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11 **UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 In re:

14 SKYMALL, LLC,
15
16 Debtor.

17 Jointly Administered with:

18 XHIBIT CORP.,
19 XHIBIT INTERACTIVE, LLC,
20 FLYREPLY CORP.,
21 SHC PARENT CORP.,
22 SPYFIRE INTERACTIVE, LLC,
23 STACKED DIGITAL, LLC, and
24 SKYMALL INTERESTS, LLC.

25 This Pleadings applies to:

26 All Debtors

27 Specified Debtors

In Proceedings Under Chapter 11

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

Jointly Administered with Case Nos.:

2:15-bk-00680-BKM
2:15-bk-00682-BKM
2:15-bk-00684-BKM
2:15-bk-00685-BKM
2:15-bk-00686-BKM
2:15-bk-00687-BKM
2:15-bk-00688-BKM

**LIMITED PRELIMINARY OBJECTION
TO THE SALE MOTION AND CURE
NOTICE AND RESERVATION OF
RIGHTS**

28 LIMITED PRELIMINARY OBJECTION
AND RESERVATION OF RIGHTS

1 Connexions Loyalty, Inc. ("Connexions") and SkyMall Ventures, LLC ("Ventures"), creditors
2 and parties-in-interest in the above-captioned Chapter 11 cases, submit this *Limited Preliminary*
3 *Objection to the Sale Motion and Cure Notice and Reservation of Rights* (the "Limited Objection"). In
4 support thereof, Connexions and Ventures respectfully states as follows:

5
6 **PRELIMINARY STATEMENT**¹

7 By the Sale Motion, the Debtors seek to sell "substantially" all of SkyMall's assets free and
8 clear of any interests pursuant to Bankruptcy Code section 363(f). However, no provision in the Sale
9 Motion identifies what assets will be sold and whether or not the Connexions Interests will be
10 implicated by the proposed sale. While Connexions does not presently object to the sale of the Subject
11 Assets, Connexions *does* object to any attempt by SkyMall to strip away or impair the Connexions
12 Interests in connection with such sale. At this juncture in the sale process – it is unclear whether there
13 will be a "Stalking-Horse Bidder", the Auction is not scheduled until March 25, 2015 and the Sale
14 Hearing is not scheduled until March 27, 2015 – it is unknown who the Prevailing Bidder will be and
15 whether the Connexions Interests will be sufficiently protected. As such, Connexions is compelled to
16 object to the Sale Motion and reserves all rights with respect thereto.²

17
18 Similarly, as related to the Cure Notice, because the Prevailing Bidder is unknown, Connexions
19 cannot evaluate either the eventual purchaser's identity or its acceptability as an assignee and, for that
20 reason as well, files this Limited Objection.

21
22 **RELEVANT FACTS**

23 1. On January 22, 2015 (the "Petition Date"), Xhibit Corp. and certain of its subsidiaries
24 (collectively, the "Debtors") filed for Chapter 11 in the United States Bankruptcy Court for the District

25
26 ¹ Capitalized terms used in this "Preliminary Statement" section but not otherwise defined shall have the meaning
given to them in the remainder of this Limited Objection.

27 ² This includes all rights to indemnity claims due to noncompliance with contractual obligations and all rights to
offset against potential future payments otherwise due to the Debtors.

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1 of Arizona (the “Court”). The Debtors continue to operate their businesses and manage their assets
2 and affairs as debtors in possession under Bankruptcy Code sections 1007 and 1008.

3 2. On February 5, 2015, an official committee of unsecured creditors (the “Committee”)
4 was appointed.

5
6 **I. The Ventures Sale**

7 3. Ventures was a wholly-owned subsidiary of SkyMall LLC (“SkyMall”) and operated a
8 loyalty business as a provider of merchandise, gift cards and rewards programs for program members
9 in various corporate and other loyalty programs throughout the United States. On September 9, 2014,
10 SkyMall sold 100% of the outstanding membership interests of Ventures (the “Ventures Sale”) to
11 Connexions, pursuant to that certain *Membership Interest Purchase Agreement*, dated as of September
12 8, 2014 (the “MIPA”). See Declaration of Scott Wiley in Support of First Day Motions [D.I. 8]
13 (“Wiley Decl.”) ¶ 14.

14
15 4. In connection with the Ventures Sale, SkyMall, Connexions and certain other parties
16 entered into a number of related agreements, including, among others, (i) the Transition Services
17 Agreement (the “TSA”),³ dated as of September 8, 2014, by and between Connexions and SkyMall,
18 (ii) the Trademark License Agreement, dated as of September 8, 2014, by and between Ventures and
19 SkyMall, (iii) the Limited Guarantee, dated as of September 8, 2014, by and between Connexions and
20 Xhibit Corp., (iv) the Indemnity Escrow Agreement, dated as of September 8, 2014, by and among
21 Connexions, SkyMall and U.S. Bank National Association, (v) the Data Sharing Agreement, dated as
22 of December 23, 2014, by and between Connexions and SkyMall, and (vi) the certain Letter
23 Agreement dated as of January 16, 2015, by and between Connexions, SkyMall and Xhibit Corp.
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26

³ The term of the TSA is up to 18 months and Connexions pays a fee to SkyMall under the TSA. Connexions and
27 SkyMall are currently negotiating amendments to the TSA that would reflect revised services to be rendered thereunder,
28 revised pricing and the timing of cessation of such services.

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1 (clauses (i) – (vi), together with the MIPA, the “Connexions Agreements” and, such rights and
2 interests thereunder, the “Connexions Interests”). Wiley Decl. ¶ 15.

3 5. Under the Connexions Agreements, Connexions and Ventures were granted certain
4 rights and interests in the Debtors’ property that were an integral part of the Ventures Sale. For
5 example, under the TSA, SkyMall provides a broad range of services to Connexions to support
6 Connexions’ operation of the acquired Ventures businesses in exchange for a fee; under the MIPA,
7 SkyMall licensed certain internally developed software to Ventures; and under the Trademark License
8 Agreement, SkyMall licensed certain trademarks to Ventures and agreed to certain website redirects
9 and email forwarding.
10

11 **II. The Sale Motion**

12 6. One of the first day pleadings filed by the Debtors was the *Motion for Orders (i)*
13 *Authorizing Bidding Procedures and Auction, (ii) Scheduling Sale Hearing and Approving Notice*
14 *Thereof, (iii) Authorizing Sale of Assets, and (iv) Granting Related Relief* and related memorandum of
15 law [D.I. 22] (the “Sale Motion”). The Sale Motion sought, among other things, entry of an order
16 authorizing bidding procedures and the sale of substantially all of SkyMall’s assets “free and clear of
17 all claims, liens, encumbrances and other interests” pursuant to Bankruptcy Code section 363(f)
18 through an auction sale. *See generally* Sale Motion.
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20

21 7. On January 29, 2015, the Court entered the *Order Establishing Bidding Procedures for*
22 *Auction Sale, Scheduling Hearing on Sale Motion, and Granting Related Relief* [D.I. 53] (as amended
23 from time to time, the “Bid Procedures Order”), which was subsequently amended (as to the Auction
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1 Sale Date only) on February 25, 2015 [D.I. 131]. The Bid Procedures Order sets important dates for
2 the Auction⁴ and sale process, including the following:

- 3 • ***Deadline to Send Cure Notices:*** February 20, 2015
- 4 • ***Deadline to Object to Sale and/or Cure Notice:*** March 4, 2015 (the “Sale
5 Objection Deadline”)
- 6 • ***Deadline to Identify Any Stalking Horse Bid:*** March 12, 2015
- 7 • ***Auction Date:*** March 25, 2015
- 8 • ***Sale Hearing:*** March 27, 2015

9 8. Significantly, however, neither the Sale Motion nor the Bid Procedures Order identify
10 with specificity the “Subject Assets” to be sold; nor did the Debtors file with the Court a form asset
11 purchase agreement or proposed form of sale order.

12 9. On February 20, 2015, the Debtors filed the *Notice of: (1) Executory Contracts and*
13 *Unexpired Leases Subject to Potential Assumption and Assignment Pursuant to Pending Sale Motion;*
14 *(2) Proposed Cure Amounts with Respect Thereto; (3) Sale Hearing and Deadline for Objections; and*
15 *(4) Related Matters* [D.I. 101] (as amended from time to time, the “Cure Notice”). On March 3, 2015,
16 the Debtors filed an amended Cure Notice [D.I. 159]. Exhibit A to the Cure Notice includes four of
17 the Connexions Agreements, identified as the following: (i) “Transition Service Agreement”, (ii)
18 “Membership Interest Purchase Agreement”, (iii) “Data Sharing Agreement” and (iv) “Trademark
19 License Agreement” (collectively, the “Identified Connexions Agreements”).⁵ The Debtors’ stated
20 cure amount for the Identified Connexions Agreements is \$0.00.

21 **LIMITED PRELIMINARY OBJECTION**
22 **TO SALE MOTION AND RESERVATION OF RIGHTS**

23 10. By the Sale Motion, the Debtors seek to sell “substantially” all of SkyMall’s assets free
24 and clear of all “claims, liens, encumbrances, and other interests” pursuant to Bankruptcy Code section
25

26 ⁴ Capitalized terms used but not otherwise defined herein shall have the meaning given to them in the Bid
27 Procedures Order.

28 ⁵ The original Cure Notice referenced an additional agreement, referred to as the “Escrow Agreement”.

LIMITED PRELIMINARY OBJECTION
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1 363(f). *See generally* Sale Motion. Because the Debtors have not identified the Subject Assets with
2 specificity, by means of a list of assets or otherwise, it is unclear whether the proposed Sale will
3 impair, implicate, or even potentially seek to extinguish, the Connexions Interests.

4
5 11. While this may be understandable given the lack of any “Stalking-Horse Bidder” as of
6 yet and the timing of the Auction – which will not be held until 21 days after the Sale Objection
7 Deadline – this puts Connexions in the unenviable position of having to put the “cart before the horse.”
8 That is, Connexions must file this Limited Objection before it has enough information to fully assess
9 the proposed Sale and, if necessary, file a comprehensive objection to the Sale Motion to protect its
10 interests.

11
12 12. Connexions has had several conversations with the Debtors concerning the need to
13 preserve the Connexions Interests in any sale, and has also emphasized this point on the record at the
14 Debtors’ first day hearing. At this time, Connexions has not received any indication from the Debtors
15 that they intend to seek to sell the Subject Assets free of the Connexions Interests. Rather, the form
16 Asset Purchase Agreement (the “APA”) provided to Connexions, and presumably provided to potential
17 bidders, includes several “notes-to-draft” indicating the Debtors’ intent to preserve the Connexions
18 Interests. This language, however, is not flushed out in the form APA nor is there any assurance that
19 the APA submitted by the Prevailing Bidder will contain appropriate language to protect and preserve
20 the Connexions Interests.

21
22 13. Accordingly, to the extent that the Debtors, in the future, seek to sell the Subject Assets
23 free and clear of the Connexions Interests or the proposed sale order seeks to impair or modify the
24 Connexions Interests, Connexions objects to the Sale Motion. No matter the form, Connexions
25 believes that the Debtors are unable to meet the standards under Bankruptcy Code section 363(f) to sell
26 the Subject Assets free and clear of the Connexions Interest. Further, the only way that the Debtors
27

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1 can provide adequate protection of the Connexions Interests, as required by Bankruptcy Code section
2 363(e), is by selling the Subject Assets subject to the Connexions Interests, with possibly even more
3 protections needed, depending upon the identity of the purchaser and sale terms, and the status of the
4 TSA at that point in time.⁶ Absent appropriate clarification in the Sale Order, the Debtors might be
5 construed as having eliminated, impaired, or modified the Connexions Interests pursuant to a “free and
6 clear” sale order. The Connexions Interests are protected from that outcome by applicable law and,
7 therefore, the Sale Order must contain sufficiently broad and explicit language preserving and
8 protecting the Connexions Interests.⁷

10 14. Accordingly, Connexions must object to the Sale Motion and reserves all rights with
11 respect thereto until the outcome of the Auction is known and more specificity regarding the sale of the
12 Subject Assets (including the APA and proposed Sale Order) is available.

13
14 **LIMITED PRELIMINARY OBJECTION**
TO THE CURE NOTICE AND RESERVATION OF RIGHTS

15 15. Exhibit A of the Cure Notice identifies only four of the Connexions Agreements.
16 Although the descriptions of the Identified Connexions Agreements are fairly specific, the Debtors fail
17 to include, and identify, certain other of the Connexions Agreements entered into in connection with
18 the Ventures Sale.⁸ It is not clear whether this is reflective of the Debtors’ intent or an oversight.

20 16. For the Debtors to assume and assign any Connexions Agreement, they must describe
21 the licenses or other contracts at issue with enough specificity to allow identification. Based on the

22 ⁶ Connexions reserves the right to fully brief this issue if it appears that the Debtors are attempting to sell the
23 Subject Assets free and clear of the Connexions Interests or otherwise modify or alter the Connexions Interests pursuant to
24 the sale of the Subject Assets or proposed order. Further, Connexions reserves all rights to raise further objections to both
25 the Sale Motion and the Cure Notice once the results of the Auction are known. Nothing contained herein, or the failure to
make any arguments in this Limited Objection, shall be deemed a waiver of any arguments that Connexions may make in
the future in connection with either the Sale Motion or the Cure Notice.

26 ⁷ Connexions will commit to work with the Debtors to reach an agreement on language to include in the Sale
Order that sufficiently protects the Connexions Interests.

27 ⁸ Nothing herein shall be deemed an admission by Connexions that any of the Connexions Agreements are
executory contracts and Connexions reserves all rights with respect thereto.

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1 description in the Cure Notice, Connexions cannot, at this time, determine the universe of the targeted
2 Connexions Agreements and the appropriate cure amounts owed.⁹

3 17. In addition, it is unclear who the Prevailing Bidder(s) will be. Rather, the Sale Motion
4 contemplates an Auction at which a buyer will emerge as the Prevailing Bidder. However, the
5 deadline to select a “Stalking-Horse Bidder”, if any, is not until March 12, 2015, the Bid Deadline is
6 not until March 19, 2015 and the Auction is not scheduled until March 25, 2015 – all of these dates are
7 after objections to both the Sale Motion and Cure Notice are due. As a result, Connexions cannot
8 evaluate either the eventual purchaser’s identity or its acceptability as an assignee and ability to
9 provide default protections. Given the uncertainty of the Auction’s outcome, Connexions cannot
10 possibly know whether the prerequisites of Bankruptcy Code section 365(b) will be met to permit the
11 assumption and assignment of the Connexions Agreements.¹⁰ Accordingly, Connexions reserves its
12 right to be heard on matters relating to the Cure Notice (including related cure amounts) until the
13 Prevailing Bidder is known and the full universe of Connexions Agreements to be assumed and
14 assigned is confirmed.
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⁹ Further, what the proper “cure amounts” will be as of the assignment date is unknown.

¹⁰ Bankruptcy Code section 365(b) sets forth specific prerequisites that must be met before a debtor can assume and assign an executory contract, including (i) curing (or providing adequate assurance of a prompt cure of) any defaults under the subject contracts; and (ii) providing adequate assurance of future performance. As noted, the Sale Motion is subject to an Auction and the ultimate identity of the Prevailing Bidder(s) is unknown. Therefore, Connexions is unable to determine whether these requirements can be met.

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1 WHEREFORE, Connexions and Ventures seeks an order sustaining the Limited Objection and
2 reserving their rights as they relate to the Sale Motion and the Cure Notice and seeks entry of an order
3 granting such other and further relief to which they may be entitled.
4

5 Dated: March 4, 2015

6 LEWIS ROCA ROTHGERBER LLP

7
8 By: /s/ Susan M. Freeman (004199)
9 Susan M. Freeman
10 Justin J. Henderson
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25 *Counsel for Connexions Loyalty, Inc. and SkyMall*
26 *Ventures, LLC*

27
28 I certify that on this 4th day of March, 2015,
I electronically transmitted the attached document
via service using the CM/ECF service list.

By s/ Marie H. Mancino

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