kling, *supra* note 173, at 260 (2012).

<sup>325</sup> *Id.* at 260.

<sup>326</sup> *Id.* at 262.

<sup>327</sup> See Motion to Authorize 363 Sale, *supra* note 188, at 1; Order Authorizing Sale of SkyMall, *supra* note 216, at 1.



to a bankruptcy proceeding. An expedient Section 363 Sale “can dramatically reduce the administrative expenses that would otherwise be incurred in managing the estate during the reorganization process, which are generally proportionate to the length of the reorganization process.”<sup>328</sup> The benefits of a 363 Sale flow not only to the debtor who wants to receive a fast sell-off, but also to the court, which can avoid the burgeoning administrative expenses typically associated with the longer, more drawn out Chapter 11 reorganization.

Furthermore, Section 363 Sales are beneficial by providing potential purchasers the ability to buy all or substantially of the bankrupt company’s assets.<sup>329</sup> The ability for bankrupt companies to utilize Section 363 provides the potential to sell “the assets of a business as unit, rather than in piecemeal liquidation.”<sup>330</sup> The benefits of marketing and selling a company in a Chapter 11 proceeding may ultimately inure to the benefit of the estate by capturing the value of the company as a going concern.<sup>331</sup> CRCMS’s logic in suggesting SkyMall’s Section 363 Sale as part of the Chapter 11 process exemplifies the notion that a Section 363 Sale will benefit the creditors when a company’s assets are worth more when being sold as a going concern, instead of being sold within the Chapter 7 context.<sup>332</sup>

Perhaps an overlooked, but nonetheless important benefit, of the Section 363 Sale is that the proceeds derived from the sale are easier to dispense in accordance with a Chapter 11 plan and liquidating trust.<sup>333</sup> The Section 363 Sale converts all or substantially all of the debtor’s assets into “fungible valuable consideration.”<sup>334</sup> As opposed to the traditional Chapter 11 process, in which a debtor in possession or Trustee is responsible for creation and implementation of a reorganization plan and liquidating trust, “the tasks and costs of [post-

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<sup>328</sup> Kling, *supra* note 173, at 262-263 (citing Samuel L. Bufford, *Chapter 11 Case Management and Delay Reduction: An Empirical Study*, 4 Am. Bankr. Inst. L. Rev. 85, 92 (1996)).

<sup>329</sup> George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process As an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1270 (2004) ((SkyMall Files\173. A NEW APPROACH TO SECTION 363(F)(3).pdf).

<sup>330</sup> *Id.* at 1270.

<sup>331</sup> *Id.*

<sup>332</sup> Motion to Authorize 363 Sale, *supra* note 188, at 3. *See* Kuney, *supra* note 329, at 1270.

<sup>333</sup> Kling, *supra* note 173, at 263; Kuney, *supra* note 329, at 1270-71.

<sup>334</sup> Kling, *supra* note 173, at 263; Kuney, *supra* note 329, at 1270-71.

Section 363 Sale] management and administration of a debtor and its estate can be dramatically reduced.”<sup>335</sup> Thus, the proceeds generated from a Chapter 363 Sale are preferential in distributing a Chapter 11 plan because “it takes little in the way of a management team to preside over an estate comprised solely of liquid assets.”<sup>336</sup>

Despite its benefits, the Section 363 Sale is a divergence from the originally intended use.<sup>337</sup> In creating Section 363, the drafters intended Section 363 to “concern[] only expedited sales that were imperative to preserve values that would rapidly diminish.”<sup>338</sup> Prior to the enactment of the Bankruptcy Reform Act of 1973, Section 363 Sales “required sufficient showing of cause for circumventing standard Chapter 11 reorganization plans.”<sup>339</sup> Today, as in *In re SkyMall*, it is apparent the standard required to permit a Section 363 have relaxed substantially from the original showing required.<sup>340</sup>

The current status quo for implementation of Section 363 Sales has received criticisms “includ[ing:] the vast power afforded to large creditors and/or existing management, the potential for “sweetheart deals,” less required disclosure than reorganization plans, and the circumvention of the creditor committees and their interests.”<sup>341</sup> This stems mainly from bankruptcy court’s use of the business judgment standard, which receives “very broad application by the courts.”<sup>342</sup> The use of this broadly applied business judgement standard can lead to an undervaluation of

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<sup>335</sup> Kuney, *supra* note 329, at 1271.

<sup>336</sup> *Id.*

<sup>337</sup> Kimon Korres, *Bankrupting Bankruptcy: Circumventing Chapter 11 Protections Through Manipulation of the Business Justification Standard in S 363 Asset Sales, and A Refined Standard to Safeguard Against Abuse*, 63 FLA. L. REV. 959, 964 (2011) (citing Robert G. Sable, et al., *When the 363 Sale Is the Best Route*, 15 J. BANKR. L. & PRAC. 2 art. 2, at 1 (2006) (Skymall Files\337.

BANKRUPTING BANKRUPTCY CIRCUMVENTING CHAPTER 11 PROTECTIONS THROUGH MANIPULATION.pdf).

<sup>338</sup> *Id.* at 965.

<sup>339</sup> *Id.*

<sup>340</sup> Order Authorizing Sale of SkyMall, *supra* note 216, at 1-4; Korres, *supra* note 337, at 964.

<sup>341</sup> Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 97 (2012) (citations omitted) (Skymall Files\341. SECTION 363 SALES MOOTING DUE PROCESS.pdf).

<sup>342</sup> Korres, *supra* note 339, at 964.

assets.<sup>343</sup> Theoretically, Section 363 Sales should allow for a healthy economy to set fair economic values for the company being sold through Chapter 11.<sup>344</sup> However, “the lack of transparency, the pace of the process, and the inconsistent treatment by the courts . . . leave the bankruptcy courts and parties in interest vulnerable unfair dealing, abuse, and sweetheart deals.”<sup>345</sup> Substantially all of SkyMall was sold to C&A in the present case for a total value of \$1.9 million.<sup>346</sup> This seems to be a low number for a company that totaled \$130 million in revenues a mere six years prior.<sup>347</sup>

Despite the potential for risks, it appears that the Section 363 Sale is an efficient way to take a troubled company through Chapter 11.<sup>348</sup> In the instant case, SkyMall was able to complete its Section 363 Sale in matter of three months.<sup>349</sup> The \$1.9 million sale price for substantially all of SkyMall’s assets does not seem to be such a “sweetheart” deal when analyzed in light of the triggering factors that led SkyMall into bankruptcy.<sup>350</sup> C&A marketing purchased substantially all of SkyMall out of bankruptcy—a company that could no longer successfully continue the business strategy that once made it a successful company.<sup>351</sup> If SkyMall is going to become successful again, it must create a new business and marketing strategy. It seems that SkyMall represents another successful example of the ever-growing use of Section 363 Sale as

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<sup>343</sup> *Id.* at 968-969.

<sup>344</sup> *Id.* at 968.

<sup>345</sup> Rose, *supra* note 324, at 251.

<sup>346</sup> See Motion to Authorize 363 Sale, *supra* note 188, at 3.

<sup>347</sup> See generally Barish, *supra* note 20.

<sup>348</sup> See Korres, *supra* note 339, at 964.

<sup>349</sup> See Motion to Authorize 363 Sale, *supra* note 188, at 1; Order Authorizing Sale of SkyMall, *supra* note 216, at 1.

<sup>350</sup> Order Authorizing Sale of SkyMall, *supra* note 216, Ex. 1, at 13; see also Conarck, *supra* note 37.

<sup>351</sup> Order Authorizing Sale of SkyMall, *supra* note 216, Ex. 1, at 13; see also Conarck, *supra* note 37.

an alternative to the traditional Chapter 11 process.<sup>352</sup> Maybe, one day, SkyMall will be able to take flight once more.

Even though SkyMall appears to be a company that benefitted from the use of a Section 363 Sale, the criticisms of the Section 363 Sale, and its potential for corruption, will continue because “nonplan sale practice occurs nationwide under a variety of locally developed procedure and without clear statutory or nation rule-based authorization and guidance.”<sup>353</sup> The growth in use of the Section 363 Sale process presents and expansion on the statute’s intended scope.<sup>354</sup> Therefore, in order to ensure that Chapter 11 Section 363 Sales are afforded the same procedural protections as the plan process, Congress should enact amendments to the Bankruptcy Code.<sup>355</sup> Professor George W. Kuney (“Professor Kuney”), a University of Tennessee Law Professor, proposed amendments that embrace the utility of the Section 363 Sale process in both Chapters 7 and 11.<sup>356</sup>

In the proposed amendments, Professor Kuney seeks to provide a statutory framework that accepts the Section 363 Sale’s function—whether or not intended by its drafters—while providing additional procedural safeguards *a la* the traditional Chapter 11 plan confirmation process.<sup>357</sup> Professor Kuney asserts that:

Very few statutory amendments are needed to put an explicit nonplan sale procedure into effect. The key is to properly define a ‘nonplan sale,’ and then to amend the substantive statutes and rules involved, providing a process for such a sale that mimics the plan confirmation process enough to satisfy due and appropriate process requirements at the least possible expense in terms of time and money. By using a process that is procedurally parallel to the plan confirmation process, this nonplan sale process would be familiar to, and draw upon, well-developed precedent from bankruptcy courts and practitioners nationwide. But by focusing just the disposition of certain assets in the process, rather than a plethora of issues, transactions, and distribution implicated in a full-

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<sup>352</sup> Rose, *supra* note 324, at 249.

<sup>353</sup> See Kuney, *supra* note 329, at 1304-05.

<sup>354</sup> See *Id.* at 1269.

<sup>355</sup> See *Id.* at 1266-87.

<sup>356</sup> See *Id.* at 1286-88.

<sup>357</sup> See *Id.* at 1296-88.

blown plan of reorganization, the process should be efficient enough to avoid becoming the murky, sticky bog that the Chapter 11 plan process often becomes.<sup>358</sup>

As Professor Kuney suggests, the use of the Section 363 Sale has grown into a well-adopted route a Chapter 11 bankruptcy may take.<sup>359</sup> Therefore, Congress should consider amending the current bankruptcy code to provide the procedural safeguards that the plan confirmation process offers to ensure that Section 363 Sales do not abridge on creditor's rights or lead to corrupt bankruptcy practices because the nonplan sales process' utility is clearly exemplified by use as a common alternative to the traditional Chapter 11 process.

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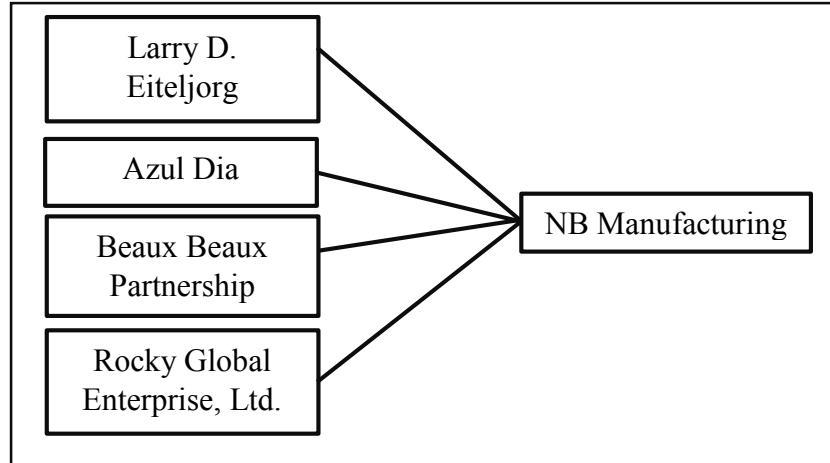
<sup>358</sup> *Id.* at 1286-87.

<sup>359</sup> *See id.* at 1269.

Appendix

Table 1: (Formation of Xhibit Corp.)

Figure 1: The Purchase of the Shell Company

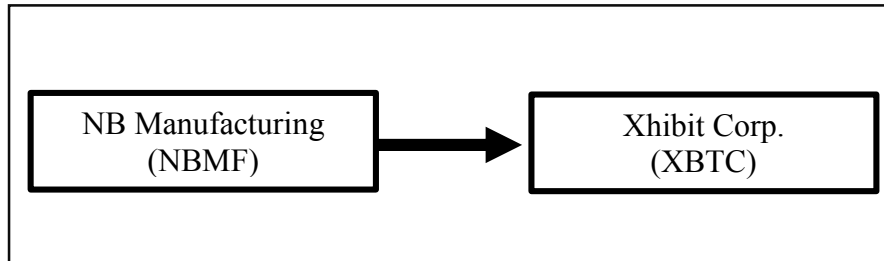


Larry D. Eiteljorg, Azul Dia, Beaux Beaux Partnership, and Rocky Global Enterprise, Ltd. purchase 72% of NB Manufacturing’s stock, thus giving them a controlling share of NB Manufacturing.<sup>360</sup> The four purchasers “bought 1,189,190 shares for a total amount likely not exceeding \$345K (\$0.29/share x 1189.2k shares).<sup>361</sup>

<sup>360</sup> Isaac Silberman, *Xhibit Corp: Management's Shady Ties, Millions Of Shares Issued For Pennies And Absurd Valuation Suggest At Least 80% Downside For This \$290M 'Cloud' Stock*, SEEKING ALPHA Jan. 7, 2013, available at <http://seekingalpha.com/article/1097851-xhibit-corp-managements-shady-ties-millions-of-shares-issued-for-pennies-and-absurd-valuation-suggest-at-least-80-percent-downside-for-this-290m-cloud-stock?page=2>.

<sup>361</sup> *Id.*

Figure 2: Rename the Shell Company

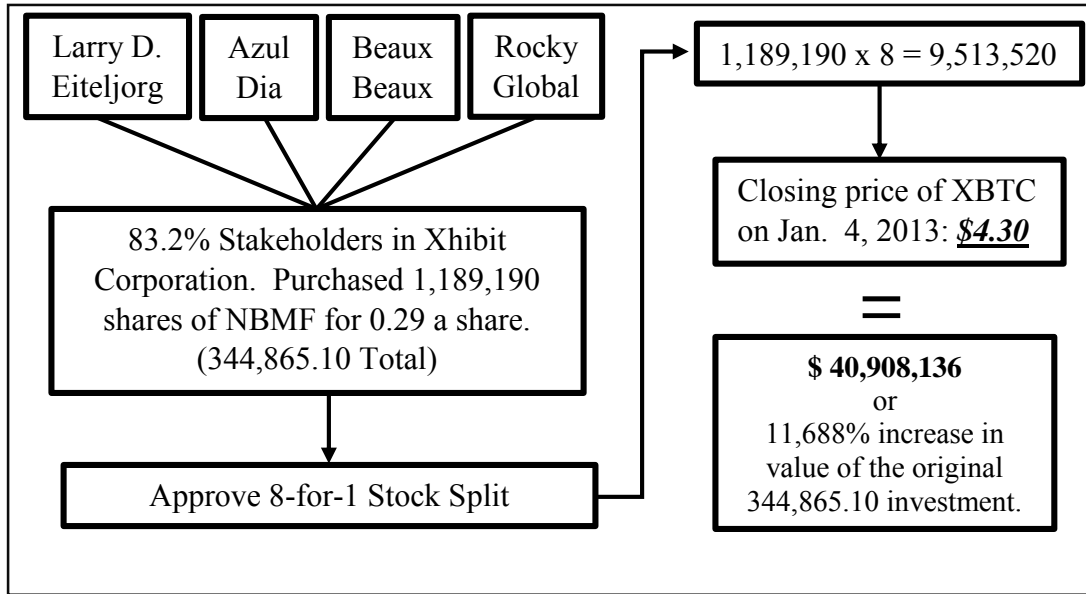


On November 13, 2012 NB Manufacturing, Inc. announced “an official name and stock ticker symbol change to Xhibit Corp.; stock symbol OTCQB:XBTC effective with the commencement of trading on November 13, 2012.”<sup>362</sup>

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<sup>362</sup> Xhibit Corp., *NB Manufacturing Announces Name Change to Xhibit Corp. and New Ticker Symbol XBTC, Both To Become Effective November 13, 2012*, PRNEWswire (Nov. 13, 2012), available at <http://www.prnewswire.com/news-releases/nb-manufacturing-announces-name-change-to-xhibit-corp-and-new-ticker-symbol-xbtc-both-to-become-effective-november-13-2012-179081911.html>.

Figure 3: Stock Split



On March 1, 2012, Xhibit Corp.’s controlling shareholders—Larry D. Eiteljorg, Azul Dia, Beaux Beaux Partnership, and Rocky Global Enterprise, Ltd.—performed an 8-for-1 stock split.<sup>363</sup> On January 4, 2013, five months prior to Xhibit Corp.’s purchase of SkyMall, the controlling shareholders’ nominal value over their stock had increased 11,688% from \$350,000 to \$40,908,136.<sup>364</sup>

<sup>363</sup> See *supra* note 360.

<sup>364</sup> *Id.*



Appendix

Table 2: (Merger of Xhibit Corp. and SkyMall)

Figure 1: Xhibit Merger with SkyMall

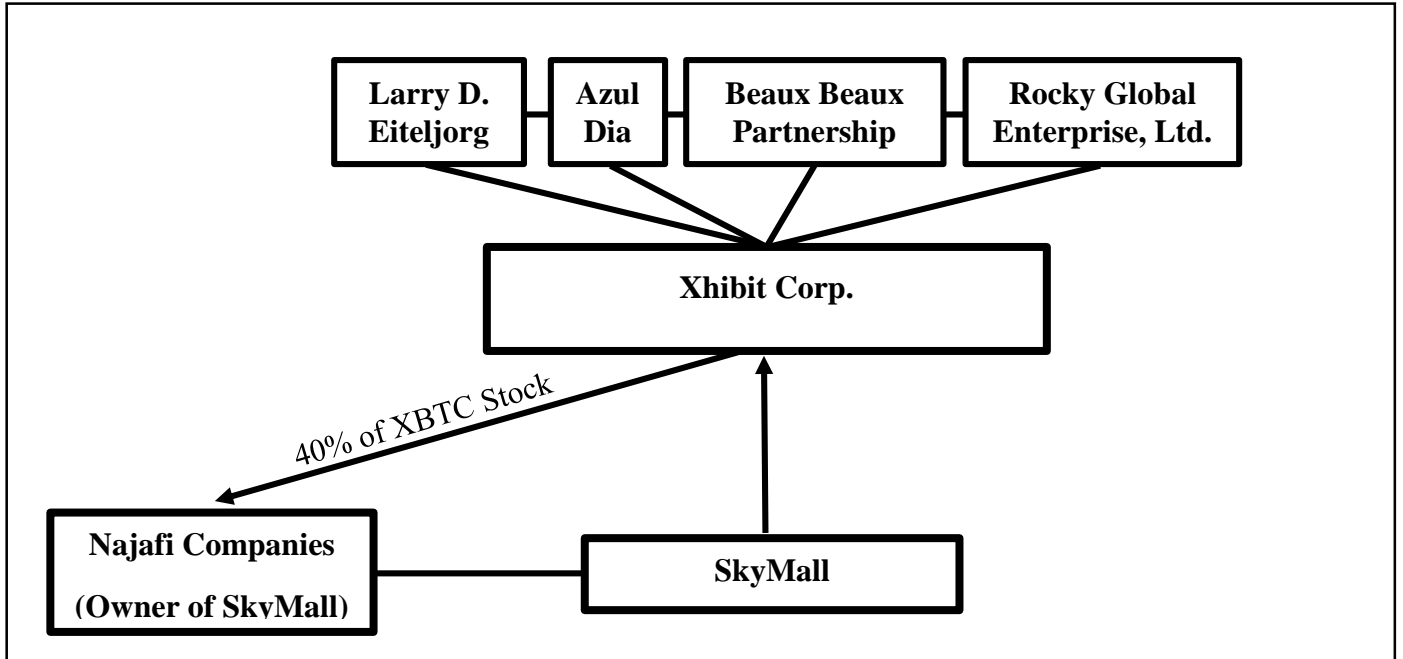


Figure 2: Xhibit & SkyMall Post-Merger

