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9

10 **IN THE UNITED STATES BANKRUPTCY COURT**  
11 **FOR THE DISTRICT OF ARIZONA**

12 In re:  
13 SKYMALL, LLC,  
14 Debtor.

15 Joint Administration pending with:

16 XHIBIT CORP.,  
XHIBIT INTERACTIVE, LLC,  
17 FLYREPLY CORP.,  
SHC PARENT CORP.,  
18 SPYFIRE INTERACTIVE, LLC,  
STACKED DIGITAL, LLC, and  
19 SKYMALL INTERESTS, LLC.

In Proceedings Under Chapter 11

Case No. 2:15-bk-00679-BKM

Joint Administration pending with  
Case Nos.:

2:15-bk-00680-MCW  
2:15-bk-00682-MCW  
2:15-bk-00684-DPC  
2:15-bk-00685-MCW  
2:15-bk-00686-MCW  
2:15-bk-00687-GBN  
2:15-bk-00686-EPB

20 This Pleading applies to:

- 21  All Debtors  
22  Specified Debtor

23 SKYMALL, LLC

**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**

24  
25 **Hearing Date: January 27, 2015**  
26 **Hearing Time: 1:30 P.M.**

1 SKYMALL, LLC, *et al.*, the debtors and debtors-in possession (the “**Debtors**”) in the  
2 above-captioned Chapter 11 cases (the “**Bankruptcy Cases**”), hereby move this Court for entry  
3 of orders (i) authorizing a sale of the Subject Assets (defined below) of Debtor SkyMall, LLC  
4 (“**SkyMall**”) free and clear of all claims, liens, encumbrances, and other interests pursuant to  
5 Bankruptcy Code § 363(f) through an auction sale as described herein, (ii) in conjunction with the  
6 sale, approving the assumption and assignment of certain executory contracts and unexpired  
7 leases, (iii) authorizing bidding and related sale procedures for the auction sale, (iv) scheduling a  
8 sale hearing and approving notice thereof, and (v) granting related relief as detailed herein.

9 This Motion is supported by the following Memorandum of Points and Authorities, the  
10 *Declaration Of Scott Wiley In Support Of First Day Motions* (the “**First Day Declaration**”), and  
11 the entire record before the Court in these Bankruptcy Cases.

12 RESPECTFULLY SUBMITTED this 23rd day of January, 2015.

13 QUARLES & BRADY LLP  
14 Renaissance One  
15 Two North Central Avenue  
16 Phoenix, AZ 85004-2391

17 By */s/ John A. Harris* \_\_\_\_\_

18 John A. Harris  
19 Robert P. Harris  
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21 Jason D. Curry

22 Proposed Attorneys for Debtors and Debtors-in-  
23 Possession  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. BACKGROUND.**

3 1. On January 22, 2015 (the “**Petition Date**”), the Debtors filed voluntary petitions in  
4 this Court for relief under Chapter 11 thereby commencing the Bankruptcy Cases.<sup>1</sup>

5 2. The Debtors continue to operate their businesses and manage their assets and  
6 affairs as debtors in possession under Bankruptcy Code §§ 1107 and 1108.

7 3. The Court has jurisdiction over these Bankruptcy Cases under 28 U.S.C. §§ 157  
8 and 1334. This Motion presents a core proceeding under 28 U.S.C. § 157(b)(2).

9 4. The Debtors’ principal place of business is located in Maricopa County, Arizona.  
10 Accordingly, venue of the Bankruptcy Cases is proper in the District of Arizona under 28 U.S.C.  
11 §§ 1408 and 1409.

12 5. The statutory predicates for the relief requested in this Motion are Bankruptcy  
13 Code §§ 105, 363 and 365.

14 6. No trustee or examiner has been appointed in these Bankruptcy Cases, nor has an  
15 official committee of unsecured creditors been established.

16 7. The general background relevant to the Debtors and this Motion is stated in the  
17 First Day Declaration, which is incorporated herein by this reference.

18 8. The Debtors have filed this Motion seeking authority to market and sell  
19 substantially all assets of SkyMall (collectively, the “**Subject Assets**”) through an auction process  
20 as provided herein. The Subject Assets include, without limitation, SkyMall’s (i) intellectual  
21 property, (ii) furniture, fixtures and equipment, (iii) inventory, (iv) customer lists, (v) accounts  
22 receivable, (vi) interests under contracts and unexpired leases, (vii) interests in real estate and  
23 fixtures, and (viii) other assets comprising SkyMall’s going concern business. The Subject Assets  
24

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25 <sup>1</sup> Unless otherwise indicated, all chapter and section references in this Motion are to  
26 Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* All “Rule” references are to the Federal Rules of  
Bankruptcy Procedure.

1 will not include, however, the following excluded assets (collectively, the “**Excluded Assets**”):  
2 (i) cash, security deposits, or other cash equivalents; (ii) avoidance actions pursuant to  
3 Bankruptcy Code §§ 544, 545, 547, 548, 549, and 553(b) and any proceeds therefrom; and (iii)  
4 certain other estate claims and causes of action. The Debtors may request approval pursuant to  
5 this Motion to sell all or part of the Subject Assets through the auction process to one or more  
6 buyers.

7 9. As discussed in the First Day Declaration, SkyMall attempted throughout the  
8 fourth quarter of 2014 to obtain additional operating capital. SkyMall explored various financing  
9 alternatives for both near-term and for longer term financing, but was unable to attract the  
10 necessary working capital on terms or in amounts sufficient to meaningfully address its liquidity  
11 needs.

12 10. Before the commencement of the Bankruptcy Cases, the Debtors retained the  
13 investment banking firm of CohnReznick Capital Market Securities, LLC (“**CRCMS**”) to explore  
14 and pursue a possible sale or other strategic options for the Debtors to, among other things,  
15 maximize the value of the SkyMall assets.

16 11. CRCMS believes that SkyMall’s assets are likely to be substantially more valuable  
17 if they can be marketed and sold as a going concern. Accordingly, the Debtors are attempting to  
18 sustain their scaled-down business operations as a going concern during the contemplated sale  
19 process.

20 12. An expeditious sale process is very important. Based on the cash reserves  
21 SkyMall has as of the Petition Date and the Debtors’ projection of the likely business and revenue  
22 performance of the scaled-down SkyMall business operations, the Debtors believe that they can  
23 maintain the SkyMall business operation during the contemplated marketing and sale process.  
24 However, because of the substantial risks and uncertainties regarding continued business  
25 operations, it is critical that the marketing and sale process is completed within the contemplated  
26

1 time frame. (The Debtors propose that the sale process will go forward whether or not the  
2 Debtors are able to continue the SkyMall business as a going concern through the scheduled sale.)

3 13. At this point, the Debtors have not approved a stalking horse agreement for the  
4 sale of the Subject Assets. The Debtors reserve the right to request the Court to approve a  
5 proposed stalking horse agreement (and address any request for bid protections by a stalking  
6 horse bidder) before the auction after marketing efforts by CRCMS.

7 **II. PROPOSED BIDDING PROCEDURES AND AUCTION.**

8 14. The Debtors will pursue a marketing effort in an effort to attract competing bidders  
9 for an auction (the “**Auction**”) to select the highest and/or best bid (or bids). The Debtors  
10 propose to hold the Auction on **March 24, 2015.**

11 15. The Debtors propose the following timeline for the sale process, Auction, and  
12 hearing on the approval of the sale:

13 Deadline for Debtors to Identify Any Stalking Horse Bid <sup>2</sup>	March 12, 2015
14 Deadline for Prequalification 15 Submissions by Bidders	March 17, 2015
16 Deadline for Submission of Bids	March 19, 2015
17 Auction Date	March 24, 2015
18 Sale Hearing	March 26, 2015 (subject to Court’s 19 calendar)
20 Sale Closing	April 15, 2015

21 16. Pursuant to this Motion, the Debtors seek entry of a Sale Procedures Order in the  
22 form attached hereto as **Exhibit A**. Among other things, the proposed Sale Procedures Order  
23  
24

25 <sup>2</sup> If the Debtors identify a Stalking Horse Bid, the Debtors will request that the Court hold a  
26 hearing prior to the Auction to consider approval of that bid as a Stalking Horse Bid, and to  
consider any bid protections requested by the party making the Stalking Horse Bid.

1 authorizes bidding and related sale procedures for the proposed Auction as set forth in Exhibit 1  
2 to the Sale Procedures Order (the “**Sale Procedures**”).

3 17. The primary terms of the proposed Sale Procedures are summarized as follows:<sup>3</sup>

4 a. Overview of the Process. The Debtors intend, with the assistance  
5 of CRCMS, to market the opportunity to purchase the Subject Assets as widely as  
6 possible. The process contemplates that bidders will conduct their due diligence  
7 prior to making bids for the Subject Assets on an as is/where is basis, and that the  
8 qualified bids will not contain any material due diligence or financing  
9 contingencies.

10 b. Right to Determine Highest and Best Bid. The Debtors, in  
11 consultation with the Official Committee of Unsecured Creditors (the  
12 “**Committee**”), if appointed, will have the sole and exclusive right to negotiate any  
13 offer made for the purchase of the Subject Assets and to determine the highest and  
14 best offer, subject to bankruptcy court review and approval. In evaluating whether  
15 a bidder has submitted the highest and best offer, the Debtors may consider,  
16 among other things: (i) the purchase price proposed in the offer; (ii) the bidder’s  
17 financial condition and ability to close; (iii) any proposed modifications to the  
18 Asset Purchase Agreement template that will be provided by the Debtors (the  
19 “**APA Template**”), including any contingencies that must be satisfied prior to  
20 closing; and (iv) the probability that a prompt closing will occur.

21 c. Stalking Horse Agreement. The Debtors reserve the right to request  
22 the Court to later approve a proposed Asset Purchase Agreement as a stalking  
23 horse agreement (the “**Stalking Horse Bid**”). Any such request by the Debtors  
24 will be filed with the Court on or before March 12, 2015.

25 d. Prequalification. On or before March 17, 2015, prospective bidders  
26 are required to submit certain information to the Debtors to demonstrate the  
financial wherewithal to consummate the potential transaction under the terms and  
conditions of these Sale Procedures. The Debtors, in consultation with the  
Committee, shall have sole discretion to determine that a bidder is prequalified  
 (“**Prequalified Bidder**”).

e. Due Diligence Requests. Due diligence inquiry will be directed to  
CRCMS. Each bidder is solely responsible for conducting its own due diligence  
and must complete its due diligence prior to the submission of its bid.

f. Deadline for Submission of Bids. The deadline for submitting all  
bids is March 19, 2015 (“**Bid Deadline**”).

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<sup>3</sup> The summary of the Sale Procedures stated in this Motion does not modify or limit the proposed Sale Procedures or Sale Procedures Order, which control over the summary of primary terms contained herein.

1 g. Submission of Bids. All bids will provide that they are subject to  
2 the approval of the Bankruptcy Court. A bid to purchase the Subject Assets must  
3 be written in electronic form submitted only by a Prequalified Bidder, and must  
4 include (among other things) a required deposit for a bid (a “**Deposit**”) of  
5 \$500,000, and an executed Asset Purchase Agreement based on a template that  
6 will be provided by the Debtors.

7 h. Qualification of Bid. After a Prequalified Bidder has delivered a  
8 bid as provided above, the Debtors, in consultation with their advisors and the  
9 Committee, will determine whether the Prequalified Bidder (i) has demonstrated  
10 the financial capacity to consummate the purchase of the Subject Assets, (ii) is  
11 reasonably likely to be able to and willing to consummate the proposed  
12 transactions, and (iii) has otherwise timely satisfied the requirements described in  
13 the prior paragraph. If so, the Debtors will designate a Prequalified Bidder as a  
14 “Qualified Bidder” and such bid as a “**Qualified Bid.**”

15 i. Auction. In the event the Debtors receive two or more Qualified  
16 Bids (including the Stalking Horse Bid, if any), the Debtors will conduct an  
17 auction sale (the “**Auction**”) at which the parties that have submitted Qualified  
18 Bids (including the Stalking Horse Bid, if any) may participate. If necessary, the  
19 Auction will be held on March 24, 2015 at 10:00 a.m. (Mountain Standard Time),  
20 or such later time as the Debtors may designate. CRCMS will direct and preside  
21 over the Auction at the direction of the Debtors, in consultation with their other  
22 advisors and the Committee. The Debtors may, in their discretion, offer the  
23 Subject Assets for sale by the lot or in bulk.

24 j. Prevailing Bidder(s). For its Qualified Bid to be considered, a duly  
25 authorized representative of a Qualified Bidder must appear in person at the  
26 Auction, unless alternative arrangements satisfactory to the Debtors have been  
made. The Auction will commence with the announcement of the highest  
Qualified Bid for each lot and for the bulk sale of the Subject Assets, and bidding  
will proceed in such manner and on such terms as are announced by the Debtors at  
the time of the Auction. Among other things, the Debtors may establish a  
minimum bidding increment at the Auction. At the conclusion of the Auction the  
Debtors will announce the highest bid combination (the “**Prevailing Bidder**” or  
“**Prevailing Bidders**”). The Debtors, in consultation with their advisors and the  
Committee, may conduct the Auction in the manner they believe will be in the best  
interests of the estate. Each Prevailing Bidder will be required to increase the  
Deposit under its Asset Purchase Agreement to at least 10% of the bid no later  
than the time of the Sales Hearing.

k. Backup Bids. If for any reason the Prevailing Bidder fails to timely  
close the sale of the Subject Assets, the Debtors will have the right to close the sale  
of the Subject Assets pursuant to the Qualified Bid(s) designated at the Auction as  
the second highest and best offer (the “**Backup Bid(s)**”) and approved by the  
Court at the Sale Hearing.

l. Sale Hearing. There will be a hearing (the “**Sale Hearing**”) to  
consider any objections to the Sale Motion and to approve the sale of the Subject  
Assets (and related assignments of executory contracts and unexpired leases) to the  
Prevailing Bidder or Prevailing Bidders.

1           18.     In addition to the approval of the Sale Procedures, the Debtors also request that the  
2 Court schedule the Sale Hearing and related objection deadlines, and approve a notice regarding  
3 the Auction and a notice to parties to executory contracts and unexpired leases that may be  
4 assigned in conjunction with the sale.

5     **III. RELIEF REQUESTED.**

6           Through this Motion, the Debtors seek the entry of two orders. First, the Debtors seek  
7 entry of the Sale Procedures Order in the form attached hereto as Exhibit A, approving the  
8 proposed Sale Procedures, scheduling the Sale Hearing, and granting related relief. Second, the  
9 Debtors request that the Court enter an Order approving the sale of some or all of the Subject  
10 Assets free and clear of all claims, liens, encumbrances, and other interests to the Prevailing  
11 Bidder(s) at the Auction and granting related relief as described herein.

12     **IV. BASIS FOR RELIEF REQUESTED.**

13           A.     The Debtors Are Pursuing A Sale Of The Subject Assets In The Sound  
14                   Exercise Of Their Business Judgment.

15           Bankruptcy Code § 363(b)(1) provides that a debtor in possession, “after notice and a  
16 hearing, may use, sell, or lease, other than in the ordinary course of business, property of the  
17 estate . . . .” 11 U.S.C. § 363(b)(1). As a general rule, so long as a debtor in possession  
18 demonstrates a sound business purpose for doing so, it should be authorized to sell assets outside  
19 the ordinary course of business pursuant to Section 363(b)(1). *See In re Walter*, 83 B.R. 14, 19-  
20 20 (B.A.P. 9th Cir. 1988); *In re Lahijani*, 325 B.R. 282, 288-89 (B.A.P. 9th Cir. 2005) (With  
21 respect to a proposed sale under Section 363(b), “[o]rdinarily, the position of the trustee is  
22 afforded deference, particularly where business judgment is entailed in the analysis . . . .”); *In re*  
23 *Ernst Home Ctr., Inc.*, 209 B.R. 974, 979 (Bankr. W.D. Wash. 1997) (“The Court may approve  
24 the [proposed sale] if [the debtor] has established some articulated business justification for the  
25 transaction.”) (internal quotations omitted); *In re Work Recovery, Inc.*, 202 B.R. 301, 303-04  
26 (Bankr. D. Ariz. 1996). When considering a decision made in the debtor’s business judgment,



1 bankruptcy courts “should presume that that the debtor-in-possession acted prudently, on an  
2 informed basis, in good faith, and in the honest belief that the action taken was in the best  
3 interests of the bankruptcy estate.” *In re Pomona Valley Med. Grp., Inc.*, 476 F.3d 665, 670 (9th  
4 Cir. 2007) (discussing the general concepts behind the business judgment rule while considering a  
5 debtor’s motion to reject an executory contract).

6 There are ample grounds to support a finding that the Debtors are pursuing the sale of the  
7 Subject Assets in good faith, and in a proper exercise of their business judgment. As established  
8 by the First Day Declaration, while the Debtors believe that the remaining SkyMall business may  
9 be continued as a going concern during the proposed sale process, the Debtors do not have the  
10 necessary operating capital to continue the business over the long term. A sale of the Subject  
11 Assets through an auction process provides the best opportunity to maximize the value of the  
12 Subject Assets for the benefit of the SkyMall estate and creditors. It is clear that the Debtors’  
13 decision to market and sell the Subject Assets through the Auction sale, conducted by a  
14 prominent investment banking firm retained by the Debtors for this purpose, is a sound business  
15 decision that should be approved by the Court.

16 B. The Proposed Sale Procedures Are Fair And Reasonable.

17 The Debtors have proposed Sale Procedures to govern the auction sale of the Subject  
18 Assets. Bid procedures are appropriate when they enhance bidding and are designed to maximize  
19 sale proceeds under the particular circumstances of a reorganization case. *In re Blixseth*, No.  
20 BKR. 09-60452-7, 2010 WL 716198, at \*8 (Bankr. D. Mont. Feb. 23, 2010); *In re Golden*  
21 *Empire Air Rescue, Inc.*, No. BAP EC-07-1086, 2007 WL 7540946, at \*7 (B.A.P. 9th Cir. Oct.  
22 25, 2007) (citing to *In re Lahijani*, 325 B.R. at 288-89); *see also Toibb v. Radloff*, 501 U.S. 157,  
23 163, 111 S. Ct. 2197, 2201, 115 L. Ed. 2d 145 (1991) (The general policy behind the Bankruptcy  
24 Code is to “maximi[ze] the value of the bankruptcy estate”).

25 The Sale Procedures proposed by the Debtor are designed to allow the Subject Assets to  
26 be marketed broadly. The Sale Procedures provide a reasonable and prudent framework for the

1 Debtors to entertain competing bids and, if such bids are received, to allow the Auction to be  
2 conducted in a fair fashion to encourage participation by financially capable bidders.

3 The Sale Procedures also establish a fair and reasonable procedure to address any issues  
4 regarding executory contracts and unexpired leases that may be assigned in conjunction with a  
5 sale of the Subject Assets (the “**Subject Contracts and Leases**”). In this regard, the proposed  
6 Sale Procedures Order establishes a procedure to provide appropriate notice to counterparties to  
7 Subject Contracts and Leases, and an appropriate opportunity to address any Cure Costs owing  
8 under Subject Contracts and Leases, or any objections to any proposed assignment in accordance  
9 with Bankruptcy Code § 365(f).

10 The proposed Sale Procedures are reasonable for the Auction sale proposed by the  
11 Debtors, are typical of type of sale procedures often approved by Bankruptcy Courts for similar  
12 sales, and should be approved by the Court.

13 C. The Proposed Sale Of The Subject Assets Satisfies The Requirements Of  
14 Section 363(f) For A Sale Free And Clear Of Claims, Liens,  
Encumbrances, And Other Interests.

15 The Debtors are requesting to sell the Subject Assets free and clear of claims, liens,  
16 encumbrances, and other interests (with liens (if any) to attach to the proceeds of the sale)  
17 pursuant to Bankruptcy Code § 363(f). Section 363(f) provides as follows:

18 (f) The trustee may sell property under subsection (b) or (c)  
19 of this section free and clear of any interest in such property of an  
entity other than the estate, only if—

- 20 (1) applicable nonbankruptcy law permits sale of such  
21 property free and clear of such interest;
- 22 (2) such entity consents;
- 23 (3) such interest is a lien and the price at which such  
24 property is to be sold is greater than the aggregate value of  
all liens on such property;
- 25 (4) such interest is in bona fide dispute; or
- 26 (5) such entity could be compelled, in a legal or equitable  
proceeding, to accept a money satisfaction of such interest.

1 As discussed in the First Day Declaration, the Subject Assets are largely unencumbered.  
2 Accordingly, among other Section 363(f) grounds, the expected purchase price far exceeds the  
3 amount of any liens encumbering any of the Subject Assets. A sale of the Subject Assets free and  
4 clear of liens under Section 363(f)(3) is thus proper and justified.<sup>4</sup>

5 D. The Proposed Assignment Of Subject Contracts And Leases Satisfies The  
6 Requirements of Section 365(f).

7 In conjunction with the proposed sale of the Subject Assets, the Debtors request authority  
8 pursuant to Bankruptcy Code § 365(f)(2) for SkyMall to assume and assign its interests under any  
9 Subject Contracts and Leases that the Prevailing Bidder(s) elect to have assigned. Section  
10 365(f)(2) provides as follows:

11 (2) The trustee may assign an executory contract or unexpired lease of the  
12 debtor only if—

13 (A) the trustee assumes such contract or lease in accordance with the  
14 provisions of this section; and

15 (B) adequate assurance of future performance by the assignee of such  
16 contract or lease is provided, whether or not there has been a default in  
17 such contract or lease.

18 As stated above, the Sale Procedures establish a fair and reasonable procedure to address  
19 any issues regarding the assignment of the Subject Contracts and Leases. To the extent  
20 necessary, the Debtors will address at the Sale Hearing any objection to the assumption and  
21 assignment of any Subject Contract and Lease, and will establish that the requirements for  
22 assignment under Section 365(f)(2) have been fully satisfied.<sup>5</sup>

23 <sup>4</sup> The Debtors reserve the right to assert that any of the other Section 363(f) requirements  
24 also are satisfied with respect to any particular lien that is asserted by any creditor.

25 <sup>5</sup> Generally, the financial ability and willingness to perform the post-assignment obligations  
26 under the assumed and assigned contracts by the successful bidder will constitute sufficient  
“adequate assurance of future performance” to justify the proposed assumption and assignment.  
*In re PRK Enterprises, Inc.*, 235 B.R. 597, 603 (Bankr. E.D. Tex. 1999); *In re THW Enterprises,*  
*Inc.*, 89 B.R. 351, 357 (Bankr. S.D.N.Y. 1988).

1 E. The Debtors Request That The Court Determine That The Prevailing  
2 Bidder Is A “Good Faith” Purchaser Under Section 363(m).

3 When a bankruptcy court enters an order approving a sale under Section 363(b)(1), the  
4 court may make a finding that the purchaser is a “good faith” purchaser under Bankruptcy Code  
5 § 363(m). *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1174 (9th Cir. 1988). Section 363(m)  
6 protects the rights of good faith purchasers at a sale under Section 363. *In re Ewell*, 958 F.2d  
7 276, 279 (9th Cir. 1992). A “good faith purchaser” is not defined by the Bankruptcy Code;  
8 however, the Ninth Circuit defines a lack of good faith as fraudulent conduct during the sale  
9 proceedings that “involves fraud, collusion between the purchaser and other bidders or the trustee,  
10 or an attempt to take grossly unfair advantage of other bidders.” *In re Suchy*, 786 F.2d 900, 902  
11 (9th Cir. 1985). Where a party has purchased estate property in good faith, Section 363(m)  
12 supports the “policy of finality” encouraged by bankruptcy courts and protects the finality of the  
13 sale. *In re Onouli-Kona Land Co.*, 846 at 1172.

14 The Debtors will request at the Sale Hearing that the Prevailing Bidder is a “good faith”  
15 purchaser for purposes of Section 363(m).

16 F. The Sale Of The Subject Assets Does Not Require The Appointment Of A  
17 Consumer Privacy Ombudsman.

18 Bankruptcy Code § 363(b)(1) provides that a debtor may not sell or lease personally  
19 identifiable information about individuals as part of a sale under Section 363(b) if the debtor has a  
20 policy prohibiting the transfer of such personally identifiable information unless certain  
21 requirements are met (one of which involves the appointment of a consumer privacy  
22 ombudsman). In this case, the Subject Assets include customer lists that contain personally  
23 identifiable information, but SkyMall’s policies to not prohibit the transfer of such information.  
24 Accordingly, the appointment of a consumer privacy ombudsman is not required in conjunction  
25 with the proposed sale. *See, e.g., In re Tridimension Energy, L.P.*, No. 10-33565-SGJ, 2010 WL  
26 5209236, at \*6 (Bankr. N.D. Tex. Nov. 19, 2010) (“The Debtors have never disclosed a policy to

1 an individual prohibiting the transfer of personally identifiable information about individuals to  
2 persons that are not affiliated with the Debtors . . . . Thus, there is no requirement that the sale of  
3 the Properties contemplated hereunder be consistent with any privacy policy or that a consumer  
4 privacy ombudsman be appointed in connection with same under Bankruptcy Code § 363(b)(1).”)

5 **V. CONCLUSION.**

6 Based on the foregoing, the Debtors respectfully request that the Court (i) enter the  
7 proposed Sale Procedures Order in the form attached hereto as Exhibit A, (ii) enter an Order  
8 approving the sale of some or all of the Subject Assets free and clear of all claims, liens,  
9 encumbrances, and other interests to the Prevailing Bidder(s) at the Auction and granting the  
10 related relief requested herein, and (iii) granting such other and further relief as the Court deems  
11 just and appropriate under the circumstances.

12 RESPECTFULLY SUBMITTED this 23rd day of January, 2015.

13 QUARLES & BRADY LLP  
14 Renaissance One  
15 Two North Central Avenue  
16 Phoenix, AZ 85004-2391

17 By /s/ John A. Harris  
18 John A. Harris  
19 Robert P. Harris  
20 Lori L. Winkelman  
21 Jason D. Curry

22 Proposed Attorneys for Debtors and Debtors-in-  
23 Possession  
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# **EXHIBIT A**

## **SALE PROCEDURES ORDER**

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re:  
SKYMALL, LLC,  
  
Debtor.  
  
Joint Administration pending with:  
  
XHIBIT CORP.,  
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FLYREPLY CORP.,  
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2:15-bk-00687-GBN  
2:15-bk-00686-EPB

This Pleading applies to:  
 All Debtors  
 Specified Debtor  
  
SKYMALL, LLC

**ORDER ESTABLISHING BIDDING  
PROCEDURES FOR AUCTION SALE,  
SCHEDULING HEARING ON SALE  
MOTION, AND GRANTING  
RELATED RELIEF**

This matter came before the Court pursuant to the *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* [Docket No. \_\_\_\_] (the “**Sale Motion**”) filed by SKYMALL, LLC, *et al.*, the debtors and debtors-in possession (collectively, the “**Debtors**”) in the above-captioned Chapter 11 cases (the “**Bankruptcy Cases**”). In the Sale

1 Motion, the Debtors request that the Court authorize a sale of substantially all of the assets of  
2 Debtor SkyMall, LLC (“**SkyMall**”) (except for certain Excluded Assets) free and clear of all  
3 claims, liens, encumbrances, and other interests pursuant to Bankruptcy Code § 363(f). Among  
4 other relief, the Debtors request in the Sale Motion that the Court authorize bidding and related  
5 sale procedures for the proposed auction sale as set forth in **Exhibit 1** to this Order (the “**Sale**  
6 **Procedures**”), schedule a hearing on the Sale Motion, and grant certain related relief.<sup>1</sup>

7 On January 27, 2015, the Court held an initial hearing on the Sale Motion (the  
8 “**Procedures Hearing**”) to consider approval of the proposed Sale Procedures and related  
9 matters. Based on the Sale Motion, the First Day Declaration submitted by the Debtors, the  
10 argument of counsel, and the entire record before the Court in the Bankruptcy Cases, the Court  
11 hereby finds and concludes as follows:

12 A. The Court has jurisdiction to consider the Sale Motion under 28 U.S.C. §§ 157 and  
13 1334, and the Sale Motion presents a core proceeding under 28 U.S.C. § 157(b)(2);

14 B. Notice of the Sale Motion and the Procedures Hearing was proper and adequate  
15 under the circumstances of these Bankruptcy Cases;

16 C. Entry of this Order is in the best interests of the Debtors, their creditors, and their  
17 estates;

18 D. The Sale Procedures are fair, reasonable and appropriate for the proposed sale, and  
19 are designed to maximize the recovery with respect to the Subject Assets;

20 E. The Debtors have demonstrated compelling and sound business reasons for the  
21 Sale Procedures and the Auction; and

22 F. The proposed sale of the Subject Assets does not require the appointment of a  
23 consumer privacy ombudsman pursuant to Bankruptcy Code §363(b)(1).

24 Based on the foregoing, and the entire record before the Court,

25 \_\_\_\_\_  
26 <sup>1</sup> Unless stated otherwise herein, terms defined in the Sale Motion and the Sale Procedures,  
as applicable, will have the same meanings when used in this Order.



1 IT IS HEREBY ORDERED as follows:

2 1. The Sale Motion shall be, and hereby is, granted in part as provided herein. Any  
3 objections to the Sale Procedures shall be, and hereby are, overruled.

4 2. The Sale Procedures (attached hereto as Exhibit 1 and incorporated herein by this  
5 reference) shall be, and hereby are, approved. The Debtors are hereby authorized to conduct an  
6 auction of the Subject Assets pursuant to the Sale Procedures and this Order.

7 3. Any objection to the Sale Motion shall be in writing and filed with the Court on or  
8 before \_\_\_\_\_, 2015 (the “**Sale Objection Deadline**”), and served on counsel for the  
9 Debtors so that such objection is received on or before the Sale Objection Deadline. (The Court  
10 will consider any objections to the Sale Motion at the Sale Hearing (defined below).)

11 4. Any responses in support of the Sale Motion shall be in writing and filed with the  
12 Court on or before \_\_\_\_\_, 2015 (the “**Sale Response Deadline**”).

13 5. After the Auction has been concluded, the Court shall conduct a hearing (the “**Sale**  
14 **Hearing**”) on the Sale Motion to consider, among other things, approval of the prevailing bid (or  
15 bids) at the Auction. The Sale Hearing shall be held on March \_\_\_, 2015 at \_\_\_ o’clock \_\_.m. at  
16 the United States Bankruptcy Court, Courtroom \_\_\_, 230 N. First Avenue, Phoenix, AZ 85003.

17 6. Within three (3) business days after entry of this Order, the Debtors shall serve a  
18 copy of this Order on all parties on the “Official Service List” established by the Court.

19 7. On or before February 20, 2015, the Debtors shall serve a notice (the “**Cure**  
20 **Notice**”) and a copy of this Order on the counterparties (each a “**Counterparty**”) to executory  
21 contracts and unexpired leases that may be assigned in conjunction with a sale of the Subject  
22 Assets (the “**Subject Contracts and Leases**”).<sup>2</sup> The Cure Notice shall, for each Subject Contract  
23 or Lease, (i) identify the Subject Contract or Lease, (ii) identify the Counterparty to such Subject

24 \_\_\_\_\_  
25 <sup>2</sup> The inclusion of any agreement as a Subject Contract and Lease does not constitute an  
26 admission by the Debtors that such agreement actually constitutes an executory contract or  
unexpired lease under the Bankruptcy Code, and the Debtors expressly reserve the right to  
challenge the status of any agreement included as a Subject Contract and Lease.

1 Contract or Lease, and (iii) identify the Debtors' contention regarding any amounts owing under  
2 such Subject Contract or Lease due to any defaults (the "**Cure Amount**"). (The Debtors may  
3 later serve the Cure Notice on other Counterparties if any bidder expresses interest in any other  
4 executor contracts or unexpired leases.)

5 8. The Cure Notice shall be deemed good and sufficient notice regarding a proposed  
6 assumption and assignment of the Subject Contracts and Leases in conjunction with a sale of the  
7 Subject Assets.

8 9. A Counterparty must file with the Court and serve on Debtors' counsel any  
9 objection to the assumption and assignment of a Subject Contract or Lease, including objections  
10 with respect to Cure Cost, on or before **March 4, 2015** (the "**Contract Objection Deadline**").

11 10. In the event that an objection to any Cure Cost is timely filed by a Counterparty,  
12 such Counterparty's objection must set forth (i) the basis for the objection, (ii) with specificity,  
13 the amount the Counterparty asserts as the Cure Cost, and (iii) appropriate documentation in  
14 support of the alleged alternative Cure Cost. In the event that the Debtors and the Counterparty  
15 cannot consensually resolve the Counterparty's objection to the Cure Cost, the Prevailing Bidder  
16 or any other assignee will segregate any disputed cure amounts pending the resolution of any such  
17 disputes by this Court or mutual agreement of the parties.

18 11. Any Counterparty failing to timely file an objection to the Cure Cost set forth in  
19 the Cure Notice shall be forever barred from objecting to the Cure Cost and from asserting any  
20 additional cure or other amounts against the Debtors, their estates, and the Prevailing Bidder with  
21 respect to the Subject Contract or Lease to which it is a Counterparty. For the avoidance of  
22 doubt, no executory contract or unexpired lease will be assumed or assumed and assigned until  
23 and unless a transaction closes pursuant to the Sale Motion that proposes assumption and  
24 assignment of such executory contract and/or unexpired lease.

25 12. Without further order of the Court, the Debtors may, in consultation with the  
26 Committee: (a) reject any bid that is (i) inadequate or insufficient, (ii) not in conformity with the

1 requirements of the Sale Procedures, or (iii) contrary to the best interests of SkyMall or its estate;  
2 (b) determine which of the Subject Assets shall be the subject of the Auction; (c) waive terms and  
3 conditions of the Sale Procedures with respect to all bidders; (d) extend deadlines set forth in the  
4 Sale Procedures; and (e) adjourn or cancel the Auction.

5 13. All Qualified Bidders at the Auction shall be deemed to have consented to the core  
6 jurisdiction of this Court and to have waived any right to jury trial in connection with any  
7 disputes relating to any Qualified Bid, the Auction, the Sale Procedures, and any sale pursuant to  
8 the Sale Motion.

9 14. The Debtors are hereby authorized to take such steps and incur such expenses as  
10 may be reasonably necessary or appropriate to effectuate the terms of this Order.

11 15. Notwithstanding any applicability of Bankruptcy Rules 6004 and 6006 or  
12 otherwise, the terms and conditions of this Order shall be immediately effective and enforceable  
13 upon its entry.

14 16. This Court retains jurisdiction with respect to all matters arising from or related to  
15 the implementation of this Order.

16 **DATED AND SIGNED AS INDICATED ABOVE.**

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# **EXHIBIT 1**

## **SALE PROCEDURES**

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re:  
  
SKYMALL, LLC,  
  
Debtor.  
  
Joint Administration pending with:  
  
XHIBIT CORP.,  
XHIBIT INTERACTIVE, LLC,  
FLYREPLY CORP.,  
SHC PARENT CORP.,  
SPYFIRE INTERACTIVE, LLC,  
STACKED DIGITAL, LLC, and  
SKYMALL INTERESTS, LLC.

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This Pleading applies to:  
  
 All Debtors  
 Specified Debtor  
  
SKYMALL, LLC

In Proceedings Under Chapter 11  
  
Case No. 2:15-bk-00679-BKM  
  
Joint Administration pending with  
Case Nos.:  
2:15-bk-00680-MCW  
2:15-bk-00682-MCW  
2:15-bk-00684-DPC  
2:15-bk-00685-MCW  
2:15-bk-00686-MCW  
2:15-bk-00687-GBN  
2:15-bk-00686-EPB

**SALE PROCEDURES**

SKYMALL, LLC (“**SkyMall**”) and the other debtors and debtors-in possession referenced above (collectively, the “**Debtors**”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on January 22, 2015, commencing the above-captioned Chapter 11 cases (the “**Bankruptcy Cases**”) in the United States Bankruptcy Court for the District of Arizona (the “**Bankruptcy Court**”). The Debtors are operating their businesses and managing their affairs as debtors in possession under Bankruptcy Code §§ 1107 and 1108.

1 The Debtors have determined that they will solicit bids for the purchase of some or  
2 substantially all of the assets of SkyMall (the “**Subject Assets**”) pursuant to Bankruptcy Code  
3 §§ 363 and 365 (a “**Sale Transaction**” or “**Sale Transactions**”).<sup>1</sup> In this regard, the Debtors  
4 filed their *Motion For Orders (I) Authorizing Bidding Procedures And Auction, (II) Scheduling*  
5 *Sale Hearing And Approving Notice Thereof, (III) Authorizing Sale Of Assets, And (IV) Granting*  
6 *Related Relief* (the “**Sale Motion**”) in the Bankruptcy Cases requesting, among other things,  
7 approval to proceed with an auction sale process. (All sales are subject to subsequent review and  
8 approval of the Bankruptcy Court as provided below.)

9 The Debtors are being assisted in this sale effort by their investment banker, CohnReznick  
10 Capital Market Securities, LLC (“**CRCMS**”). In furtherance thereof, the Debtors have  
11 established the sale procedures described herein (collectively, the “**Sale Procedures**”) that will  
12 govern the marketing, evaluation, auction, documentation, and effectuation of a Sale Transaction  
13 or Sale Transactions. The Sale Procedures have been approved by the Bankruptcy Court through  
14 its *Order Establishing Bidding Procedures For Auction Sale, Scheduling Hearing On Sale*  
15 *Motion, And Granting Related Relief* dated January \_\_, 2015 (the “**Sale Procedures Order**”).

16 **1. Overview of the Process.** The Debtors intend, with the assistance of CRCMS, to  
17 market the opportunity to purchase the Subject Assets as widely as possible.

18 **2. Right to Determine Highest and Best Bid.** The Debtors, in consultation with the  
19 Official Committee of Unsecured Creditors (the “**Committee**”), if appointed, shall have the sole  
20 and exclusive right to negotiate any offer made for the purchase of the Subject Assets and to  
21 determine the highest and best offer, subject to bankruptcy court review and approval. In  
22 evaluating whether a bidder has submitted the highest and best offer, the Debtors may consider,  
23 among other things: (i) the purchase price proposed in the offer; (ii) the bidder’s financial

24 \_\_\_\_\_  
25 <sup>1</sup> The Subject Assets do not include (i) cash, security deposits, or other cash equivalents; (ii)  
26 avoidance actions pursuant to Bankruptcy Code §§ 544, 545, 547, 548, 549, and 553(b) and any  
proceeds therefrom; and (iii) certain other estate claims and causes of action. The Subject Assets  
are described in the APA Template described below.

1 condition and ability to close; (iii) any proposed modifications to the Asset Purchase Agreement  
2 template that will be provided by the Debtors (the “**APA Template**”), including any  
3 contingencies that must be satisfied prior to closing; and (iv) the probability that a prompt closing  
4 will occur. Any proposed modification to the terms set forth in the APA Template, other than an  
5 increase in the amount of the purchase price and the deletion of terms of the Asset Purchase  
6 Agreement that are specific to the prospective bidder, may be viewed in a negative light by the  
7 Debtors. Following the deadlines for prequalification of the bidders (“**Prequalification**”) and the  
8 submission of qualified bids, the Debtors intend to conduct an auction to obtain the highest and  
9 best bid or bids (“**Auction**”), followed by a sales hearing in the Bankruptcy Court to confirm the  
10 prevailing bid or combination of bids.

11 The process contemplates that bidders will conduct their due diligence prior to making  
12 bids for the Subject Assets on an as is/where is basis, and that the qualified bids will not contain  
13 any material due diligence or financing contingencies. Qualified Bidders shall examine or inspect  
14 the Subject Assets prior to the Auction or waive such right. **All assets are being sold as is,**  
15 **where is without recourse to, representation by, or warranties by, the Debtors of any kind**  
16 **or description whatsoever, either express or implied, including, without limitation, any**  
17 **warranties and/or representations of merchantability, fitness for a particular purpose,**  
18 **physical condition, title, possession, quiet enjoyment or the like and with all faults.** In  
19 addition, in the event that any of SkyMall’s software is included in an asset sale, the Debtors  
20 make no representations or warranties regarding the Prevailing Bidder’s right to use such  
21 software, as to the performance of the software, its non-infringement or otherwise. In such  
22 circumstances, the Debtors recommend that Prevailing Bidder contact the software manufacturer  
23 directly to resolve any such issues.

24 The Debtors are not responsible for the correct description, genuineness, authenticity,  
25 count of, or defect in any goods, and make no warranty or representation in connection therewith.  
26 No sale shall be set aside nor allowance made on account of any incorrectness, error in

1 cataloging, or any imperfection not noted. No deductions will be allowed on damaged goods. All  
2 goods are being exposed for public exhibit and sold “as is, where is” and without recourse.  
3 Qualified Bidders acknowledge that they had the opportunity to inspect all assets prior to  
4 tendering their bid and waive any and all claims against the Debtors with respect thereto.

5 **3. Stalking Horse Agreement.** As of the date the Sale Procedures Order was  
6 entered, the Debtors have not approved a stalking horse agreement for the sale of the Subject  
7 Assets. The Debtors reserve the right to request the Bankruptcy Court to later approve a proposed  
8 Asset Purchase Agreement as a stalking horse agreement (the “**Stalking Horse Bid**”). Any such  
9 request by the Debtors will be filed with the Bankruptcy Court on or before **March 12, 2015**.

10 **4. Prequalification.** On or before **March 17, 2015**, prospective bidders are required  
11 to submit certain information to the Debtors to demonstrate the financial wherewithal to  
12 consummate the potential transaction under the terms and conditions of these Sale Procedures.  
13 This information may include financial statements or other documents of such entity (including  
14 information on any third-party funding required to consummate and perform under the Purchase  
15 Agreement) establishing such entity’s financial wherewithal to timely close the transactions  
16 contemplated thereunder. Other than sharing information with the Committee (and its advisors),  
17 the Debtors will keep the information provided for qualification confidential. The Debtors, in  
18 consultation with the Committee, shall have sole discretion to determine that a bidder is  
19 prequalified (“**Prequalified Bidder**”).

20 **5. Due Diligence Requests.** Due diligence inquiry should be directed to CRCMS,  
21 Attn: Jeffrey R. Manning, 500 E Pratt Street, Baltimore, MD 21202; [jeff.manning@crcms.com](mailto:jeff.manning@crcms.com);  
22 Phone: (410) 690-8788. Each bidder is solely responsible for conducting its own due diligence  
23 and must complete its due diligence prior to the submission of its bid. Access to due diligence  
24 information will be subject to a Non-Disclosure Agreement (in form acceptable to the Debtors)  
25 between SkyMall and prospective bidders.

26



1           **6.     Deadline for Submission of Bids.** The deadline for submitting all bids is **March**  
2 **19, 2015 (“Bid Deadline”)**. The required materials comprising a bid for the Subject Assets must  
3 be delivered to the following parties such that they are received by 5:00 p.m. prevailing Eastern  
4 Time: (i) the Debtors’ investment bank, CRCMS, Attn: Jeffrey R. Manning, 500 E Pratt Street,  
5 Baltimore, MD 21202; [jeff.manning@crcms.com](mailto:jeff.manning@crcms.com); Phone: (410) 690-8788; (ii) the Debtors’  
6 counsel [Quarles & Brady LLP] and (iii) counsel for the Committee. The Debtors may in their  
7 sole discretion, but will not be obligated to, extend the Bid Deadline.

8           **7.     Submission of Bids.** All bids will provide that they are subject to the approval of  
9 the Bankruptcy Court. A bid to purchase the Subject Assets must be written in electronic form  
10 submitted only by a Prequalified Bidder, and must include the following:

11           i.       The required deposit for a bid (a “**Deposit**”) shall be \$500,000. The  
12 Deposit shall be in the form of a certified check or a wire transfer delivered as directed by  
CRCMS;

13           ii.      An executed Asset Purchase Agreement based on the APA Template  
14 providing for implementation of a Sale Transaction that:

15                   (a)     indicates which of the Subject Assets the bidder proposes to acquire  
pursuant to the Asset Purchase Agreement;

16                   (b)     indicates which of SkyMall’s executory contracts and unexpired  
17 leases the bidder intends to have assumed and assigned in conjunction with the  
18 Asset Purchase Agreement; and

19                   (c)     indicates any material conditions to closing of the Asset Purchase  
20 Agreement (including financing, due diligence, environmental and other  
21 conditions to performance by the entity) after approval of the Asset Purchase  
22 Agreement by the Bankruptcy Court;

23           iii.     A red-lined copy of the Asset Purchase Agreement showing the differences  
24 from the APA Template;

25           iv.     Written evidence demonstrating adequate assurance of future performance  
26 by the acquiring entity to the non-Debtor parties under the unexpired leases and executory  
contracts to be assumed and assigned under the Asset Purchase Agreement; and

1 v. A written statement identifying the controlling interest holders in the  
2 acquiring entity and evidence that the board of directors (or comparable governing body)  
3 for the entity making the bid has fully authorized and approved the submission, execution,  
and delivery of the Purchase Agreement and the consummation of the transactions  
contemplated thereby.

4 **8. Qualification Of Bid.** After a Prequalified Bidder has delivered a bid as provided  
5 above, the Debtors, in consultation with their advisors and the Committee, will determine whether  
6 the Prequalified Bidder (i) has demonstrated the financial capacity to consummate the purchase of  
7 the Subject Assets, (ii) is reasonably likely to be able to and willing to consummate the proposed  
8 transactions, and (iii) has otherwise timely satisfied the requirements described in the prior  
9 paragraph. If so, the Debtors shall designate a Prequalified Bidder as a “**Qualified Bidder**” and  
10 such bid as a “**Qualified Bid.**” Promptly after making such determination, the Debtors will  
11 advise the bidder of such determination and, if the bid is not designated a Qualified Bid, why it is  
12 not a Qualified Bid. A Prequalified Bidder submitting a nonconforming bid will have until 5:00  
13 p.m. prevailing Eastern Time on **March 22, 2015** to resubmit a bid to qualify, and such  
14 determination is at the sole discretion of the Debtors, in consultation with their advisors and the  
15 Committee.

16 **9. Auction.** In the event the Debtors receive two or more Qualified Bids (including  
17 the Stalking Horse Bid, if any), the Debtors will conduct an auction sale (the “**Auction**”) at which  
18 the parties that have submitted Qualified Bids (including the Stalking Horse Bid, if any) may  
19 participate. If necessary, the Auction will be held on **March 24, 2015 at 10:00 a.m. (Mountain**  
20 **Standard Time)**, or such later time as the Debtors may designate, at a location in Phoenix,  
21 Arizona designated by the Debtors. CRCMS shall direct and preside over the Auction at the  
22 direction of the Debtors, in consultation with their other advisors and the Committee.

23 The Debtors may, in their discretion, offer the Subject Assets for sale by the lot or in bulk.  
24 The Debtors reserve the right to remove assets from the Auction either before or after bidding has  
25 completed. In the event of a removal after bidding has been completed, but before irrevocable  
26

1 payment in full, the purchaser's sole remedy shall be the refund of any Deposit and purchase  
2 price actually paid.

3 The Debtors will announce any additions to or deletions from the Subject Asset on the day  
4 of the Auction. The Debtors assume no responsibility for, and make no representations or  
5 warranties concerning, descriptions of assets contained in marketing materials for the Auction. It  
6 is the obligation of each Qualified Bidder to verify such descriptions prior to the Auction.

7 The Debtors shall not be liable for any damages of any type or nature (whether in contract,  
8 tort or otherwise) sustained or claimed by any bidder or any other person or entity in connection  
9 with the Auction.

10 **10. Prevailing Bidder(s).** For its Qualified Bid to be considered, a duly authorized  
11 representative of a Qualified Bidder must appear in person at the Auction, unless alternative  
12 arrangements satisfactory to the Debtors have been made. The Auction will commence with the  
13 announcement of the highest Qualified Bid for each lot and for the bulk sale of the Subject  
14 Assets, and bidding will proceed in such manner and on such terms as are announced by the  
15 Debtors at the time of the Auction. Among other things, the Debtors may establish a minimum  
16 bidding increment at the Auction. At the conclusion of the Auction the Debtors will announce the  
17 highest bid combination (the "**Prevailing Bidder**" or "**Prevailing Bidders**"). The Debtors, in  
18 consultation with their advisors and the Committee, may conduct the Auction in the manner they  
19 believe will be in the best interests of the estate. Each Prevailing Bidder will be required to  
20 increase the Deposit under its Asset Purchase Agreement to at least 10% of the bid no later than  
21 the time of the Sales Hearing.

22 **11. Backup Bids.** If for any reason the Prevailing Bidder fails to timely close the sale  
23 of the Subject Assets, the Debtors shall have the right (without the requirement of further notice  
24 to any party) to close the sale of the Subject Assets pursuant to the Qualified Bid(s) designated at  
25 the Auction as the second highest and best offer (the "**Backup Bid(s)**") and approved by the  
26 Bankruptcy Court at the Sale Hearing (described below). All other Qualified Bidders shall be

1 required to make their bids irrevocable until five (5) business days from the date of the Sale  
2 Hearing so that their bids may be considered as a potential Backup Bid.

3       **12. Sale Hearing.** Through the Sale Procedures Order, the Bankruptcy Court has  
4 scheduled a hearing (the “**Sale Hearing**”) to consider any objections to the Sale Motion and to  
5 approve the sale of the Subject Assets (and related assignments of executory contracts and  
6 unexpired leases) to the Prevailing Bidder or Prevailing Bidders. The Sale Hearing is scheduled  
7 for **March \_\_, 2015, \_\_\_\_\_ .m. (Mountain Standard Time)** at the United States Bankruptcy  
8 Court for the District of Arizona, Courtroom \_\_, 230 N. First Avenue, Phoenix, AZ 85003.  
9 Each of the Prevailing Bidder or Prevailing Bidders and the Backup Bidder or Backup Bidders  
10 must produce a competent witness at the Sale Hearing (and any subsequent hearing) to provide  
11 testimony, if necessary, to establish adequate assurance of future performance by each such  
12 bidder under the unexpired leases and executory contracts to be assigned to such bidder, to the  
13 extent required by Bankruptcy Code §§ 365(b)(1)(C) and/or 365(f)(2)(B). At the Sale Hearing,  
14 the Debtors will request that the Court approve the sale of the Subject Assets to the Backup  
15 Bidder or Backup Bidders in the event the contemplated sale to the Prevailing Bidder or  
16 Prevailing Bidders does not timely close; in which case such Backup Bidder or Backup Bidders  
17 shall become the Prevailing Bidder or Prevailing Bidders.

18       **13. Return of Deposits.** The Debtors shall return the deposit of any Qualified Bidder  
19 that is not declared a Prevailing Bidder(s) or Backup Bidder(s) two (2) business days after the  
20 entry of the order approving the Sale Transaction(s). In the event a declared Prevailing Bidder  
21 fails to timely perform any material obligation under its executed Asset Purchase Agreement, the  
22 declared Prevailing Bidder shall forfeit all deposits made, without regard to the Debtors’ ultimate  
23 damages occasioned by such failure; such deposits shall be applied to the Debtors’ damages, if  
24 any, and shall not constitute liquidated damages, however, each Qualified Bidder acknowledges  
25 and agrees that under such circumstances, the Debtors’ damages are not less than the amount of  
26 the deposit; and, notwithstanding the foregoing, the Debtors and the bankruptcy estates shall

1 retain all other rights, remedies, claims, counterclaims, and defenses, including the right to seek  
2 equitable or injunctive relief.

3 **14. Reservation of Rights.** The Debtors reserve the right, in consultation with their  
4 advisors and the Committee, to alter the Sale Procedures, including extending deadlines contained  
5 herein, and to establish procedures and rules during the Auction, as they may determine  
6 reasonably appropriate to maximize the value realized by the Debtors estate from the Sale  
7 Transaction(s).

8 **15. Damages for Controlling of Sales Price.** All potential bidders are advised that,  
9 under Bankruptcy Code § 363(n) and applicable law, the Debtors and/or their estates may avoid a  
10 transaction and recover damages (actual and possibly punitive) if the sale price was controlled by  
11 any undisclosed agreement amongst the bidders.

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