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

10 In re:
11 SKYMALL, LLC,
12 Debtor.

In Proceedings Under Chapter 11
Case No. 2:15-bk-00679-BKM

13 Jointly Administered with:

Jointly Administered with Case Nos.:

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

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

21 This Pleading applies to:

- 22 All Debtors
23 Specified Debtors

**DEBTORS' BRIEF IN SUPPORT OF
COHNREZNICK CAPITAL MARKET
SECURITIES, LLC'S EMPLOYMENT
APPLICATION**

**Hearing Date: February 19, 215
Hearing Time: 1:30 p.m.**

24 This Brief is filed by SKYMALL, LLC, *et al.*, the debtors and debtors-in possession (the
25 “**Debtors**”) in the above-captioned Chapter 11 cases (the “**Bankruptcy Cases**”), in further
26 support of the Emergency Application for Entry of an Order Authorizing the Employment and

1 Retention of CohnReznick Capital Market Securities, LLC as Investment Banker Pursuant to 11
2 U.S.C. §§327 and 328 [Docket No. 21] (the “Application”).¹ In the Application, the Debtors
3 seek entry of an order under 11 U.S.C. §§ 327, 328, and 1103, authorizing their employment and
4 retention of CohnReznick Capital Market Securities, LLC (“CRCMS”), as investment banker to
5 the Debtors.

6 The Application is supported by: (i) the Verified Statement in Support of Debtors’
7 Emergency Application for Entry of an Order Authorizing the Employment and Retention of
8 CohnReznick Capital Market Securities, LLC as Investment Banker Pursuant to 11 U.S.C. §§327
9 and 328 (the “Manning Statement”), attached as Exhibit A to the Application; and (ii) the
10 Declaration of Scott Wiley in Support of First Day Motions [Docket No. 8] (the “Wiley
11 Declaration”).

12 On January 26, 2015 the United States Trustee (the “UST”) filed an objection to the
13 Application (the “Objection”). An initial hearing on the Application was held on January 27,
14 2015 (the “Initial Hearing”). After the Initial Hearing, the Court approved the Application on an
15 interim basis, but reserved consideration of the following issues (the “Disputed Issues”) which
16 were raised by the UST in the Objection: (i) whether the indemnification provision set forth in
17 Section 6 of the CRCMS Engagement Agreement will be approved; and (ii) whether CRCMS’s
18 proposed compensation structure will be subject to review under the “reasonableness” standard of
19 Bankruptcy Code 11 U.S.C. §330 rather than the “improvident” standard of Bankruptcy Code
20 11 U.S.C. §328. The Court asked for additional briefing before ruling on the Disputed Issues.

21 As discussed below, the applicable law and the record before the Court show that the
22 indemnification provision and the compensation provisions of the Engagement Agreement are
23 appropriate and should be approved under the provisions and standards stated in Bankruptcy
24 Code §328.

25 _____
26 ¹ Capitalized terms not defined in this Brief shall have the meanings ascribed to them in the Application.

1 **I. THE INDEMNIFICATION PROVISION IS APPROPRIATE AND SHOULD BE**
2 **APPROVED.**

3 It is well established by courts in the Ninth Circuit and other circuits that indemnification
4 provisions for estate professionals retained under Bankruptcy Code §328 are not per se improper.
5 While such provisions should be scrutinized, they are proper when reasonable under the facts of
6 the subject bankruptcy case. See, e.g., In re Aloha Airgroup, Inc., No. 04-3063, 2005 WL
7 1156092, at *1 (Bankr. D. Haw. 2005) ("More recently, however, nearly all courts agree that
8 while such provisions require careful scrutiny, they are not unreasonable *per se.*"); In re Simplot,
9 No. 06-00002-TLM, 2007 WL 2479664, at *20-21 (Bankr. D. Idaho 2008) (same); United Artists
10 Theatre Co. v. Walton, 315 F.3d 217, 233 (3d Cir. 2003) (same); In re Joan & David Halpern
11 Inc., 248 B.R. 43, 46 (Bankr. S.D.N.Y. 2000) *aff'd sub nom. In re Joan & David Helpern, Inc.*,
12 No. 00 CIV. 3601 (JSM), 2000 WL 1800690 (S.D.N.Y. Dec. 6, 2000) ("there is no blanket
13 prohibition, as the United States Trustee argues, against an indemnity clause in a financial advisor
14 retention").²

15 Factors which the courts look to in determining whether an indemnity or similar provision
16 for financial advisors and similar professionals is reasonable include:

- 17 (1) The nature of the professional's services and risk of claims arising from
18 such services.
- 19 (2) The importance to the debtor and the estate of the services to be
20 performed by the professional.
- 21 (3) Whether the provision is standard or common in the applicable industry
22 or market.

23 ² The cases cited by the UST in its Objection also recognize these principles. See In re
24 Metricom, Inc., 275 B.R. 364, 371 (Bankr. N.D. Cal. 2002) (while court generally disfavored
25 indemnity provisions, it recognized "the Code does not prohibit indemnity/contribution or
26 exculpation provisions, and that there is no statutory or binding bankruptcy case law basis upon
which to establish a *per se* rule against such protections for professionals in bankruptcy cases";
appropriate standard is whether the subject provision is reasonable); In re Mortgage & Realty
Trust, 123 B.R. 626, 630-31 (Bankr. C.D. Cal. 1991) (same); In re WCI Cable, Inc. 282 B.R. 457,
479 (Bankr. D. Or. 2002) (same).

- 1 (4) Does the professional ordinarily require such a provision.
- 2 (5) The scope of the provision (in particular, are gross negligence, willful
- 3 misconduct, bad faith excluded).
- 4 (6) Is the indemnity provision consistent with applicable non-bankruptcy

5 See, e.g., Aloha Airlines, 2005 WL 1156092 at *1; Simplot, 2007 WL 2479664 at *20-21;

6 United Artists, 315 F.3d at 229-234; Joan & David Helpern, Inc., 2000 WL 1800690 at *2. The

7 Third Circuit has noted the proper framework for assessing the reasonableness of indemnity

8 provisions for financial advisors and similar professionals:

9 Financial advisors are an essential part of reorganizations. Our decision today

10 recognizes the need for safeguards from the second-guessing of creditors and,

11 ultimately, the courts. At the same time, it assigns courts their accustomed task of

12 evaluating the process by which advice is given. If financial advisors take the

13 appropriate steps to arrive at a result, the substance of that result should not be

questioned. So understood, agreements to indemnify financial advisors for their

negligence are reasonable under §328(a) of the Bankruptcy Code.

14 United Artists, 315 F.3d at 234.³

15 The indemnification provision at issue in the Engagement Agreement is reasonable and

16 should be approved under all applicable factors for determining the reasonableness of such

17 provisions:

18 1. CRCMS is being retained as an investment banker to conduct an expedited

19 marketing and sale process for essentially all of SkyMall and its business assets. The SkyMall

20 assets are complex; CRCMS will need to deal with many third parties interested in the sale; and

21 CRCMS will have to rely extensively on information provided by the Debtors to complete the

22 ³ The UST's Objection includes citations to In re American Hardwoods, Inc., 885 F.2d 621

23 (9th Cir. 1989) and related cases. See Objection at 2-3. However, the indemnification provision

24 before the Court does not implicate American Hardwoods. American Hardwoods held that a

25 chapter 11 plan may not include a provision that enjoins a party from pursuing a non-debtor post-

26 confirmation. American Hardwoods, 885 F.2d at 626. This is not the issue before the Court. The

indemnification provision before the Court is not a release, and it does not enjoin non-debtor

parties from pursuing CRCMS. The indemnification provision provides CRCMS with limited

scope indemnity rights against the Debtors, and does not affect third-party rights. The reasoning

of American Hardwoods and related decisions is not applicable in this matter.

1 marketing and sale process in the contemplated expedited timeframe. See Application at ¶11;
2 Wiley Declaration at ¶¶23; 28-33.

3 2. The sale process which CRCMS is being retained to conduct is essential to the
4 Debtors and to the success of these Bankruptcy Cases. The sale process is the principal initial
5 phase of these Bankruptcy Cases, and it is a process designed to produce the greatest value and
6 return for creditors in these cases. See Wiley Declaration at ¶¶28-33.

7 3. CRCMS is one of the nation's premier distress and investment banking firms. Mr.
8 Manning is a highly credentialed and experienced distress and investment banking professional.
9 It is a regular and standard requirement of CRCMS to have an indemnity provision; it requires
10 one in regard to its engagement with the Debtors; and the indemnity provision is a standard
11 provision in the applicable market and industry for this type of engagement. See Manning
12 Statement.

13 4. The indemnity provision is limited in scope. It does not release CRCMS from
14 claims or preclude suits or actions by third parties. It does not encompass gross negligence, bad
15 faith, or willful misconduct. Any application of the provision (if such a situation ever arises) is
16 subject to the jurisdiction and orders of this Court. See Engagement Agreement at ¶¶6, 15.⁴

17 In light of all of the foregoing, the indemnity provision in the Engagement Agreement is
18 reasonable under Bankruptcy Code §328 and should be approved by the Court.

19 **II. CRCMS'S TRANSACTION FEE SHOULD BE APPROVED AND DETERMINED**
20 **UNDER SECTION 328 OF THE BANKRUPTCY CODE.**

21 Bankruptcy Code §328 provides that a professional may be employed "on any reasonable
22 terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or
23 percentage fee basis, or on a contingent fee basis." 11 U.S.C. §328(a). Bankruptcy Code §328
24

25 ⁴ In addition, Delaware law (SkyMall is a Delaware limited liability corporation and the
26 Engagement Agreement has a Delaware choice of law provision) provides for indemnification of
corporate officers and agents. See, e.g., United Artists, 315 F.3d at 228-30.

1 also provides that when an estate professional's employment with a percentage or other fixed
2 basis fee is approved under that section, the fee remains subject to subsequent adjustment "after
3 the conclusion of such employment, if [the terms and conditions of the approved fee] prove to
4 have been improvident in light of developments not capable of being anticipated at the time of the
5 fixing of [the terms and conditions of the fee]." 11 U.S.C. §328(a).

6 The Transaction Fee is a fixed percentage fee calculated as a function of the sale price,
7 and the fee is entirely contingent on Court approval of and closing of a sale. See Engagement
8 Agreement at ¶2. Accordingly, the Transaction Fee is the type of fixed percentage fee that is
9 expressly contemplated under Bankruptcy Code §328(a). The Engagement Agreement and the
10 Application request expressly that the CRCMS retention and the Transaction Fee be approved
11 under Bankruptcy Code §328. See Engagement Agreement at ¶2; Application at ¶11.

12 The courts in the Ninth Circuit recognize that approval of a fixed percentage fee of the
13 type at issue in the Application may be approved under Bankruptcy Code §328 at the outset of the
14 case, so long as the fee (and the other terms and conditions of the retention) are reasonable. See,
15 e.g., In re Circle K Corp., 279 F.3d 669, 674 (9th Cir. 2001) (a professional can be retained under
16 Section 328, and have its compensation governed under that section, if the professional invokes
17 Section 328 explicitly in its retention application); In re Confections By Sandra, Inc., 83 B.R.
18 729, 731 (B.A.P. 9th Cir. 1987) (Section 328 anticipates that terms of a fee arrangement can be
19 established prior to the performance of the contemplated professional services); In re Danner, No.
20 BAP ID-11-1315-HJUMK, 2012 WL 3205242, at *4 (B.A.P. 9th Cir. July 31, 2012) (“§328
21 contemplates that employment of professionals under §327 will be based on reasonable terms and
22 conditions. Thus, a bankruptcy court may properly review an employment application for the
23 reasonableness of the compensation agreement at the outset of a case.”).

24 The Transaction Fee is a reasonable fee arrangement that is beneficial to the estates under
25 the facts of these cases. The fee is a clearly stated and fixed percentage of the consideration paid
26 for sale of the SkyMall assets. CRCMS has testified that the fee structure is consistent with

1 market standards. See Manning Statement at ¶13. The Transaction Fee is entirely contingent -
2 the Transaction Fee is not payable unless and until there is an actual sale that is approved by the
3 Court and that actually closes.⁵ To approve any bankruptcy sale, the Court will have to find that
4 the sale (which will include payment of the Transaction Fee on closing) is beneficial to the
5 Debtors and their estates. Ultimate allowance and payment of the Transaction Fee remains
6 subject to the "improvident" review standard of Bankruptcy Code §328(a).

7 The UST does not object to the retention of CRCMS or to the terms or amount of the
8 Transaction Fee. Rather, the UST raises a technical issue regarding after-the-fact review of the
9 Transaction Fee. Despite the provisions of Bankruptcy Code §328(a) and the fixed percentage
10 and contingent nature of the Transaction Fee, the UST asserts that allowance of the fee should not
11 be reviewed under the "improvident" standard of Bankruptcy Code §328, but should remain
12 subject to the after-the-fact "reasonableness" review applied to allowance of hourly fee charges
13 under Bankruptcy Code §330. See Objection at p. 2. This is incorrect as a matter of law.

14 The Ninth Circuit has ruled directly that fixed contingent fees approved under Bankruptcy
15 Code §328(a) remain subject to the "improvident" standard provided under the section, but they
16 are not subject to a "reasonableness" analysis under Bankruptcy Code §330 as a matter of law.
17 See In re Reimers, 972 F.2d 1127, 1129 (9th Cir. 1992).

18 In Reimers, the Ninth Circuit analyzed a situation where a bankruptcy trustee retained
19 special counsel to prosecute an estate cause of action using a contingency fee. Id. The
20 bankruptcy court approved the retention of the special counsel and the contingency fee
21 arrangement. Id. However, after the action was concluded, the bankruptcy court refused to allow
22 payment of the contingency fee. Id. The bankruptcy court instead allowed payment of only an
23 amount equal to the number of hours the court estimated the special counsel had spent on the case
24

25 ⁵ The only other fee to CRCMS under the Engagement Agreement was an initial pre-
26 petition fee of \$50,000, and an additional fixed fee payment of \$25,000 to be made on or about
February 16, 2015. See Application at ¶11.

1 multiplied by an hourly rate. Id. The district court affirmed the bankruptcy court's ruling.
2 Reimers, 972 F.2d at 1127-28.

3 The Ninth Circuit began its analysis by noting that "[u]nder Bankruptcy Code §328, where
4 the bankruptcy court has previously approved the terms for compensation of a professional, when
5 the professional ultimately applies for payment, the court cannot alter those terms unless it finds
6 the original terms [to be improvident]." Reimers, 972 F.2d at 1128 (citations omitted). Because
7 of the provisions of Bankruptcy Code §328, the Ninth Circuit found that the lower courts'
8 application of a Bankruptcy Code §330 "reasonableness" standard to the special counsel's fee was
9 legal error:

10 Here, in calculating a reasonable fee for [the special counsel's] services, the
11 bankruptcy court merely estimated the number of hours he must have worked and
12 multiplied that number by his hourly fee. It made no finding of unanticipated
developments that rendered the original terms improvident. Thus, its decision, and
the district court's affirmance, were in error.

13 The bankruptcy court assumed that section 330 gave it the power to make a
14 general "reasonableness" review, despite the express language of section 328.
15 Neither it, nor the district court, cited any authority supporting this disregard of the
statutory language.

16 Reimers, 972 F.2d at 1128-29.

17 The CRCMS fee structure is reasonable and should be approved under Bankruptcy Code
18 §328(a).

19 **III. CONCLUSION.**

20 In light of all of the foregoing, and in conjunction with the final order approving the
21 retention of CRCMS, the Debtors request that the retention of CRCMS be approved under
22 Bankruptcy Code §328, including approval of the indemnity provision and the fee structure
23 (including the Transaction Fee) proposed in the Engagement Agreement.

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RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

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