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Court File No. CV-10-8647-00CL

Skyservice Airlines Inc.

TENTH REPORT OF THE RECEIVER

JUNE 2, 2011

Court File No. CV-10-8647-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

Between

THOMAS COOK CANADA INC.

Applicant

- and -

SKYSERVICE AIRLINES INC.

Respondent

**TENTH REPORT TO THE COURT SUBMITTED BY
FTI CONSULTING CANADA INC.
IN ITS CAPACITY AS RECEIVER**

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I. INTRODUCTION

1. On March 31, 2010 (the “**Date of Receivership**”), FTI Consulting Canada Inc. was appointed as receiver (the “**Receiver**”) of all of the assets, undertakings and properties of Skyservice Airlines Inc. (“**Skyservice**”) pursuant to the order of the Honourable Mr. Justice Gans (the “**Receivership Order**”) granted upon the application of Thomas Cook Canada Inc. pursuant to section 243(1) of the *Bankruptcy and Insolvency Act (Canada)* and section 101 of the *Courts of Justice Act (Ontario)*.
2. To date the Receiver has filed nine Reports as well as a Supplement to the Second Report and Supplement to the Third Report (the “**Receiver’s Reports**”). The Receiver’s first report dated April 14, 2010 (the “**First Report**”) was filed in support of the Receiver’s motion for, among other things, approval for the Receiver to enter into aircraft return agreements, aircraft return indemnity agreements and responsible person agreements with lessors and others to govern the return of aircraft leased by Skyservice and other related arrangements. Attached as Appendix “A” is the First Report (without appendices).
3. The First Report also informed the Court about claims asserted by Sunwing Tours Inc. (now Sunwing Vacations Inc.) (“**Sunwing**”), including possible proprietary or trust claims, in respect of funds held by the Receiver (the “**Sunwing Claim**”), and about the arrangements negotiated by the Receiver with Sunwing to ensure Skyservice’s monies continued to be available to fund the receivership.
4. The purpose of this, the Receiver’s Tenth Report, is to provide the Court with further information regarding the Sunwing Claim and the Receiver’s analysis of the validity of the trust aspect of the Sunwing Claim, and to seek an order, among other things, declaring that the amounts claimed in the Sunwing Claim are not subject to a proprietary or trust interest as alleged by Sunwing.
5. The discussion of the Sunwing Claim in this report is divided as follows:

- (i) **Background** - A description of the background to the Sunwing Claim and the interim agreement reached between the Receiver and Sunwing;
- (ii) **Allegations** - A summary of the allegations advanced by Sunwing;
- (iii) **Facts** - An outline of the facts relating to the Sunwing Claim, including a description of the applicable agreements and a discussion of the manner in which the agreements were applied; a description of the actual payments made by Sunwing to Skyservice; and a description of the manner in which the payments received from Sunwing were treated, including a description of funds currently held in a segregated account by the Receiver;
- (iv) **Security Posted by Skyservice with Sunwing** - A description of the security posted by Skyservice with Sunwing; and
- (v) **Summary** - A summary of the Receiver's observations and conclusions.

II. TERMS OF REFERENCE

6. In preparing this report, the Receiver has relied upon unaudited financial information of Skyservice, Skyservice's books and records, certain financial information prepared by Skyservice and discussions with Skyservice's employees. The Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information except as specifically set out herein. Accordingly, the Receiver expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation.
7. The information and advice described in this Report as being provided to the Receiver by McCarthy Tétrault LLP (the "Receiver's Counsel") has been provided to the Receiver to assist it in considering its course of action and is not intended as legal or other advice to, and may not be relied upon by, any other stakeholder.

8. This report discusses the proprietary or trust aspect of the Sunwing Claim. The Receiver reserves the right to disallow and contest the validity and quantum of any amount claimed by Sunwing, including the Sunwing Claim, separate and apart from the proprietary or trust aspects. In other words, the discussion in this report does not constitute acceptance by the Receiver that Sunwing has a claim against Skyservice for any amounts whatsoever as part of the claims process.
9. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined are as defined in the Receivership Order or the Receiver's Reports.

III. THE SUNWING CLAIM

1. BACKGROUND

9. As set out in the First Report, by letter dated April 2, 2010, counsel to Sunwing informed the Receiver's Counsel that Sunwing asserted a claim, including a potential proprietary or trust interest, to funds held by the Receiver. A copy of that letter is attached hereto as Appendix "B".
10. Sunwing's counsel alleged that at least \$7,200,000 had been provided by Sunwing to Skyservice on account of services that had not been provided by Skyservice before the receivership and alleged that such funds "are subject to Sunwing's interest, including without limitation a proprietary or trust interest, do not form part of the Skyservice estate and are not subject to any court ordered charges or other security."
11. Receiver's Counsel responded to counsel for Sunwing by letter dated April 5, 2010 seeking details and documentation to support the trust claim since none had been provided. Receiver's Counsel specifically requested copies of all agreements and other documentation to identify the funds claimed by Sunwing and to prove Sunwing's proprietary interest therein. Attached hereto as Appendix "C" is a copy of the letter.

12. In the interim, to ensure there was money available to fund the continuing activities in the receivership (given the amount of the Sunwing Claim relative to the funds on hand in the receivership), the Receiver and Sunwing entered into a letter agreement dated April 8, 2010 (executed by counsel to Sunwing on behalf of Sunwing on April 9, 2010) in which Sunwing and the Receiver agreed, among other things, that:
- (i) notwithstanding the Sunwing Claim, the Receiver could continue to spend Skyservice funds held or received in the future by the Receiver unless and until Sunwing obtained a final court order on not less than seven days notice to the Receiver declaring Sunwing's ownership interest in all or some of the funds; and
 - (ii) until further order of the Court, the Receiver would keep segregated \$2,329,473 of the funds of Skyservice and segregate any deposits recovered from suppliers or service providers that were held by such suppliers or service providers on a segregated basis in respect of goods or services to be provided to Sunwing.

A copy of the April 8, 2010 letter agreement (the "**Sunwing Letter Agreement**") is attached hereto as Appendix "D".

13. In connection with applications brought by airport and other authorities for the seizure of Skyservice aircraft, Sunwing delivered a motion record that included the affidavit of Mark Williams, sworn April 27, 2010 (the "**Williams Affidavit**"). In his affidavit, Mr. Williams, the President of Sunwing Airlines Inc., a wholly owned subsidiary of Sunwing Travel Group Inc. (the "**Sunwing Group**"), which is also the 100% shareholder of Sunwing, provided some additional background regarding the Sunwing Claim. The Williams Affidavit is attached hereto as Appendix "E".

14. On May 12, 2010, counsel for Sunwing wrote to Receiver's Counsel providing some additional information with respect to the Sunwing Claim. The May 12, 2010 letter is attached hereto as Appendix "F".
15. In addition, the Receiver conducted its own review of Skyservice records and other information, as discussed below, in considering the merits of the Sunwing Claim. The Receiver then engaged with Sunwing in a series of without prejudice communications, which led to a letter from Receiver's counsel to Sunwing's counsel setting out the Receiver's understanding of the corrections and clarifications made by Sunwing to its position (the "**Clarifying Letter**"). A copy of the Clarifying Letter from Receiver's Counsel dated December 7, 2010 is attached as Appendix "G".
16. Counsel for Sunwing responded to the Clarifying Letter on December 24, 2010. The December 24, 2010 letter is attached hereto as Appendix "H".
17. While Sunwing has asked the Receiver to conclude that Sunwing has a trust or other ownership interest in the \$2,329,473 that has been segregated and in various other funds held or that may be recovered by the Receiver, based on its review of the available information to date, and discussions with Receiver's Counsel, the Receiver is unable to do so. As a result, the Receiver seeks an order that, as provided in the Sunwing Letter Agreement, it may spend or distribute all funds without regard to the Sunwing Claim and an order determining that the amounts claimed in the Sunwing Claim are not subject to a proprietary or trust interest as alleged by Sunwing.

2. THE ALLEGATIONS

18. The Sunwing Claim is described in the May 12, 2010 letter from Sunwing's counsel, with clarification provided in the December 24, 2010 letter. In essence, the Sunwing Claim may be divided into the following four categories:

- (i) **General Invoice Amounts** - Sunwing claims it pre-paid for services that were not delivered prior to the receivership and that those funds were held in trust for Sunwing. Sunwing claims \$2,329,473 is subject to an "actual" trust and \$3,513,450.08 (which includes and is duplicative of the amount claimed in the "actual" trust) is subject to a constructive trust.

Sunwing's claim includes (i) \$1,064,367.04 relating to Skyservice invoice REV-005130; and (ii) \$2,449,083.04 relating to Skyservice invoice REV-005146, amounts that Sunwing says were "paid to Skyservice for a specific purpose, being the charter flight services between March 27 and April 2, 2010" and "between April 3 and April 9, 2010". Sunwing claims that such amounts were "held in trust for Sunwing unless and until used for that purpose" and, "[b]ecause such services were not provided [the amounts are] held in trust by the Receiver for the benefit of Sunwing."

In the December 24, 2010 letter, Sunwing clarified that its trust claim relating to these general invoice amounts is two-fold:

- (a) Sunwing claims that \$2,329,473 of the above-described invoice amounts were segregated by Skyservice and therefore held in an "actual" trust for the benefit of Sunwing;
- (b) Sunwing claims that \$3,513,450.08 (which amount includes and is duplicative of the claim for \$2,329,473 in (a), above), is held in a constructive trust for the benefit of Sunwing, with the constructive trust imposed to remedy an alleged unjust enrichment as follows: Skyservice was enriched by the above-described amounts, Sunwing was correspondingly deprived, and there was no juristic reason for the enrichment due to the appointment of the Receiver and Skyservice's failure "to provide the flights pre-paid for".

- (ii) **Third Party Invoice Amounts** – In the May 12, 2010 letter, Sunwing claimed it made weekly payments to Skyservice, which “included amounts for operating costs incurred by Skyservice to third party goods and services providers... in connection with the operation of aircraft leased by Skyservice.” Sunwing claimed these amounts “were paid by Sunwing to Skyservice for the sole and express purpose of ... being used to fund payments to third parties” and alleged that, to the extent such an amount was not paid to the third party, “such funds are the property of Sunwing and were received by the Receiver in trust, for the benefit of Sunwing.”

It appears Sunwing is not pursuing this aspect of the claim separate and apart from its claim relating to Third Party Deposits, described below. In the Clarifying Letter, Receiver’s Counsel listed Sunwing’s Third Party Deposit claim and asked Sunwing to advise if it was claiming any other amounts under the category of third party payments or third party deposits. Sunwing’s response in the December 24, 2010 letter references only the third party payments described in the Third Party Deposit claim, below.

- (iii) **Third Party Deposits** - Sunwing claims it made payments to Skyservice for the purpose of funding Skyservice’s deposits with third parties (or funding for a tourist card inventory) and to the extent the funds were not used for that purpose or to the extent the deposits are returned to the Receiver, the funds are held subject to a Quistclose trust for Sunwing.

Sunwing claims that it paid the following deposits (collectively the “Deposits”) to Skyservice “for the sole and express purpose of those Deposits being either transferred to the third party beneficiaries of the money or used to fund the tourist card inventory” and, to the extent the Deposits were not transferred to the third party for the deposit or used to fund the tourist card inventory, or to the extent the Deposits are returned to the Receiver by the third party, “such funds are the property of Sunwing

and are received by the Receiver in trust, for Sunwing” (the “**Deposit Claim**”):

- (a) \$678,000 on account of fees for the Greater Toronto Airport Authorities;
- (b) \$2,400,000 for an Imperial Oil fuel deposit;
- (c) \$390,000 for a Serviceair deposit, portions of which Sunwing states are related to flights that did not occur as a result of the receivership;
- (d) \$237,000 and US\$213,000 to enable Skyservice to purchase an inventory of tourist cards for Sunwing.

Sunwing has clarified that its Deposit Claim relates only to amounts from the Deposits that were not in fact remitted to the intended third party payee. That is, Sunwing claims that to the extent the above amounts were paid to Skyservice for the specific purpose of delivery to a third party *and* to the extent the funds were not so delivered to the third party, the portion of the funds that were not paid to the third party as intended, is subject to a Quistclose trust. As set out herein and in the Clarifying Letter, the Receiver reviewed the Skyservice records and concluded that, in each case, Skyservice paid amounts to the applicable third party shortly after receipt of amounts from Sunwing for the intended party, which payments were in excess of the amounts received from Sunwing.

In the December 24, 2010 letter, Sunwing added two points:

- (a) to the extent funds were received from parties other than Sunwing for payment to the third party payees in the Deposit Claim and not paid to the intended payee, some or all of those amounts are held in trust and “Sunwing’s portion thereof” is requested by Sunwing; and
- (b) to the extent Skyservice has received or is owed a refund from one of the third party payees described in the Deposit Claim, the amount refunded is held by Skyservice in trust and requested by Sunwing.

- (iv) **Damages** – Sunwing claims that it incurred damages “[a]s a result of Skyservice’s receivership and its consequent failure to provide the charter flight services for which Sunwing prepaid.” (the “**Damages Claim**”). Sunwing estimates that the Damages Claim will exceed \$4,900,000.

As set out in the Clarifying Letter and confirmed in the December 24, 2010 letter, Sunwing has clarified that it does not claim that this amount is subject to a trust, except to the extent there is overlap among the amounts claimed as damages and costs and amounts claimed in the ‘trust’ categories listed above.

3. **FACTS RELATING TO THE SUNWING CLAIM**

- 19. The Receiver has reviewed the information provided by Sunwing in response to the request by Receiver’s Counsel for supporting information and documentation. In addition, the Receiver has sought information from Skyservice. The following description of the relevant facts is based on the information provided by Sunwing as well as additional information the Receiver has been able to locate from Skyservice’s records or otherwise ascertain.

A. Agreements between Sunwing and Skyservice

- 20. On June 11, 2006, Skyservice entered into a commercial agreement (as amended, the “**Commercial Agreement**”) with First Choice Canada Inc. (“**FCC**”). Attached as Appendix “T” is a copy of the Commercial Agreement. Certain financial details not relevant to this analysis have been redacted from the Commercial Agreement attached hereto at the request of Sunwing.
- 21. In February 2010, FCC amalgamated with Red Seal Tours Inc. to form Sunwing (FCC and Sunwing are variously referred to herein as “Sunwing” or “FCC” where appropriate).
- 22. Sunwing is owned by the Sunwing Group, in which TUI Canada Holdings Inc. (“**TUI Canada**”) owns a 25% voting interest and 49% economic interest. TUI

Canada is in turn indirectly owned by TUI Travel PLC ("**TUI**"). TUI also indirectly owns Thomson Airways Limited ("**Thomson**").

23. The Receiver understands that Sunwing carries on business as an operator of package tours and charter flights and operates a retail travel business.
24. In the Commercial Agreement, the parties agreed, among other things, to enter into individual charter agreements in the form of pro-forma charter agreements attached thereto (the "**Charter Agreements**") pursuant to which Sunwing would charter aircraft from Skyservice.
25. There are two types of pro-forma Charter Agreements attached to the Commercial Agreement, one for individual charter agreements between Sunwing and Skyservice (the "**Charter Pro Forma**") and the other for individual extended charter agreements between Skyservice and a company that is a subsidiary or affiliate of Sunwing (the "**Extended Charter Pro Forma**"). As discussed below, the Receiver understands that only the Charter Pro Forma was used for the Charter Agreements that underlie the Sunwing Claim and that, other than the charter agreement in relation to a spare aircraft (C-FOBH) for which there do not appear to have been amounts invoiced in advance of flying that form part of the Sunwing Claim, the Charter Agreements that underlie the Sunwing Claim appear to be consistent with the Charter Pro Forma in the material respects.

i. The Practise

26. The relevant terms of the Commercial Agreement and the Charter Pro Forma (the "**Agreements**") are detailed below. In practise, the manner in which the Agreements were applied by Skyservice and Sunwing with respect to invoicing and payments was as follows:
 - (i) the parties agreed upon an operating budget prior to the beginning of the flying season, which began on November 1st. The budget was based on the parties' estimate of Operating Costs, Overhead Charges and Profit

Charges (as defined below) based on Sunwing's anticipated flight programme for the season;

- (ii) from the operating budget, the parties calculated the budgeted cost on an Average Seat Mile ("ASM") basis. That is, the amount of the total budget was divided by the expected number of seat miles in the Sunwing flight programme for the season, to determine an anticipated cost per seat mile. The ASM calculation was then used by Skyservice to invoice Sunwing throughout the entire season;
- (iii) Skyservice invoices were created in relation to each one-week period in which Skyservice flights for Sunwing were to take place. Skyservice issued invoices approximately two weeks in advance of the week in question by taking the number of seat miles planned for that week (a multiple of the number of passengers by the number of miles to be flown) and multiplying that by the ASM. In this manner, the price charged by Skyservice for flights that week was equal to a portion of the total budget as determined by the number of seat miles scheduled for the week (as opposed to the actual or expected costs, plus profit, for that particular week);
- (iv) the Skyservice invoices were delivered to Sunwing and payment was due from Sunwing the week before the flying took place. As described above, the invoices were not for specific flight costs only – they were invoices for a percentage of the overall budget costs (including Operating Costs, Overhead Charges and the Profit Charge) calculated on the basis of a formula associated with the number of flight miles scheduled for the week. Indeed, certain costs are not specific to individual flights. For example, certain costs are in respect of both Sunwing charters and flights chartered by other Skyservice customers (e.g. ground crew costs, premises or equipment rent and overhead costs). Other costs are paid in advance such

that the funds have not even been paid by Sunwing to Skyservice when the costs are paid by Skyservice (e.g. certain taxes);

- (v) As described below, funds received from Sunwing as payment for the invoices were deposited into the Skyservice general Canadian dollar account at HSBC Bank Canada (account number of 270-217436-001) (the "Skyservice Canadian General Account"). Skyservice did not segregate the amounts received nor did it use the amounts received only for the costs associated with the corresponding weekly flights. Rather, monies were paid out of the Skyservice Canadian General Account as required by Skyservice in the operation of its business generally for all customers, including for amounts such as building rent, utilities, office staff salaries, navigation fees, ground handling costs, hangar costs, pilot salaries, maintenance and cabin crew salaries, catering and so on. This appears to be consistent with the invoicing process described above, which did not invoice for specific flight costs only;
- (vi) if the number of flights actually flown in a week did not match the number of flights scheduled to be flown, then in accordance with the Charter Agreement, adjustments were made after the end of the month. This did not involve reviewing or allocating actual costs but rather was an adjustment in the formula solely based on the number of flights, to ensure the ASM was multiplied by the actual number of flights flown. At the end of the season, the Charter Agreement provides for a final adjustment based on the number of flights and seat miles flown; and
- (vii) months after costs were incurred and paid by Skyservice, Skyservice would review the actual costs paid by it and allocate such costs between customers based on formulas relating to aircraft months or seat miles actually flown. The Receiver understands that, in practise, during the course of the relationship there were circumstances in which the actual

costs allocated to Sunwing (as determined months after the costs were paid) were less than the costs invoiced to Sunwing using the calculated ASM and that in those circumstances, the parties agreed that Skyservice would subtract the difference from the Budget in the following season. In other words, a form of "credit" was provided, but no payment was involved.

27. As the Receiver understands Sunwing's position, Sunwing agrees that the invoice amounts were determined based on a formula, as described above, and not based on specific costs for specific flights, and that costs invoiced included costs not divisible by flight. However, it argues that this was a matter of internal management and that costs may be attributed to a specific flight even though the invoices and funds received in payment of invoices were not treated in that manner. Sunwing further alleges that the invoices are explicitly for flights scheduled in a certain week and that amounts paid with respect to those flights can be identified and allocated to flights not provided.

ii. The Commercial Agreement

a) Charter Fee and Budget

28. The Commercial Agreement provides in section 5.1.1 that each Charter Agreement will be entered on a "Total Cost Basis" with Sunwing paying a "Charter Fee", consisting of an Overhead Charge, Operating Costs and a Profit Charge. In addition to the Charter Fee, Sunwing is to pay a bonus in circumstances set out in Appendix 9.1 of the Commercial Agreement (capitalized terms used in this section are as defined in the Commercial Agreement).
29. Appendix 8 of the Commercial Agreement provides for the calculation of the Tariff under each Charter Agreement, providing that the Charter Fee is equal to the quotient of

"(A) the sum of (i) the applicable Profit Charge determined in accordance with Clause 7, *pro-rated* daily for the Term; (ii) all projected Operating Costs

associated with operating the relevant Aircraft and performing the part of the Programme applicable to that Aircraft in accordance with the budget for the relevant Holiday Year in accordance with Clause 11 and (iii) the Overhead Charge determine in accordance with Clause 6.2”

divided by

“(B) the Seat Miles planned by FCC for the Applicable Holiday Year, subject always to the Minimum Seat Mile Guarantee.”

30. The components of the Charter Fee are defined in the Commercial Agreement:
- (i) Overhead Charge, according to clause 6.2 of the Commercial Agreement, is a monthly allocation of qualifying Skyservice overheads including Skyservice finance, legal administration, human resources, ground operation, crew scheduling, operational safety, telecommunications, customer relations, facilities and amortization costs among other overhead costs described in Appendix 6 to the Commercial Agreement.
 - (ii) Operating Costs, according to Appendix 5 of the Commercial Agreement, means all operating costs including, but not restricted to costs associated with operating the Aircraft and performing the Sunwing flight programme pursuant to the Charter Agreements including:
 - (a) Aircraft lease costs, such as:
 - (i) Rental
 - (ii) Maintenance reserves (to the extent that these are not recovered at the end of the lease term)
 - (iii) Insurance;
 - (b) Taxes and indemnities payable by Skyservice pursuant to the lease; and
 - (c) All charges associated with the return of the Aircraft in accordance with the lease terms;
 - (d) Aircraft maintenance and repair costs;
 - (e) Fuel and oil costs;
 - (f) Ground handling costs such as:

- (i) Aircraft, passenger, baggage and cargo handling
 - (ii) De-icing
 - (iii) Aircraft cleaning and catering;
 - (g) Security;
 - (h) Airport, government and navigation fees;
 - (i) Flight and cabin crew salaries and expenses; and
 - (j) Irregular operations, welfare costs and sub-chartering of replacement aircraft.
- (iii) The Profit Charge is calculated in accordance with a chart in Appendix 7 of the Commercial Agreement, which is based on a blended and weighted average of rates agreed between the parties for the profit charge element of the Charter Fee chargeable with respect to each Aircraft pursuant to the relevant Charter Agreement.

31. The Commercial Agreement provides that the Charter Fee – consisting of the Overhead Charge, Operating Costs and Profit Charge – is to be calculated in accordance with a budget for the “Holiday Year” (which runs from November 1 to October 31) that is agreed upon in advance and is to be invoiced weekly in advance on a fixed and per-seat mile basis. In particular, clause 5.1.2 provides as follows:

“The Charter Fee applicable to each Charter Agreement in any Holiday Year shall be calculated in accordance with a Budget for such Holiday Year agreed between the Parties pursuant to Clause 11.4 and invoiced weekly in advance on a fixed and a per-seat mile basis as set out in Appendix 8 according to the planned flying programme set out in the relevant Charter Agreement (the “Tariff”) subject to all Charter Fee payments under the relevant Charter Agreement being reconciled in accordance with Clause 11.5.”

32. The budget is defined in Clause 11.4, which provides:

“The agreed projected schedule of Operating Costs for each Season, projected Profit Charges and projected Overhead Charges for the relevant Season in each Holiday Year shall, when applied to the Programme for each Season in the relevant Holiday Year, form the budget for such Season in such Holiday Year (the “Budget”).

33. Clause 5.1.3 provides that Skyservice is entitled to revise the Charter Fee subject to and in accordance with clause 11.5:

“In addition to the Charter Fee as set out in the Charter Agreement, subject to, and in accordance with the provisions, [sic] of Clause 11.5 in the event of any increase or decrease in any costs or charges relating to the Programme (including for the avoidance of doubt any costs relating to the termination of the Programme whether in relation to the return of the Aircraft, the lease agreement or otherwise), or the incurring by Skyservice of any cost based on unplanned or unforeseen events not caused by Skyservice’s Gross Negligence or wilful misconduct related to the Programme or to the Charter Agreement, the Parties acknowledge and agree that Skyservice shall be entitled to revise the Charter Fee and therefore the Tariff accordingly provided that such costs have not been included as Operating Costs.”

b) Reconciliation

34. Clause 11.5 provides for reconciliation in the event of a difference between the actual Operating Costs and the budgeted Operating Costs, subject to certain minimums, as follows:

“FCC and Skyservice shall conduct a reconciliation of actual Operating Costs against the projected schedule of Operating Costs at the end of each Season. FCC shall have the right to require documentary evidence of actual costs incurred in relation to (A) variations over budget or (B) where FCC have reasonable grounds for believing that savings against budget should have been realised, in each case, equal to or greater than either (i) [REDACTED] (subject to a *de minimis* level of [REDACTED]) and (ii) [REDACTED] in each case per line item specified in Appendix 5. If Skyservice is prevented from providing such documentary evidence by reason of contractual or statutory confidentiality obligations in relation to such expenditure, then Skyservice shall submit a written explanation of the cost levels actually achieved compared to those budgeted, certified as true and complete and signed by an officer of the Company. If Skyservice is not able to either (i) substantiate the projected cost levels in the manner contemplated above or (ii) explain such non-reduction to FCC’s satisfaction then the budgeted cost in the case of (A) or the reduction against budget in the case of (B), shall take effect and Skyservice shall promptly make to FCC the necessary payment. The reconciliation shall be made taking into account accruals for future liabilities on a commercially reasonable basis.” [Redaction as per attached Commercial Agreement].

35. With respect to the Profit Charge element of the Charter Fee, Clause 7.2 provides that at the end of each Holiday Year, Skyservice is to calculate whether an Adjustment Payment is due, which occurs when certain assumptions regarding the term of the charter agreements prove to be incorrect.

c) Other "Advance Funding"

36. There is also a provision in the Commercial Agreement pursuant to which Sunwing is required to provide additional "advance funding":

"If the Programme requires (i) flight attendant or pilot training to be carried out prior to the start of the Season, (ii) third party fuel and ground handling suppliers' deposits for reasons other than a decline in Skyservice's credit standing or (iii) the establishment of a new base of operations for Skyservice, then FCC shall provide to Skyservice a method of advance funding to Skyservice the reasonable costs of Skyservice in relation to such training, deposits or establishment costs."

37. The manner in which the Charter Fee, reconciliation and additional advance funding provisions were applied by Sunwing and Skyservice in practise is discussed above and in paragraphs 82-86, below.

d) Relevant Termination Provisions

38. Article 16.1 provides for events of default by Skyservice pursuant to which Sunwing would become entitled to terminate the Commercial Agreement prior to the expiry of the Term. Article 16.2 provides that, in the event of a termination pursuant to Article 16.1 "Skyservice shall on demand pay any amounts owing to FCC pursuant to this Agreement or any Charter Agreement" and, upon receipt of such amounts, "FCC shall pay to Skyservice any amounts owing by FCC to Skyservice". This provision speaks to the payment of amounts "owing" and does not provide for "return" of any amounts held "in trust" or otherwise "belonging" to FCC.

e) No Trust Language

39. There is no language in the Commercial Agreement referring to a trust or requiring payments to be held in trust nor is there a clause in the Commercial Agreement requiring funds received on account of a Charter Fee to be held in a segregated account. To the contrary, clause 24.1 contains an acknowledgement that nothing in the agreement creates a fiduciary relationship as between the parties.

iii. Charter Pro Forma

40. The Charter Pro Forma sets out the terms and conditions for individual Charter Agreements between Sunwing and Skyservice, such as the ones upon which payments were made by Sunwing to Skyservice. The Charter Pro Forma is attached as Appendix 1 to the Commercial Agreement (which is Appendix "I" hereto).
41. Pursuant to clause 4.1 of the Charter Pro Forma, Sunwing pays Skyservice a Charter Fee, in accordance with a tariff, for services performed under the Charter Agreement.
42. Clause 4.2 provides that the Charter Fee is to be paid by Sunwing on a weekly basis based on the Charter Fee for the number of roundtrip flights (or "Rotations") scheduled to be flown in the ensuing week. There is then a provision for adjustments based on the actual number of Rotations and actual seat miles flown:

"Charterer shall pay to Skyservice the Charter Fee applicable to the Program on a weekly basis. Each weekly payment shall be based on the Charter Fee for the number of Rotations scheduled to be flown in the ensuing week. Any necessary adjustments to take into account the number of actual Rotations operated during the preceding month shall be made within ten (10) days of the end of each month. A final adjustment for the actual number of Rotations and the actual Seat Miles flown by the Aircraft, together with applicable surcharges, shall be made [each Season within ninety (90) days of the end of

the first such Season or in the case of the second Season,] within sixty (60) days following the end of the Term. ...”

43. Clause 4.2 also provides a resolution mechanism in the event Skyservice fails to pay its debts in connection with the operation of the aircraft:

“... Throughout the Term, Skyservice agrees to pay its debts in connection with the operation of the Aircraft, including applicable surcharges and departure taxes, on a timely basis. In the event that Charterer becomes aware that Skyservice has failed to pay any of its debts in connection with the operation of the Aircraft, Charterer shall forthwith notify Skyservice of the supplier involved and the nature of the payment to be made. Skyservice shall then have fifteen (15) calendar days to satisfy such payments and to provide Charterer with proof of such payment, failing which, *Charterer may make such payment directly to the supplier and set off such amount against amounts owing to Skyservice hereunder*, except in the event that Skyservice is contesting in good faith and on reasonable grounds its obligation to pay such amounts, in which case Skyservice shall provide Charterer with its reasons for such protests.” [emphasis added]

44. Clause 4.3 provides for the protection of the amounts paid by Sunwing to Skyservice under the Charter Agreement. It does not provide for the amounts to be held in trust - in that regard, clause 4.2 also clarifies that “all payments are to be received into Skyservice’s bank account in immediately available funds in full, free and clear of any deductions, withholding taxes, duties and levies.” Clause 4.3, entitled “Advanced Payment Protection”, provides for security by letter of credit, bond or other security:

“All advance payments made by Charterer under this Agreement shall be secured by Skyservice with a letter of credit, bond or other security as required by law. All limitations on the liability of Skyservice under this Agreement are without prejudice to this Section 4.3 and the rights of Charterer under any security provided pursuant to it. Skyservice will comply with the requirements of the *Canada Transportation Act, 1996* (Canada) and the regulations adopted thereunder regarding advance payments to air carriers by charter operators and shall provide Charterer on or before the first Flight pursuant to this Agreement a copy of the security instrument issued by a Canadian financial institution establishing that all advance payments for Flights to be made pursuant to this Agreement are fully secured.”

This protection and the security in this case are discussed further below beginning at paragraph 103.

45. Clause 7.2 provides the parties' agreement as to the remedy available in the event Skyservice failed to provide aircraft to Sunwing for any reason, including:

"In the event that Skyservice fails to secure arrangements for an alternate aircraft within eighteen (18) hours of the Aircraft becoming unavailable (other than where Charterer has waived Section 7.2), Charterer shall be entitled to make arrangements for an alternate aircraft to perform a Flight; provided, however that Charterer must notify Skyservice immediately of such arrangement, and provide further that Skyservice shall be entitled to perform all flights upon completing arrangements for an alternate aircraft in accordance with this Section 7.2."

Of note, this section does not provide for funds to be held in trust or returned to Sunwing.

46. Again, there is no trust or other proprietary language nor is there any provision in the Charter Pro Forma that requires the segregation of funds. Rather, section 8.1, of the Charter Pro Forma, like the provision in the Commercial Agreement, provides that nothing in the agreement shall be construed to create any fiduciary relationship as between the parties.

iv. Extended Charter Pro Forma

47. The Extended Charter Pro Forma applies in circumstances in which Sunwing "wishes to charter the Aircraft on an extended basis from [Skyservice] and [Skyservice] is willing to charter the Aircraft on an extended basis to [Sunwing]..."
48. It is the Receiver's understanding that the Extended Charter Pro Forma did not form the basis of any Charter Agreements in relation to the Sunwing Claim.

v. First Choice Agreement

49. There is also a further agreement (the "**First Choice Agreement**"), originally between Skyservice and First Choice Airways Limited ("**First Choice**") dated August 28, 2006. The rights and obligations of First Choice under the First Choice Agreement were novated to Thomson by agreement dated September 30, 2008. As set out above, Thomson and Sunwing are both indirectly owned by TUI.
50. Sunwing referenced this agreement in the Williams Affidavit; however, it is the Receiver's understanding that the First Choice Agreement does not form the basis for any part of the Sunwing Claim.

vi. Correspondence or Other Evidence

51. The Receiver has not found any correspondence between Skyservice and Sunwing or other evidence prior to the Date of Receivership in which a trust or proprietary interest was asserted by Sunwing or in which Skyservice was required or asked to segregate the funds provided to it by Sunwing.

B. Payments Made by Sunwing to Skyservice

i. Invoices at Issue

52. Sunwing has demanded payment of:
- \$1,064,367.04 relating to invoice REV-005130 dated March 17, 2010 in the amount of \$3,189,731.34 in respect of flights for the period March 27-April 2, 2010; and
 - \$2,449,083.04 relating to invoice REV-005146 dated March 23, 2010 in the amount of \$2,449,083.04 in respect of flights for the period April 3-9, 2010.
53. The Receiver has reviewed the Skyservice records in relations to those invoices and the payments received in relation thereto.

a) Invoice REV-005130 (March 17, 2010)

54. REV-005130 was issued March 17, 2010 in the amount of \$3,189,731.34 for flights in respect of the period March 27-April 2, 2010. This invoice is attached hereto as Appendix "J".

55. As noted in the December 24, 2010 letter from Sunwing's counsel, there had previously been a disagreement regarding the amount of this invoice that related to services not delivered between March 31 and April 2, 2010. However, the Receiver has now resolved the discrepancy and agrees with the Sunwing calculation of \$1,064,367.04. This amount represents the portion of the Budget allocated to the seat miles on the flights that were scheduled to be flown for Sunwing between March 31 and April 2, 2010 but not actually provided.

b) Invoice REV-005146 (March 23, 2010)

56. REV-005146 was issued March 23, 2010 in the amount of \$2,449,083.04 for flights for the period April 3-9, 2010. This invoice is attached hereto as Appendix "K".

57. Sunwing alleges that it paid \$2,449,083.04 to Skyservice by wire transfer on March 26, 2010. It further states that the \$2,449,083.04 was held in a separate Skyservice account between its receipt on March 26 and the appointment of the Receiver, and then held in a segregated account by the Receiver.

58. According to Skyservice records, however, Skyservice received a single payment from Sunwing on March 26, 2010, being a payment by wire transfer at 13:20 into the Skyservice Canadian General Account in the amount of \$2,685,435.58. It was not unusual for Sunwing to pay multiple invoices together in one wire transfer and it appears that occurred in this case.

59. According to Skyservice, the \$2,685,435.58 amount received from Sunwing on March 26, 2010 related to two invoices:

- (i) invoice SALES000000817 dated March 26, 2010 for passenger taxes between March 8-14, 2010 in the amount of \$355,969.25. This invoice is attached as Appendix "L". Of note, such taxes are payable in arrears and, according to Skyservice, payments are applied to the oldest amount first unless otherwise specified.
- (ii) invoice REV-005146 in the amount of \$2,449,083.04.

- 60. A credit note - REVCRD-001472, attached hereto as Appendix "M" - in the amount of \$119,609.86 was applied in payment of the difference between the amount received from Sunwing on March 26, 2010 and the total amount due under the two above-listed invoices, with the remaining difference of \$6.85 representing bank charges.
- 61. Further details regarding the treatment of the funds deposited in to the Skyservice Canadian General Account is described under the heading "Treatment of Funds" below.
- 62. According to the December 24, 2010 letter from Sunwing's counsel, Sunwing does not appear to dispute the facts set out in paragraphs 58-60, above. However, it states that payment of \$119,609.86 of invoice REV-005146 with a credit note is no different than if it had paid the full amount in cash.

c) Unpaid Invoices Issued by Skyservice to Sunwing

- 63. It is also important to note for this analysis that amounts were due from Sunwing to Skyservice arising under the Agreements for flying that took place prior to March 31, 2010. In particular, the following amounts have been invoiced to Sunwing and remain unpaid:

| Invoice # | Description | Amount |
|------------------|---|-----------------|
| REV-005183 | Fuel differential for the month of March 2010 | US \$554,296.56 |
| SALES000000826 | Travel taxes (March 19-28, 2010) | US \$25,875.00 |
| SALES000000822 | Travel taxes (March 15-31, 2010) | \$647,445.25 |

| | | |
|----------------|----------------------------------|-----------------|
| SALES000000823 | Travel taxes (March 15-31, 2010) | US \$787,683.00 |
|----------------|----------------------------------|-----------------|

Attached hereto as Appendix "N" are copies of the above-listed invoices.

ii. Other Payments Made to Skyservice: Third Party Invoices and Deposits

64. Sunwing also made payments to Skyservice in relation to the following third party invoices or deposits:

(i) Third Party Invoices:

- (a) Passenger taxes (Canadian dollars or US dollars)
- (b) Other re-bills (Canadian dollars or US dollars) for amounts not otherwise covered in the Commercial Agreement or Charter Agreements. The most common re-bill is for counter rentals at the airports for check-in.

(ii) Tourist Card transactions (US dollars)

(iii) Third Party Deposits or Prepayments:

- (a) GTAA 'deposit' (Canadian dollars)
- (b) Imperial Oil 'deposit' (Canadian dollars)
- (c) Servisair 'deposit' (Canadian dollars)
- (d) Fuel differentials (US dollars)

65. Amounts claimed by Skyservice in relation to the above-listed items were separately invoiced by Skyservice to Sunwing and were paid by Sunwing into one of two general Skyservice accounts, one being in US dollars and the other in Canadian dollars. On a regular basis Sunwing would pay more than one Skyservice invoice with a single wire transfer.

66. With respect to invoices for third party invoices, it appears Sunwing is no longer pursuing this claim separate and apart from the Deposit Claim.

67. With respect to Sunwing's Deposit Claim, which relates to both third party deposits and amounts paid in relation to tourist cards, the following amounts were received by Skyservice from Sunwing on the dates as noted:

| | | |
|--------------------|----------------|-------------------|
| GTAA | \$678,000 | October 22, 2009 |
| Imperial Oil | US \$2,400,000 | November 25, 2009 |
| Servisair | \$390,000 | December 22, 2009 |
| Tourist Cards | \$237,000 | October 9, 2009 |
| Tourist Cards (US) | US \$213,000 | October 9, 2009 |

68. There is no dispute that the above-listed amounts were received by Skyservice from Sunwing on the dates listed (into the Skyservice Canadian General Account, with the exception of the Imperial Oil and US Tourist Card amounts that were received into the US General Account (as defined below)). However, according to Skyservice accounting staff, the amounts received from Sunwing, as listed above, were not delivered to or held by the third parties as deposits but rather were used by Skyservice to facilitate payments or prepayments as discussed below.
69. With respect to GTAA, Skyservice paid GTAA twice a month (on the 1st and 15th of each month) based on an estimate of the amounts that would be incurred for aeronautical fees and airport improvement fees over the next 15 days. At the end of the 15 day period, GTAA would reconcile the amount actually owing and a debit or credit would be issued, which would be taken into account on the next prepayment. Accordingly, the \$678,000 listed in the above chart was not provided to the GTAA to be held as a deposit; rather, it was deposited into the Skyservice Canadian General Account and the prepayment amounts were paid to GTAA from that account.

- 70. Skyservice records show that the C\$678,000 in the above chart was received from Sunwing on October 22, 2009 and Skyservice paid an amount in excess of that to the GTAA on October 27, 2009, as follows: C\$ 827,300.00 was paid to GTAA by Direct Deposit (Payment No. HSBCCAD00001396).
- 71. Similarly, no deposit was held with Imperial Oil; rather, the amount received from Sunwing was deposited into the Skyservice Canadian General Account and Skyservice prepaid Imperial Oil from that account each Monday, Wednesday and Friday based on an estimate of the fuel they expected would be required.
- 72. Skyservice records show that the US\$2,400,000 payment was received from Sunwing on November 25, 2009 and an amount in excess of that was paid by Skyservice to Imperial Oil by December 2, 2009 as follows:

| <u>Payment Date</u> | <u>Payment Method</u> | <u>Payment No.</u> | <u>Payment Amt.</u> |
|-------------------------|-----------------------|--------------------|-------------------------|
| 26-Nov-09 | Wire | WT000506 | US\$ 250,000.00 |
| 26-Nov-09 | Wire | WT000507 | US\$ 346,653.00 |
| 26-Nov-09 | Wire | WT000508 | US\$ 346,653.00 |
| 26-Nov-09 | Wire | WT000509 | US\$ 519,979.00 |
| 2-Dec-09 | Wire | WT000546 | US\$ 346,653.00 |
| 2-Dec-09 | Wire | WT000547 | US\$ 346,653.00 |
| 2-Dec-09 | Wire | WT000548 | US\$ 519,979.00 |
| TOTAL (PAYMENTS) | | | US\$2,676,570.00 |

- 73. With respect to Servisair, the amount received from Sunwing was deposited into the Skyservice Canadian General Account. No deposits were held with Servisair; rather, Skyservice paid Servisair on 30 day credit terms.
- 74. Skyservice records show that the C\$390,000 payment was received from Sunwing on December 22, 2009 and an amount in excess of that was paid by Skyservice to Servisair on January 6, 2010 as follows: C\$ 504,316.61 was paid to Servisair by Direct Deposit (Payment No. HSBCCAD00002050).
- 75. With respect to the Tourist Cards, Skyservice purchased the tourist cards from the Cuban embassy (in Canadian dollars) and the Dominican Republic embassy (in

US dollars) for use over a period of months. There was no deposit held by these embassies. The amounts listed in the above chart were deposited into the Skyservice Canadian or US General Account and the embassies were paid from those accounts.

- 76. Skyservice records show that the US\$213,000 payment was received from Sunwing on October 9, 2009 and an amount in excess of that was paid by Skyservice on account of the US Tourist Cards on December 22, 2009 as follows: US\$ 358,750.00 was paid on account of US Tourist Cards by Wire (Payment No. WT000682).
- 77. Skyservice records also show that the C\$237,000 payment was received from Sunwing on October 9, 2009 and an amount in excess of that was paid by Skyservice on account of the Canadian Tourist Cards as follows:

| <u>Payment Date</u> | <u>Payment Method</u> | <u>Payment No.</u> | <u>Payment Amt.</u> |
|-------------------------|-----------------------|--------------------|-----------------------|
| 14-Dec-09 | Wire | WT000043 | C\$ 160,000.00 |
| 19-Jan-10 | Wire | WT000065 | C\$ 112,000.00 |
| TOTAL (PAYMENTS) | | | C\$ 272,000.00 |

- 78. In the December 24, 2010 letter, Sunwing added an additional claim that, to the extent funds were received from parties other than Sunwing for payment to the third party payees in the Deposit Claim and not paid to the intended payee, some or all of those amounts (the “**Other Third Party Payments**”) are held in trust and “Sunwing’s portion thereof” is requested by Sunwing.
- 79. The Receiver has made inquiries and has been advised that Skyservice did not receive prepayments or deposits from parties other than Sunwing.
- 80. In the December 24, 2010 letter, counsel to Sunwing also claimed that, to the extent Skyservice has received or is owed a refund from one of the third party payees described in the Deposit Claim, the amount refunded is held by Skyservice in trust and requested by Sunwing.

81. Of the third party payees described in the Deposit Claim, each of GTAA, Imperial Oil and Servisair claims that it is owed amounts from Skyservice (as opposed to owing a refund to Skyservice) and has filed a proof of claim in the receivership claims process. With respect to the tourist cards, Skyservice did have some tourist cards in its possession at the time of the receivership but no reimbursement was available from the relevant embassies and such tourist cards were sold to Sunwing at a discounted price.

iii. Adjustment Amount

82. As set out above, Skyservice sent general invoices to Sunwing based on (i) a multiple of the number of seat miles planned for the week in question and (ii) the ASM that was calculated at the beginning of the flying season based on the overall operating budget and the expected number of seat miles for the season.
83. In the 2009/2010 year an adjustment was made to the ASM calculated. In mid-December, 2009, in or around the time that TUI Canada became an indirect shareholder of Sunwing, it became clear that Sunwing would require approximately 20% fewer flight services than had been budgeted for the season. According to former Skyservice employees, this was extremely unusual since, over the course of the entire relationship between Skyservice and Sunwing, ASM adjustments had been unnecessary.
84. The 2009/2010 operating budget had projected a fixed number of Rotations, with an ASM corresponding to that number. In mid-December 2009, the projected Rotations were reduced and, as a result, the ASM was increased proportionately.
85. Since this change took place some two months into the season, during November and December the invoices to Sunwing had been on the basis of the lower ASM. As a result, it was agreed that Sunwing had underpaid the price for flights between November, 2009 and January, 2010 by \$1,964,736.

86. Therefore, in addition to the general invoice amounts, Sunwing also made weekly payments to Skyservice over a six week period in January and February 2010 to pay that amount. This is consistent with a relationship in which the weekly invoices from Skyservice to Sunwing were not invoices for specific costs incurred by Skyservice for the specific scheduled flights, but rather, represented the agreed price for flight services, which happened to be based on a formula using the ASM and number of seat miles projected for the week.

C. Treatment of Funds Received From Sunwing

i. Prior to Receivership

87. Prior to the Date of Receivership, all funds received by Skyservice from Sunwing were deposited into the Skyservice Canadian General Account or the Skyservice general U.S. dollar account at HSBC Bank Canada (the "**US General Account**") (together, the "**General Accounts**").
88. Skyservice also had several other accounts at HSBC Bank Canada, including an account (account number of 270-217436-002) that was used by Skyservice since at least 2008 for cash deposits from in-flight sales of food, liquor and duty free items (the "**In-Flight Collections Account**").
89. From an operational perspective:
- (a) Sunwing wired funds on a weekly basis for the Charter Fee in accordance with the Skyservice invoices.
 - (b) As noted above, on a regular basis Sunwing would pay more than one Skyservice invoice with a single wire transfer.
 - (c) The funds were wired into one of the Skyservice General Accounts such that there was no segregation but rather, the funds were commingled with other Skyservice funds.
 - (d) Skyservice paid its various costs and expenses from the General Accounts, including its overhead costs and operating costs for the

aircraft chartered to Sunwing as well as aircraft chartered to other customers.

ii. Immediately preceding and during the Receivership

90. On March 29, 2010, in advance of the potential insolvency, Skyservice employees undertook to identify payments that had been made to Skyservice that related entirely to future flying that Skyservice was contracted to perform.
91. This review apparently identified 4 separate amounts totalling \$2,731,802.76, which Skyservice transferred from the Skyservice Canadian General Account to the In-Flight Collections Account as set out below: (a) \$2,329,473.00 in respect of the Sunwing payment made on March 26, 2010 (described above); and (b) three other amounts totalling \$402,329.76 from third parties (Canag Travel (\$270,000), RN International Travel (\$15,000) and Canadian Broomball Association (\$117,329.76)) no portion of which has been distributed to those third parties to date. Of note, \$2,329,473.00 is the difference between the total Sunwing payment on March 26, 2010 of \$2,685,435.58, which applied to two invoices, and the \$355,969.25 amount due under invoice SALES000000817 for passenger taxes, minus bank charges.
92. The Receiver has attempted to ascertain Skyservice's intended purpose in identifying and transferring such amounts from the Skyservice Canadian General Account to the In-Flight Collections Account. However, the Receiver was unable to locate any contemporaneous documentary evidence that would indicate the reason for isolating the funds. In this regard, the Receiver considers it to be noteworthy that Skyservice created a series of trusts to address certain other matters prior to the receivership by way of formal trust documents and delivery of funds to a separate trust account held by a law firm as trustee. In contrast, although occurring at around the same time, no such trust document appears to have been created in this case (nor were the funds transferred to a trust account or third party trustee).

93. The Receiver further sought to obtain evidence of parties as to their recollection of why the funds were isolated. Various rationales were provided -the funds were transferred to another account out of an abundance of caution, they were transferred to ensure the funds were protected from misuse or misappropriation, and they were transferred because they related solely to future flying and should therefore have been refundable (although note this latter view does not appear to coincide with the operation of the Agreements as described above). Rob Giguere, a former Skyservice principal who was involved at the time the funds were moved to the In-Flight Collections Account, informed the Receiver that these funds were transferred to keep track of the funds as they were not certain if there would be a receivership (and any associated timing) and there was never any intention on the part of Skyservice to create a trust. Mr. Giguere further advised that they had created trusts for other monies at the same time, understood the difference between establishing a trust and simply transferring the funds to a different account (recognizing that by moving the funds to a different account rather than creating a trust, the funds remained in the control of Skyservice to be used by Skyservice, without restriction), and made a decision to not create a trust with these funds. The Receiver confirms there were trusts created by Skyservice in favour of Skyservice employees, the Worker's Compensation Board of Manitoba, and the Receiver General of Canada (in relation to an Air Traveller's Security Charge) as well as a trust in relation to a Key Employee Retention Plan. Each such trust was established at around the time the funds were transferred, which trusts were documented and which trust funds were held in a trust account with external legal counsel.
94. The following is a summary of all transactions made in the In-Flight Collections Account between March 26, 2010 (the date of the Sunwing payment) and April 1, 2010:

- (i) March 29, 2010 at 13:42 - \$2,614,473.00 was transferred from the Skyservice Canadian General Account to the In-Flight Collections Account.
 - (ii) March 29, 2010 at 13:42 - \$56,300.00 was transferred from the In-Flight Collections Account to the Skyservice Canadian General Account.
 - (iii) March 30, 2010 at 08:40, \$117,329.76 was transferred from the Skyservice Canadian General Account to the In-Flight Collections Account.
95. On March 26, 2010, the balance in the In-Flight Collections Account was \$56,303.97. On April 2, 2010, the balance in the In-Flight Collections Account was \$2,738,259.86.
96. On March 26, 2010, the balance in the Skyservice Canadian General Account was \$14,985,965.61. On March 29, 2010, the balance in the Skyservice Canadian General Account was \$18,516,683.09. The lowest balance in the Skyservice Canadian General Account between March 26, 2010 (the date of the Sunwing payment) and March 29, 2010 (the date of the last transfer from the Skyservice Canadian General Account to the In-Flight Collections Account prior to the Date of Receivership) was \$12,371,492.61 on March 29, 2010.
- iii. Sunwing Amount Currently Held By Receiver**
97. Of the \$2,731,802.76 transferred from the Skyservice Canadian General Account to the In-Flight Collections Account, \$2,329,473.00 was associated with the Sunwing payment made on March 26, 2010.
98. As described above, the amount of \$2,329,473.00 was part of the wire transfer of \$2,685,435.58 received from Sunwing into the Skyservice Canadian General Account on March 26, 2010 at 13:20. It represented a partial payment of invoice REV-005146.

99. Following the appointment of the Receiver, the amounts in the In-Flight Collections Account, together with the amounts in the other Skyservice accounts at HSBC, were deposited into the Receiver's account.
100. In accordance with the Sunwing Letter Agreement, the Receiver transferred \$2,329,473.00 to a separate account held by the Receiver, where these funds remain. This transfer was pursuant to the terms of the Sunwing Letter Agreement, which was without prejudice to Sunwing's arguments as to the characterization of any funds for the purpose of establishing whether it had a valid trust claim.
101. Accordingly, in respect of the amount received from Sunwing by wire transfer on March 26, 2010 the following appears to have occurred:
- (i) \$2,685,435.58 was received from Sunwing on March 26, 2010 by wire transfer at 13:20 into the Skyservice Canadian General Account where it was co-mingled with other funds.
 - (ii) \$355,969.25 was applied to the payment of Skyservice invoice SALES000000817 representing payment of passenger taxes in arrears.
 - (iii) the remainder of \$2,329,466.33 was applied in partial payment of invoice REV-005146.
 - (iv) On March 29, 2010 at 13:42 \$2,614,473.00 was transferred by Skyservice from the Skyservice Canadian General Account to the In-Flight Collections Account, including \$2,329,466.33 in respect of (iii), above.
 - (v) Following the appointment of the Receiver, the \$2,329,466.33 was among the funds transferred by HSBC to the Receiver's account.
 - (vi) In accordance with the Sunwing Letter Agreement, the \$2,329,466.33 has been held in a segregated account maintained by the Receiver.

102. In the Sunwing Letter Agreement, pending resolution of the Sunwing Claim, the Receiver also agreed to segregate any deposits received for suppliers or service providers that were held by such suppliers or service providers on a segregated basis in respect of goods or service to be provided to Sunwing. However, to date no such funds have been received.

D. Security Posted by Skyservice with Sunwing

103. As set out above, clause 4.3 of the Charter Pro Forma requires all advance payments made by Sunwing under the agreement to be secured. The clause provides:

“All advance payments made by Charterer under this Agreement shall be secured by Skyservice with a letter of credit, bond or other security as required by law. All limitations on the liability of Skyservice under this Agreement are without prejudice to this Section 4.3 and the rights of Charterer under any security provided pursuant to it. Skyservice will comply with the requirements of the *Canada Transportation Act, 1996 (Canada)* and the regulations adopted thereunder regarding advance payments to air carriers by charter operators and shall provide Charterer on or before the first Flight pursuant to this Agreement a copy of the security instrument issued by a Canadian financial institution establishing that all advance payments for Flights to be made pursuant to this Agreement are fully secured.”

104. This is consistent with the regulations governing Skyservice, as an operator of charters for tour operators. Pursuant to the Regulations Respecting Air Transportation (SOR/88-58) (the “**Regulations**”) pursuant to the *Canadian Transportation Act*, Skyservice was defined as an “ABC/ITC” carrier, meaning its passenger charter flights were both advance booking charters (“ABCs”) and inclusive tour charters (“ITCs”).
105. The Regulations require a “financial guarantee” to be posted by the applicant (in this case, Skyservice), to protect advance payments made by the charterer (in this case, Sunwing) with respect to ABCs:

Financial Guarantees

65. (1) The Agency shall not consider an application for a program permit to operate an ABC unless the applicant has a financial guarantee with a Canadian financial institution, in a standard form provided by the Agency, that provides that any advance payment in respect of the ABC is fully protected from the time it is received by the applicant from the charterer.

(2) An air carrier shall, at least 30 days before the cancellation or termination of a financial guarantee referred to in subsection (1), file a copy of a new or renewed, as the case may be, financial guarantee with the Agency.

(3) A financial guarantee referred to in subsection (1) shall specify

(a) that any amount to which a charterer is entitled under the contract for unperformed ABC transportation be fully and promptly refunded by the Canadian financial institution that issued the guarantee;

(b) that any amount refunded in accordance with paragraph (a) be deposited in a trust account in the name and for the benefit of the charterer;

(c) that any money withdrawn from the trust account be used only for the payment of replacement air transportation or refunds to the proposed users of the ABC, either directly or through the appropriate travel agent or provincial authority;

(d) that the financial institution that issued the financial guarantee will not amend or cancel the financial guarantee without first giving 45 days notice to the Agency; and

(e) the name of the province under the laws of which the financial guarantee is to be interpreted.

(4) An application for a program permit made pursuant to subsection 48(1) to operate an ABC shall include

(a) a statement by each charterer, signed and witnessed, certifying that the charterer is in possession of

(i) in the case of a letter of credit, the original of the letter of credit applicable in respect of the ABC, or

(ii) in the case of any other type of financial guarantee, a copy of the financial guarantee applicable in respect of the ABC; and

(b) a copy of the financial guarantee applicable in respect of the ABC.

106. Neither the Regulations nor the Charter Pro Forma provide for funds received from Sunwing as advance payments to be held in trust for Sunwing. Rather, each provides that security is to be posted to secure any advance payments and that any amount to which Sunwing is entitled under the contract for unperformed services is to be refunded by the financial institution that issued the guarantee.
107. In this case, Skyservice arranged for its bank to issue a letter of credit (the "Skyservice LC") to FCC (now Sunwing). Attached as Appendix "O" is a copy of the Skyservice LC.
108. The LC is structured to decline in value over the course of the season from a low of \$1000 to a high of \$7,500,000 and then gradually declining back to \$1000. As of March 31, 2010, the value of the Skyservice LC was \$5.5 million.
109. The Skyservice LC was not backed by a cash deposit of Skyservice but instead was backed by a letter of credit provided by FCC (now Sunwing) and issued by the Royal Bank of Scotland (the "FCC LC") in the same amount (including corresponding increases and decreases on the same dates) as the Skyservice LC. Attached as Appendix "P" is a copy of the FCC LC.
110. The FCC LC states at page 8:

"This standby letter of credit provides security in relation to the outstanding letter of credit issued by the HSBC Bank of Canada on behalf of Skyservice Airlines Inc. in favour of First Choice Canada Inc."
111. The Receiver understands that Sunwing did not resort to the security arrangements contemplated by the Commercial Agreement and Regulations by calling upon the Skyservice LC.
112. While Sunwing has elected not to resort to these security arrangements, it appears the Commercial Agreement and Regulations were structured to provide this remedy to Sunwing for any prepayments rather than contemplating the creation of a trust or the refunding of amounts to Sunwing if not used for a specific purpose.

Indeed, the availability of the standby letter of credit and the provisions in the Commercial Agreement and Regulations providing for such security support the acceptance of any advance payments by Skyservice and the retention of those amounts by the receivership estate.

IV. SUMMARY

113. Pursuant to its review of the documentation and information provided by Sunwing in support of its claim and the Receiver's own investigation, the Receiver has not identified any evidence of an agreement or mutual intention between Skyservice and Sunwing that the amounts paid by Sunwing to Skyservice in relation to the general invoices, deposits or any other amounts would be held in trust, used solely for a specific purpose, returned to Sunwing in the event they were not used for that purpose, or segregated in any manner.
114. To the contrary, the information available to the Receiver suggests that there was no such intention, including the following:

- (i) Skyservice did not have a separate trust account and did not segregate the amounts received from Sunwing.

In anticipation of the receivership, an amount equivalent to a Sunwing payment was transferred to a second Skyservice account, along with certain other amounts. This was done by Skyservice on a unilateral basis and there is no trust document (unlike other trusts created by Skyservice, which were clearly documented) and no clear evidence of an intention on the part of Skyservice to create a trust for the benefit of Sunwing. If there had been evidence of such an intention, the Receiver would have to consider further whether fraudulent conveyance and preference issues arise as a result.

- (ii) the amount charged by Skyservice to Sunwing was calculated, in part, based on the anticipated costs of the Sunwing flights. However, there was

no requirement and it did not in fact occur that Sunwing made payments for specific costs or that the specific monies paid by Sunwing could only be, or were in fact applied only for a defined purpose, that is to Sunwing-specific costs. Rather,

- (a) the amounts paid by Sunwing in relation to the general invoices were calculated based on a formula using total costs budgeted for the season (including Operating Costs, Overhead Charges and a Profit Charge) divided by the planned number of seat miles, multiplied by the number of seat miles in a given week. An invoice for a week of flights did not set out or apply to specific costs relating solely to those flights;
- (b) costs incurred by Skyservice were paid from Skyservice General Accounts without allocating such costs to specific flights or even, in many cases, to a specific customer. Certain costs are not specifically divisible by flight and are incurred by both Sunwing charters and flights chartered by other Skyservice customers while others are paid in advance such that the funds have not even been paid by Sunwing to Skyservice when the costs are paid by Skyservice.
- (iii) the Agreements are clear that there is no fiduciary relationship between Skyservice and Sunwing, which is inconsistent with a trust relationship;
- (iv) in the event the Commercial Agreement is terminated by FCC following a default by Skyservice, the Agreement provides for final payment of amounts "owing" between the parties. It does not provide for "return" of any amounts held in trust;
- (v) the Agreements provide for limited reconciliation of actual Operating Costs to budgeted Operating Costs. In practise, Skyservice reconciled its actual costs – allocated to each customer based on certain formulas – to the amounts invoiced to each customer; however, the allocation of costs and reconciliation was done months after the costs were actually paid by Skyservice using its general funds;

- (vi) rather than providing that funds are to be returned to Sunwing if not used for a specific purpose, the Charter Agreement provides that if Skyservice fails to make a payment then Sunwing may make such payment directly to the supplier and set off such amount against amounts owing to Skyservice. Similarly, if Skyservice fails to provide aircraft then the Charter Agreement provides that Sunwing is entitled to “make arrangements for alternate aircraft” rather than providing for amounts to be held in trust or returned to Sunwing;
- (vii) the Agreements and Regulations provide a specific and entirely separate mechanism to protect pre-payments made by Sunwing; specifically, they require security, which in this case is the Skyservice LC. In other words, the Agreements do not provide for monies to be held in trust for Sunwing but do provide an alternate method – the Skyservice LC – to protect pre-payments. Sunwing has not called on the Skyservice LC, with the effect that the “back to back” FCC LC has also not been called upon;

115. The Agreements and Regulations and existence of a letter of credit to secure advance payments, therefore, appear to provide a juristic reason for Skyservice to have accepted and for the Receiver to now retain amounts paid pursuant to the invoices in question. Not only are the amounts invoiced not directly related to individual flights but also Sunwing is given different remedies pursuant to the Agreements and Regulations in the event services are not provided by Skyservice. In addition, the receivership, the insolvency regime and competing rights of other creditors may also constitute juristic reasons for the Receiver to retain amounts paid and to require Sunwing to claim pursuant to the insolvency regime.

In any event, Receiver’s counsel is not aware of any authority clearly establishing that knowledge of the possibility of the commencement of a receivership application by a third party requires a company to refuse to accept payments on invoices issued pursuant to a long-standing and ongoing contract and that failure

to refuse payments in such circumstances vitiates the juristic reasons permitting the payments to be received and retained.

116. With respect to the Third Party Amount Claim and Third Party Deposit Claim, the amounts paid by Sunwing in these categories were deposited in the Skyservice General Accounts and used as general funds. Skyservice did not have deposits with the third parties in relation to which the amounts were provided to Skyservice. Those parties were paid by Skyservice from the Skyservice General Accounts either in advance or on 30 day credit terms.

Moreover the amounts received from Sunwing for payment to third parties were in fact paid by Skyservice to the respective third party. Accordingly, even if these funds were paid by Sunwing to Skyservice for the purpose of paying the third party and *only* for that purpose and the parties intended the amounts would be returned to Sunwing if not used for that purpose, the funds were not only co-mingled and not segregated but also the funds were paid to the intended third parties.

117. With respect to the Sunwing Damages Claim, Sunwing has confirmed that it does not claim that a trust exists with respect to its claim for costs and damages (except to the extent costs and damages are included in their other trust claims discussed above).
118. As previously noted, this Report should not be considered as acceptance of the validity or quantum of any claim by Sunwing against Skyservice.

The Receiver respectfully submits to the Court this, its Tenth Report.

Dated this 2nd day of June, 2011.

FTI Consulting Canada Inc.
in its capacity as receiver of
Skyservice Airlines Inc.
and not in its personal or corporate capacity



Nigel D. Meakin
Senior Managing Director



Jamie T Engen
Managing Director

1365055

Appendix I

**THE COMMERCIAL AGREEMENT DATED JUNE 11, 2006
BETWEEN SKYSERVICE AND
FIRST CHOICE CANADA INC. (NOW SUNWING)
(THE "COMMERCIAL AGREEMENT")**

THIS COMMERCIAL AGREEMENT (this "Agreement") is entered into on 11 June 2006

BETWEEN

FIRST CHOICE CANADA INC. a company incorporated under the laws of Canada whose principal place of business is at 160 Bloor St. East, Suite 400, Toronto, Ontario M4W 1B9, Canada ("FCC");

SKYSERVICE AIRLINES INC. a company incorporated under the laws of Canada whose principal place of business is at 31 Fasken Drive, Etobicoke, Ontario, M9W 1K6, Canada ("Skyservice"),

each a "Party" and collectively the "Parties".

IT HAS BEEN AGREED as follows:

1. INTERPRETATION

1.1 Definitions

| | |
|------------------------|--|
| "Adjustment Payment" | has the meaning given to such term in Appendix 7 |
| "Affiliate" | shall have the meaning given to it in the <i>Canada Business Corporations Act</i> |
| "Aircraft" | means the Year-Round Aircraft, Seasonal Aircraft and Spare Aircraft or any one of them, as the context may require |
| "Aircraft Months" | means in respect of an Aircraft, the total number of thirty (30) day periods (or parts thereof) for which such Aircraft is subject to a Charter Agreement provided that in respect of any Year-Round Aircraft, a Holiday Year shall be deemed to consist of twelve (12) Aircraft Months |
| "Bookings" | shall have the meaning given to such term in Clause 10.1.1 |
| "Budget" | shall have the meaning given to such term in Clause 11.4 |
| "Business Day" | means any day other than a Saturday or a Sunday on which banks in Toronto, Canada are open for commercial banking business during normal banking hours |
| "Canadian Index" | shall have the meaning given to such term in Clause 10.1.1 |
| "Consumer Price Index" | means the consumer price index published for all of Canada by Statistics Canada or any successor agency thereto |
| "Charter Agreement" | shall mean (1) an individual charter agreement between Skyservice and FCC in the form of the pro-forma Charter Agreement as set out in Appendix 1 and/or (2) an individual extended charter agreement between Skyservice and a Group Company in the form of the pro-forma Extended Charter Agreement as set out in Appendix 2 and "Charter Agreements" shall be construed accordingly |
| "Charter Fee" | shall have the meaning given to such term in Clause 5.1 |
| "Charter Offer" | shall have the meaning given to such term in Clause 9.3 |
| "Chartered Fleet" | shall have the meaning given to such term in Clause 4.1 |
| "Claims" | includes any claim, demand, action, suit, cause of action, assessment or reassessment, charge, judgement, debt, liability, expense, cost, damage or loss, contingent or otherwise, including loss of value, reasonable professional fees and all reasonable costs incurred in investigating and pursuing any of the foregoing or any proceeding relating to any of the foregoing |
| "Commencement Date" | means 1 November 2006 |

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| "Controllable Operating Costs" | shall have the meaning given to it in Appendix 9 |
| "Dispute" | shall have the meaning given in Clause 22.2 |
| "Early Termination Sum" | shall have the meaning given to it in Clause 16.4.1 |
| "Extended Charter Common Terms Agreement" | shall mean the common terms agreement substantially in the form set out in Appendix 2 |
| "FCC Aircraft Months" | shall have the meaning given to it in Clause 6.2.3 |
| "FCC Termination Event" | Means any of the vents specified in Clause 16.3 |
| "Flight Hour" | means in respect of any Aircraft each hour (or part thereof) elapsing from the moment that the wheels leave the ground on take off to the moment that the wheels touch the ground on landing |
| "Force Majeure" | shall mean causes which are beyond the control of a Party and which prevent such Party from performing its obligations under this Agreement and include acts of God, terrorism, strikes, lockouts or other industrial or labour disputes or disturbances (other than those strikes, lockouts, industrial or other labour disputes or disturbances that are foreseeable and that affect only the Party's operations), wars, blockades, insurrections, riots, earthquakes, typhoons, hurricanes or other severe storms, floods, fires, explosions and acts or omissions of any Governmental Body |
| "Governmental Body" | means any government, parliament, legislature, regulatory authority, governmental department, agency, commission, board or court or other law, rule or regulation-making entity having or purporting to have jurisdiction on behalf of any nation or state or province or other subdivision thereof or any municipality, district or other subdivision thereof, including the Department of Transport (Transport Canada) and the Canadian Transportation Agency |
| "Gross Negligence" | means any act or omission done or omitted to be done with intent to cause damage, death, delay, injury or loss or recklessly and with knowledge that damage, death, delay, injury or loss would probably result. |
| "Group Company" | shall mean any Company that is a Subsidiary or Affiliate of FCC |
| "Holiday Year" | shall mean the period running from 1 November in one year until 31 October in the following year |
| "Indemnified Party" | shall have the meaning given to such term in Clause 13.1 |
| "Indemnified Parties" | shall have the meaning given to such term in Clause 13.1 |
| "Indemnitee" | means either an Indemnified Party or a Party Indemnified, as the context may require |
| "Lease Agreement" | shall have the meaning given to such term in the relevant Charter Agreement |
| "Minimum Average Term" | shall have the meaning given to such term in Clause 6.2.4 |
| "Minimum Chartered Fleet Size" | shall have the meaning given to such term in Clause 4.1 |
| "Minimum Seat Mile Guarantee" | shall have the meaning given to such term in Clause 5.2 |
| "Operating Costs" | shall have the meaning given to it in Appendix 5 |

| | |
|---------------------------------------|--|
| "Other Termination Event" | shall have the meaning given to such term in Clause 16.5.1 |
| "Overhead Charge" | shall have the meaning given to it in Clause 6.2 |
| "Party Indemnified" | shall have the meaning given to such term in Clause 13.2 |
| "Parties Indemnified" | shall have the meaning given to such term in Clause 13.2 |
| "Person" | means any individual, sole proprietorship, partnership, firm, entity, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate and Governmental Body and, where the context requires, any of the foregoing when they are acting as trustee, executor, administrator or other legal representative |
| "Prime Rate" | means the prime lending rate of interest announced from time to time by the Royal Bank of Canada as its "prime rate" being its reference rate then in effect for determining interest rates on Canadian dollar commercial loans at Toronto |
| "Profit Charge" | shall have the meaning given it in Clause 7 |
| "Programme" | means the flight programme provided by FCC to Skyservice in respect of the Chartered Fleet (which shall be subdivided so that each Aircraft has its own sub-programme and designated base airport) for any Season and in respect of any Extended Charter Agreement the flight programme provided by the relevant Group Company in respect of the relevant Aircraft |
| "Reference Year" | shall have the meaning given to such term in Clause 10.1.1 |
| "Resumption Month" | shall have the meaning given to such term in Clause 10.1.1 |
| "Season" | means a Winter or a Summer |
| "Seasonal Aircraft" | shall mean an aircraft which is contracted by way of Charter Agreement for all or a portion of one Season |
| "Security Deposit" | shall have the meaning given to such term in Clause 5.4.1 |
| "Skyservice Termination Event" | shall mean any of the events specified in Clause 16.1 |
| "Spare Aircraft" | shall mean any aircraft designated as such by FCC at the beginning of each Holiday Year |
| "Subsidiary" | shall have the meaning given to it in the <i>Canada Business Corporations Act</i> |
| "Summer" | shall mean the period running from 1 May to 31 October in any year |
| "SSV Fleet Size" | means in respect of any Holiday Year the total number of fixed wing commercial aircraft operated by Skyservice's charter airline business in any such Holiday Year multiplied by the number of thirty (30) -day periods or parts thereof that such aircraft were registered to Skyservice on the Transport Canada Aircraft register (each an "aircraft month") provided that in respect of any aircraft registered to Skyservice for the duration of the Holiday Year the number of aircraft months shall be twelve (12) |
| "SSV Qualifying Overheads" | shall have the meaning given to such term in Clause 6.2.3 |
| "Suspended Clauses" | shall have the meaning given to such term in Clause 10.1.1 |
| "Suspension Period" | means the period commencing on the first day of the Trigger Month and ending on the first day of the Resumption Month |
| "Tariff" | shall have the meaning given to such term in Clause 5.1.2 |
| "Term" | shall be the term of the Agreement as more particularly set out in Clause 2 |
| "Termination Costs" | shall have the meaning given to such term in the relevant Charter Agreement |

| | |
|---|---|
| "Total Cost" | means the aggregate of the Profit Charge, the Overhead Charge and the Operating Costs |
| "Trigger Month" | shall have the meaning given to such term in Clause 10.1.1 |
| "UK & Eire Bookings" | shall have the meaning given to such term in Clause 10.2.1 |
| "UK & Eire Index" | shall have the meaning given to such term in Clause 10.2.1 |
| "UK & Eire Trigger Month" | shall have the meaning given to such term in Clause 10.2.1 |
| "UK & Eire Reference Year" | shall have the meaning given to such term in Clause 10.2.1 |
| "UK & Eire Resumption Month" | shall have the meaning given to such term in Clause 10.2.1 |
| "Winter" | shall mean the period running from 1 November in one year until 30 April in the following year |
| "Year-Round Aircraft" | shall mean an aircraft which is contracted by way of a Charter Agreement for a period of not less than twelve (12) months |

1.2 Construction

In this Agreement, save where the contrary is indicated, reference to

- 1.2.1 this Agreement or to any other document shall be construed as a reference to this agreement or such other document as the same may from time to time be amended, varied, novated or supplemented;
- 1.2.2 this Agreement shall be construed as including reference to all its appendices and schedules and any other document which is supplemental to its terms;
- 1.2.3 a statute shall be construed as a reference to such statute as the same may have been, or may from time to time be, amended or re-enacted;
- 1.2.4 a "Clause" or a "Appendix" is a reference to a Clause of, or an Appendix to, this Agreement; and
- 1.2.5 the singular shall include the plural and vice versa and reference to one gender shall include all genders.

2. TERM

- 2.1 Subject to Clause 2.2, this Agreement shall be effective from the Commencement Date and subject to termination by notice pursuant to Clause 2.3 or Clause 2.4 or early termination pursuant to the express provisions of any other Clause of this Agreement, this Agreement shall endure for a period running from the Commencement Date until 31 October 2011 (the "Term").
- 2.2 It is a condition precedent to the provisions of this Agreement coming into effect pursuant to Clause 2.1 that no Skyservice Termination Event, Other Termination Event or Termination Event has occurred which is continuing on the Commencement Date.
- 2.3 FCC may, by written notice served on or prior to 31 October 2008 by FCC to Skyservice indicating its intention to terminate this Agreement, elect to terminate the Parties' rights and obligations under this Agreement on 31 October 2009. If FCC elects to terminate this Agreement pursuant to this Clause 2.3, then the Early Termination Sum shall not be payable and the Term shall end on the 31 October 2009.
- 2.4 FCC may terminate this Agreement at any time by (i) serving a notice in writing on Skyservice nominating a date at least thirty (30) days after the date of the notice as being the date of termination and (ii) paying to Skyservice prior to such anticipated date of termination the amounts specified in paragraphs (a) and (b) of Clause 16.4.1. The payments contemplated by paragraphs (c) and (d) of Clause 16.4.1 shall be payable by FCC promptly on demand by Skyservice in respect of an early termination under this Clause 2.4. For greater certainty, the parties expressly agree that the payment obligations under Clause 16.4.1 paragraphs (c) and (d) shall survive the termination of this Agreement.

3. AGREEMENT TO ENTER INTO CHARTER AGREEMENTS

- 3.1 The Parties agree that during the Term FCC, shall enter into Charter Agreements with Skyservice on the following terms:
- 3.1.1 The Charter Agreements entered into by FCC and Skyservice in relation to Year-Round or Seasonal Aircraft shall be substantially in the form set out in Appendix 1 to this Agreement;
 - 3.1.2 The Charter Fees payable pursuant to the respective Charter Agreements shall be calculated on a Total Cost Basis in accordance with the provisions of this Agreement; and
 - 3.1.3 The Charter Agreements shall be entered into on a Seasonal or on a Year-Round basis as applicable with a scheduled expiration date falling no later than the last day of the Term.
- 3.2 The Parties agree that during the Term, if a Group Company has a requirement for a Year-Round Aircraft for one or more Seasons, then upon receipt of not less than six (6) months written notice from FCC of such requirement of such Group Company and without prejudice to Clause 4.6, subject to any regulatory constraints that would prevent Skyservice from complying with the terms of any such Extended Charter Agreement, Skyservice shall enter into an Extended Charter Agreement with such Group Company in substantially the form set out in Appendix 2 to this Agreement.

4. FLEET SIZE COMMITMENT

- 4.1 The fleet of aircraft chartered from Skyservice by FCC (or a Group Company) by way of Charter Agreements (the "Chartered Fleet") during any Holiday Year shall be no smaller than:
- 4.1.1 3 Year-Round Aircraft; and
 - 4.1.2 2 Seasonal Aircraft :
- (4.1.1.and 4.1.2 comprising the "Minimum Chartered Fleet Size")
- 4.2 The Parties agree that in order to change the size or composition of the Chartered Fleet, FCC must give written notice to Skyservice on the following terms:
- (i) to vary the number of Year-Round Aircraft, not less than eight (8) months prior to the occurrence of the change;
 - (ii) to vary the number of the Seasonal Aircraft for any Holiday Year, not less than six (6) months prior to the occurrence of the change.
- 4.3 The Parties agree that in any Holiday Year, FCC shall have the right to change the size and composition of the Chartered Fleet by giving notice pursuant to Clause 4.2 subject to Clause 4.1 and to the following restrictions:
- 4.3.1 The year-on-year increase in the number of Year-Round Aircraft shall not exceed 3;
 - 4.3.2 The year-on-year decrease in the number of Year-Round Aircraft shall not exceed 2;
 - 4.3.3 The year-on-year increase in the number of Seasonal Aircraft shall not exceed 3;
 - 4.3.4 The year-on-year decrease in the number of Seasonal Aircraft shall not exceed 2; and
 - 4.3.5 The number of Aircraft Months relating to Seasonal Aircraft shall not exceed the number of Aircraft Months relating to Year-Round Aircraft in any one Holiday Year.
- 4.4 The Parties agree that, subject to Clauses 4.5, 4.6, 6.2.4, 7, 10, and 12.1 and Appendix 7, the Minimum Chartered Fleet Size shall operate such that irrespective of and without prejudice to:

- 4.4.1 the failure of the Chartered Fleet to meet the Minimum Chartered Fleet Size;
- 4.4.2 the failure of one or more of the Aircraft of the Chartered Fleet actually to operate the whole or part of the Programme set out in the relevant Charter Agreement; or
- 4.4.3 the early termination of certain or all of the Charter Agreements;

the Overhead Charge and the Profit Charge shall be payable by FCC at all times during the Term as if:

- a. the Minimum Chartered Fleet Size is being complied with; and
- b. each Aircraft so forming part of the Chartered Fleet is flying no less than one (1) seat-mile per month.

4.5 The provisions of Clause 4.4 shall not apply to the extent that and for the period that:

- 4.5.1 the circumstances described in Clauses 4.4.1 to 4.4.3 (inclusive) are attributable to a breach by Skyservice of its obligations pursuant to the lease of an Aircraft unless such breach has been caused by (i) a breach by FCC of a Charter Agreement or (ii) a breach by any Group Company of an Extended Charter Agreement or any other agreement to which the Group Company is a party which relates to the Aircraft;
- 4.5.2 the failure of Skyservice and FCC or any Group Company to enter into one or more Charter Agreements (such as would enable FCC to meet the Minimum Chartered Fleet Size) as a result of Skyservice failing to offer Charter Agreements on Satisfactory Commercial Terms. For the purposes of this provision, the terms of a proposed Charter Agreement shall only be considered to be "**Satisfactory Commercial Terms**" if the actual aircraft rental and maintenance costs forming part of the Operating Costs payable pursuant to that Charter Agreement are no higher than the lowest aircraft rental and maintenance costs which FCC, acting in good faith, can demonstrate are available to Skyservice for the lease of an aircraft for the term required by FCC of substantially identical specification and configuration to that of the Aircraft under the proposed Charter Agreement. For the avoidance of doubt, Aircraft already within the Chartered Fleet shall not be used for the comparison contemplated in the preceding sentence.
- 4.5.3 A termination of a Charter Agreement by FCC prior to the scheduled expiry date in accordance with the terms of the relevant Charter Agreement;

each an "**Exonerating Event**" and neither FCC nor any Group Company shall have liability with respect to any shortfall between (i) the aggregate of the Overhead Charges and Profit Charges that would have been paid by FCC or any Group Company under the Charter Agreements in accordance with the provisions of Clauses 4.1, 4.2, 4.3, 6.2 and 7 and (ii) the aggregate of Overhead Charges and Profit Charges that were actually paid during that period when the Minimum Chartered Fleet Size was not met, provided that such failure to comply with the Minimum Chartered Fleet Size is caused by an Exonerating Event.

4.6 Non-Canadian Regulatory Constraint on Extended Charter Agreements

If, during the Term, Skyservice's ability to operate within the UK or Eire is revoked or suspended for any reason caused by Skyservice then (i) the provisions of Clauses 4.1, 4.2, 4.3 and 4.4 shall be suspended to the extent necessary in relation to either (A) if no notice has been served pursuant to Clause 3.2, in respect of the relevant Holiday Year the number of Aircraft that had in the previous Summer been operated under Extended Charter Agreements or (B) if designated prior to the suspension or revocation, the number of Year-Round Aircraft that had been designated for Extended Charter Agreements pursuant to Clause 3.2; and (ii) those Year-Round Aircraft so designated by FCC pursuant to Clause 3.2 shall be converted to Seasonal Aircraft for the duration of the revocation or suspension of Skyservice's authority to fly from UK or Eire bases and any breach of Clause 4.3.5 that shall be caused by such conversion of Year-Round Aircraft to Seasonal Aircraft shall be deemed to have been waived by Skyservice.

4.7 Lease Delay or Termination

- 4.7.1 Notwithstanding the commencement of the term of any Charter Agreement, the Parties acknowledge and agree that Skyservice shall not be required to operate any Flights under any Charter Agreement until the Aircraft specified in such Charter Agreement has been delivered to Skyservice under the relevant lease agreement provided, however, that if the Aircraft is not delivered under the Lease Agreement, Skyservice shall use its reasonable commercial efforts to arrange for an alternative aircraft in accordance with Section 7.2 of the relevant Charter Agreement.
- 4.7.2 FCC shall not be obligated to pay the Termination Costs under the Charter Agreement in the event that such termination results from an event of default under the Lease Agreement directly caused by an action or omission by Skyservice, and FCC has met all of its material obligations hereunder. In the event that such termination results from (i) a change in law or interpretation of any law the effect of which renders it unlawful (excluding any unlawfulness caused by an act or omission of the aircraft lessor) for the lessor or Skyservice to give effect to any of their respective obligations contemplated by the Lease Agreement, or (ii) a Total Loss of the Aircraft (as defined in the Lease Agreement), FCC shall not be liable to pay any Profit Charge as part of the Termination Costs described in Section 3.2.3 of the relevant Charter Agreement. The Parties further agree that in the event that FCC and Skyservice enter into a new charter agreement described in the immediately following paragraph for a term commencing in the same Season and year as the Season and year in which the Lease Agreement terminated, FCC shall only be responsible to pay such portion of the Termination Costs described in Section 3.2.3 (i) and (ii) and shall, for the avoidance of doubt, not be obligated to pay the Termination Costs described in Section 3.2.3 (iii) and (iv) of the relevant Charter Agreement. Notwithstanding the foregoing, FCC acknowledges and agrees that in the event of termination of the Charter Agreement hereunder, FCC shall not be entitled to, and Skyservice shall not be liable for, any damages, costs, losses or expenses, whether foreseen or unforeseeable, direct, indirect, special or consequential damages, and whether in contract, tort or otherwise.
- 4.7.3 Without limiting the generality of the foregoing, Skyservice agrees that in the event that the Charter Agreement is terminated pursuant to the immediately preceding paragraph, Skyservice shall use reasonable efforts to locate an alternate aircraft similar to the Aircraft. Where, as a result of such reasonable efforts, Skyservice enters into negotiations with an aircraft lessor for an alternate aircraft, Skyservice agrees to negotiate a new Charter Agreement with FCC in respect of such aircraft on terms substantially similar to the charter agreement other than changes required to reflect the terms relating to such aircraft; provided, however, that nothing in this paragraph shall be construed as affecting the termination of the Charter Agreement described in the above paragraph. The Parties agree that this paragraph is not intended to create an obligation on FCC to agree to enter into such new Charter Agreement.

5. CHARTER TERMS

5.1 Charging Basis

- 5.1.1 The Parties agree that each Charter Agreement shall be entered into on a Total Cost Basis and that with respect to each Charter Agreement FCC, shall pay to Skyservice an amount (the "Charter Fee"), which shall be comprised of the following:
- a. The Overhead Charge
 - b. The Operating Costs; and
 - c. The Profit Charge.
- 5.1.2 The Charter Fee applicable to each Charter Agreement in any Holiday Year shall be calculated in accordance with a Budget for such Holiday Year agreed between the Parties pursuant to Clause 11.4 and invoiced weekly in advance on a fixed and a per-seat mile basis as set out in Appendix 8 according to the planned flying programme set out in the relevant Charter Agreement (the "Tariff") subject to all Charter Fee payments under the relevant Charter Agreement being reconciled in accordance with Clause 11.5.

- 5.1.3 In addition to the Charter Fee as set out in the Charter Agreement, subject to, and in accordance with the provisions, of Clause 11.5 in the event of any increase or decrease in any costs or charges relating to the Programme (including for the avoidance of doubt any costs relating to the termination of the Programme whether in relation to the return of the Aircraft, the lease agreement or otherwise), or the incurring by Skyservice of any cost based on unplanned or unforeseen events not caused by Skyservice's Gross Negligence or wilful misconduct related to the Programme or to the Charter Agreement, the Parties acknowledge and agree that Skyservice shall be entitled to revise the Charter Fee and therefore the Tariff accordingly provided that such costs have not been included as Operating Costs.
- 5.1.4 If the provisions of Clauses 4.5, 4.6, 10 or 12.1 cause any reduction in the Profit Charge or Overhead Charge that would otherwise have been due for a Season or a Holiday Year, then the Charter Fee (and consequently the Tariff) under each Charter Agreement shall be revised by Skyservice accordingly and the provisions of this Clause 5.1.4 shall take precedence over the relevant sections of the relevant Charter Agreement.
- 5.1.5 All revenue generated by the operation of any Aircraft (including, without limitation, all revenue (net of cost of sales) earned during any Flight that relates to the following items: sale of headsets; duty free and other in-flight sales; special catering requirements (if any) seat selection; cargo; and the following industry surcharge income, if any, over and above the cost of supply, sums attributable to NAVCAN, US overflight, fuel, currency, insurance and security shall, unless otherwise agreed by the parties in writing, be for the account of FCC. If Skyservice creates or introduces new business or *ad hoc* flights for any Aircraft then (i) FCC shall have the right to agree whether such flight takes place and the terms on which it would be undertaken and (ii) if such flight does take place, FCC shall pay a commission to Skyservice for the introduction of such *ad hoc* flight or new business equal to ██████████ of the revenue actually received by FCC in relation to such *ad hoc* flight. This Clause 5.1.5 shall not operate in respect of programs operated by Skyservice to and from destinations in Eastern Europe for which Skyservice purchases seats from FCC in which case the purchase price of the seats shall be agreed to be the revenue payable to FCC by Skyservice in relation to such operation.
- 5.1.6 For the avoidance of doubt any rebates, recoveries, discounts or inflows or other amounts of a similar nature received by or on behalf of Skyservice shall, if not paid directly to FCC during the relevant Season, be credited to FCC by way of reduction of the related expense in the reconciliation at the end of the relevant Season.

5.2 Charter Programme

Skyservice shall operate the Aircraft in accordance with the Programme, which will be provided by FCC no less than four (4) months prior to each Season during the Term. FCC shall have the right to change the Programme, the schedule of Flights to be operated pursuant to the Programme or the destinations, provided that FCC shall give Skyservice at least seven (7) days prior written notice of such change, and upon the condition that any increased number of Flights shall be capable of being performed by the relevant Aircraft designated for such Flights as then configured as set out in Schedule A of the relevant Charter Agreement, unless otherwise agreed in writing by the Parties. The Programme for each Aircraft shall otherwise be updated and determined subject to the foregoing restrictions and in accordance with Section 2.3 of each relevant Charter Agreement.

Notwithstanding the foregoing, FCC acknowledges and agrees that, subject to Clause 4.4 and Clause 4.5, the Programme shall be subject to a minimum guarantee (the "Minimum Seat Mile Guarantee") of one (1) seat mile per Season per Aircraft.

5.3 Destinations Served by the Aircraft

Skyservice agrees to deploy the Aircraft as may be requested by FCC for Flights to any destinations that may be served by such aircraft type from Toronto or other Canadian departure points as may be authorized under Skyservice insurance policies and Lease Agreements that are within the range of the Aircraft, all in accordance with the destinations set forth in the Programme.

5.4 Programme Performance Bond

SSV Commercial Agreement 070606 -execution version

- 5.4.1 FCC acknowledges that Skyservice has, upon the representation of FCC, that FCC will charter each of the Aircraft in accordance with the Programme, and in reliance upon same, entered into a Lease Agreement in respect of each of the Aircraft in conjunction with and running simultaneous to the Charter Agreement, to lease the Aircraft to perform the Programme. FCC agrees to provide to Skyservice, at the beginning of each Season, an irrevocable Letter of Credit in an amount agreed to by the Parties and such additional amounts as may be reasonably required by Skyservice in accordance with Programme changes from time to time during the Term, as security (the "Security Deposit") pending the commencement of performance of the Programme for that Season.
- 5.4.2 Any letter of credit provided hereunder must be irrevocable and drawn on an international bank selected by FCC and approved by Skyservice. Skyservice shall not unreasonably withhold or delay its approval of a bank of international standing. Such letter of credit shall have a non-cancellable term of at least sixty (60) days after the end of the relevant Season from the date of issue. If FCC is unable to provide a letter of credit satisfying the terms of this Clause 5.4.2, then Skyservice may require FCC to provide a cash deposit to be held as security in lieu of such Letter of Credit. Whenever the balance of the amount of the Security Deposit becomes less than the required amount (determined in accordance with Clause 5.4.1, Charterer shall immediately either (i) in the case of a letter of credit, procure an increase in the Letter of Credit or (ii) in the case of a cash deposit make a further payment to Skyservice sufficient to restore such amount to the required balance of the Security Deposit.
- 5.4.3 The Aircraft contemplated as being operated under this Agreement are Boeing 757 and Airbus A320 type aircraft. If the Parties agree to the introduction of any other aircraft type not at that time on Skyservice's then existing air operator's certificate, then FCC shall provide to Skyservice a method of advance funding to Skyservice the reasonable costs of Skyservice in relation to the introduction of a new aircraft type. For the avoidance of doubt, this method of funding shall be outside of the Tariff mechanism payable under the Charter Agreements.
- 5.4.4 If the Programme requires (i) flight attendant or pilot training to be carried out prior to the start of the Season, (ii) third party fuel and ground handling suppliers' deposits for reasons other than a decline in Skyservice's credit standing or (iii) the establishment of a new base of operations for Skyservice, then FCC shall provide to Skyservice a method of advance funding to Skyservice the reasonable costs of Skyservice in relation to such training, deposits or establishment costs.
- 5.4.5 Any remaining portion of the Security Deposit will be refunded to Charterer without interest or, in the case of a Letter of Credit, shall be returned, when no further obligations or liabilities remain outstanding under the Charter Agreements in relation to the relevant Season.

6. OPERATING COSTS AND OVERHEAD CHARGE

6.1 Operating Costs

The Operating Costs with respect to a Charter Agreement shall be as set out in, and calculated in accordance with, Appendix 5. Without prejudice to the provisions of Clause 5, Skyservice shall have the obligation throughout the Term to use all reasonable commercial efforts to minimize the Operating Costs payable by FCC pursuant to the Charter Agreements and by any Group Company pursuant to any Extended Charter Agreement, but only to the extent that such efforts do not materially adversely affect the quality of the Services delivered under such Charter Agreements.

6.2 Overhead Charges

6.2.1 Payment

The monthly amount of Overhead Charge payable under any Charter Agreement between FCC and Skyservice in any one Holiday Year (the "Overhead Charge") shall throughout the Term, subject to Clause 6.2.2, be the amount calculated in accordance with Clause 6.2.3 to be the Initial Overhead Charge. The amount of Overhead Charge shall be subject to escalation on each anniversary of the Commencement Date at a

percentage rate equal to the percentage rate increase (if any) in the Consumer Price Index that occurred during the previous Holiday Year.

6.2.2 Variation Following Fleet Size Change

If there is a change in the SSV Fleet Size which is more than (a) [redacted] and (b) [redacted] Aircraft Months from the SSV Fleet Size subsisting (x) in the Holiday Year 2006/7 in the case of the first such adjustment and (y) at the time of the immediately preceding adjustment pursuant to this Clause 6.2.2, in the case of any subsequent adjustment pursuant to this Clause 6.2.2, then the following shall apply:

- (i) Skyservice and FCC shall negotiate in good faith to agree either (A) an appropriate increase (if any) in the Overhead Charge from the Overhead Charge in effect at the time that such reduction occurs if the SSV Fleet Size has decreased or (B) an appropriate decrease (if any) in the Overhead Charge from the Overhead Charge in effect at the time that such increase occurs if the SSV Fleet Size has increased. For the avoidance of doubt, due to the nature of airline operations, the parties anticipate that any such agreed increase would be less than that directly proportionate to the decrease in the number of Aircraft Months and any such agreed decrease would be less than that directly proportionate to the relevant increase in the number of Aircraft Months; and
- (ii) If the SSV Fleet Size has decreased then Skyservice shall use all commercially reasonable efforts to reduce the total SSV Qualifying Overheads to the maximum extent possible without materially adversely affecting the quality of services delivered under the Charter Agreements, taking into account the reduction in the SSV Fleet Size. The reduction in the SSV Qualifying Overheads achieved by Skyservice shall be taken into account in the negotiations contemplated in paragraph (i) above in scenario (B).

6.2.3 Calculation of "Initial Overhead Charge"

The Initial Overhead Charge shall be the result of the following formula:

$$\frac{A \times C}{B}$$

Where:

- A is total FCC Aircraft Months for the 2006/7 Holiday Year;
- B is total SSV Fleet Size for the 2006/7 Holiday Year; and
- C is the total SSV Qualifying Overheads for the 2006/7 Holiday Year.

For the purposes of this Agreement,

"SSV Qualifying Overheads" shall mean the total of the costs set out in Appendix 6 subject in all cases, to such costs not being incurred by Skyservice as a result of its Gross Negligence or willful misconduct, or breach of contract with a third party (unless such breach results in a net cost reduction).

For the avoidance of doubt "SSV Qualifying Overheads" shall not include any of the following:

- a. direct, indirect or allocated costs from the business of any of Skyservice's Affiliates or any of Skyservice's other businesses (other than Skyservice's charter airline business) including, without limitation, the provision of maintenance facilities to third parties;
- b. the cost to Skyservice of any goods or services provided directly or indirectly by an Affiliate of Skyservice, but only to the extent that (i) the provision (including the terms thereof) of such goods or services by the affiliate of Skyservice has not been approved in advance by FCC and (ii) Skyservice is not able to demonstrate to FCC's reasonable satisfaction that there is a cost benefit or saving from the provision of such goods or services from Skyservice's

Affiliate as opposed to the most competitive price available to Skyservice from a non-Affiliate third party.

"FCC Aircraft Months" shall mean the total number of Aircraft Months of all Seasonal Aircraft and Year-Round Aircraft in the relevant Holiday Year.

6.2.4 Minimum Seasonal Aircraft Months

With respect to the Seasonal Aircraft, a minimum Overhead Charge shall apply such that if (A) the Charter Agreements in respect of the Seasonal Aircraft in any Holiday Year have not had an average term of 4.5 months (the **"Minimum Average Term"**), they shall be deemed to have had such a Minimum Average Term and FCC shall be charged the difference between (i) the Overhead Charge actually paid by FCC during the Holiday Year in relation to the Seasonal Aircraft and (ii) the Overhead Charge that would have been paid by FCC if the Minimum Average Term had been met and (B) if any Charter Agreement has a term of less than [REDACTED] months, then the term shall be deemed to have been [REDACTED] months for the purpose of the payments under Clause 6.2.1 only.

Worked Example - for illustration purposes only

In one year, there are to be four (4) Seasonal Aircraft with Charter Agreement durations of 3.8, 4.3, 4.5 and five (5) months respectively. One Aircraft does not meet the minimum and so is deemed to have a duration of [REDACTED] months for overhead allocation purposes. The extra amount shall be charged to that Aircraft by raising Overhead Charge per Aircraft Month by a factor of [REDACTED]. Durations for overhead purposes now become 4, 4.3 4.5 and 5. Average 4.45. The average does not meet the minimum guaranteed average of 4.5, so an adjustment to a 4.5 average is necessary. In order to achieve this, the per Aircraft Month Overhead Charge is increased by factor 4.5/4.45.

7. PROFIT CHARGE

- 7.1 The profit charge element of the Charter Fee, chargeable with respect to each Aircraft pursuant to the relevant Charter Agreement, in any Holiday Year during the Term shall be as calculated in accordance with Appendix 7 (the **"Profit Charge"**).
- 7.2 Skyservice shall, at the end of each Holiday Year, calculate whether an Adjustment Payment, as contemplated in Appendix 7, is due at the end of such Holiday Year. If the Adjustment Payment is due from Skyservice to FCC, then Skyservice shall pay to FCC the Adjustment Payment within forty-five (45) days of the end of each Holiday Year. If the Adjustment Payment is due from FCC to Skyservice, then FCC shall make such payment to Skyservice within forty-five (45) days of receipt of written demand from Skyservice.
- 7.3 The Parties have agreed that the Profit Charge calculated in accordance with Appendix 7 shall apply in respect of the 2005/6 Holiday Year. On the Commencement Date a reconciliation calculation shall be carried out by Skyservice and the difference between (i) the total amount of Profit Charge paid to Skyservice in respect of the Aircraft operated during the 2005/6 Holiday Year and (ii) the total amount that would have been payable to Skyservice in respect of Profit Charges for the 2005/6 Holiday Year if calculated in accordance with Appendix 7, shall be paid by Skyservice if (i) is greater than (ii) and by FCC if (ii) is greater than (i). The payment of any resulting Adjustment Payment shall be made in accordance Clause 7.2.
- 7.4 Except as provided in Clause 7.5, no Profit Charge shall be payable with respect to any Spare Aircraft.
- 7.5 If any Spare Aircraft operates a fixed schedule of flying, not in substitution for one of the Seasonal Aircraft or Year-Round Aircraft, but in addition to the Programme agreed to be operated for the Seasonal and Year-Round Aircraft, then a monthly Profit Charge shall be payable by FCC to Skyservice in respect of such Spare Aircraft for the duration of the fixed schedule of flying calculated in accordance with the following formula:

$$X = A \times \frac{B}{C}$$

Where:

- X is the Profit Charge per month payable in respect of the relevant Spare Aircraft;
- A is the Profit Charge in effect during the relevant period calculated in accordance with Appendix 7;
- B is the number of Flight Hours operated by the relevant Spare Aircraft per month, pro-rated for partial months, in respect of its fixed schedule of flying; and
- C is the average number of Flying Hours per month (prorated for partial months) operated by the Seasonal Aircraft and the Year-Round Aircraft during the months (or parts thereof) that the fixed schedule is operated in any one Season in which the Profit Charge is to be calculated.

Worked Example - for illustration purposes only

In the 2006/7 Winter Season the designated Spare Aircraft is employed on a fixed schedule of flying which is not in substitution for any of the non-spare Aircraft which involves a return flight from Toronto to Punta Cana on each Saturday in December, January and February. The return flight consumes a total of 44 Flying Hours per month, the average utilization per month of the non-spare Aircraft for the months of December, January and February is 300 Flying Hours. The Profit Charge per month applicable for the 2006/7 Holiday Year is Cdn\$72840

$$x = \text{Cdn}\$72840 \times \frac{44}{300} \qquad x = \text{Cdn}\$10683.2$$

Any Profit Charge in respect of a Spare Aircraft shall be payable by FCC to Skyservice within ten (10) Business Days of receipt of an invoice for the amount calculated in accordance with the provisions of Clause 7.4.2

7.6 Bonus

In relation to any Holiday Year, the Parties shall agree a bonus structure whereby if Skyservice meet certain financial and other performance targets an amount is paid by FCC to Skyservice in excess of the cumulative Charter Fees payable in such Holiday Year. The bonus structure for the Holiday Year commencing on the Commencement Date shall be that set out in Appendix 9. Following agreement of the Budget for the next Holiday Year (in accordance with Clause 11), but prior to the commencement of such Holiday Year, the Parties shall discuss whether any amendments should be made to the existing bonus structure. If no amendments to the existing bonus structure are agreed, then the existing bonus structure shall continue to apply. Any amendments to the bonus structure that are agreed by the Parties shall be set out in an amendment to this Agreement.

8. SUBSTITUTION OR EARLY TERMINATION OF YEAR-ROUND AIRCRAFT

8.1 Provided that FCC provide Skyservice with not less than eight (8) months notice of the required change then, notwithstanding any provision to the contrary in the relevant Charter Agreement, FCC shall have the right with respect to any Year-Round Aircraft to substitute such aircraft with another during the term of the applicable Charter Agreement. This right shall be subject to Skyservice's ability to terminate the lease for the original aircraft, which Skyservice agrees to use its reasonable commercial efforts to achieve, to facilitate the substitution of such Year-Round Aircraft. FCC shall promptly on demand pay any costs reasonably incurred by Skyservice to third parties in respect of such early termination and substitution.

8.2 Subject to the provisions of Clause 4, provided that FCC provide Skyservice with not less than eight (8) months notice then, notwithstanding any provision to the contrary in the relevant Charter Agreement, FCC shall have the right with respect to any Year-Round Aircraft to terminate the Charter Agreement related to such Aircraft during the term of the applicable Charter Agreement. This right shall be subject to Skyservice's ability to terminate the lease for the relevant aircraft, which Skyservice agrees to use its reasonable commercial efforts to

achieve, to facilitate the early termination of the Charter Agreement for such Year-Round Aircraft. FCC shall promptly on demand pay any costs reasonably incurred by Skyservice to third parties in respect of such early termination but the provisions of Section 3.1.4 of the relevant Charter Agreement shall not apply and consequently FCC shall not be obliged to pay Termination Costs under the relevant Charter Agreement.

- 8.3 In order to qualify as a Year-Round Aircraft, the Aircraft subject to a Charter Agreement must remain in the Chartered Fleet for not less than twelve (12) consecutive months. If an Aircraft which has been designated as a Year-Round Aircraft is substituted pursuant to Clause 8.1 or the Charter Agreement related to such Aircraft is terminated pursuant to Clause 8.2, prior to the expiry of such period of twelve (12) months, then such Aircraft shall be considered to have been a Seasonal Aircraft (and the Aircraft Months for such Aircraft shall be deemed to be Aircraft Months relating to a Seasonal Aircraft for the purposes of the calculation of Profit Charges) and an Adjustment Payment shall become due at the end of the Holiday Year during which the change took place, calculated in accordance with the provisions Appendix 7. Such Adjustment Payment shall be payable in accordance with the provisions of Clause 7.2.

Worked Example of Year-Round Aircraft Substitution - for illustration purposes only

If an aircraft becomes one of the aircraft comprising the Chartered Fleet, that aircraft is designated as a Year-Round Aircraft on 1 November 2006 (the "Original Aircraft") and on 1 December 2006, FCC serves notice to substitute an aircraft (the "Replacement Aircraft") for the Original Aircraft on 1 August 2007, then the Aircraft Months for the Original Aircraft shall be considered to have been Aircraft Months in respect of a Seasonal Aircraft and an Adjustment Payment shall become due forty-five (45) days after the end of the 2006/7 Holiday Year in accordance with Clause 7.2. If the Replacement Aircraft leaves the Chartered Fleet prior to 31 July 2008, then the Aircraft Months for the Replacement Aircraft shall also be considered to have been Aircraft Months for a Seasonal Aircraft and an Adjustment Payment shall become due forty-five (45) days after the end of the 2007/8 Holiday Year in accordance with Clause 7.2. If, however, the Replacement Aircraft remains in the Chartered Fleet until or beyond 31 July 2008, then the Aircraft Months in respect of the Replacement Aircraft shall be considered to be Year-Round Aircraft Months for the purposes of Clause 7 and Appendix 7 and no Adjustment Payment shall become due at the end of the Holiday Year during which the replacement Aircraft exits the Chartered Fleet.

9. SKYSERVICE AS PREFERRED PROVIDER

- 9.1 Subject to Clause 9.3, the Parties agree that Skyservice shall be FCC's preferred provider of aircraft that are dedicated entirely to a FCC charter programme. Subject to compliance by Skyservice with its obligations under the Charter Agreements and under this Agreement, Skyservice shall have a first right to provide additional aircraft in excess of those required by the provisions of Clause 4.1, in which event such aircraft shall become subject to a Charter Agreement as a Seasonal or a Year-Round Aircraft.
- 9.2 If FCC has a requirement for additional aircraft for a Season or a Holiday Year, FCC shall negotiate in good faith with Skyservice, to agree terms on which such Aircraft would be operated in order to have Skyservice provide such aircraft. The Parties agree that such process of negotiation shall not extend longer than ninety (90) days from the date FCC first notified Skyservice of its requirement for an aircraft. The Parties acknowledge that FCC will continue from time to time to use blocked space and *ad hoc* charter arrangements with other carriers. Without prejudice to the preceding sentence, FCC agrees to confer with Skyservice to determine if a dedicated aircraft could be used on a more cost-effective basis for such requirements. If a dedicated aircraft could not be used more effectively for the purpose then, notwithstanding the general right of FCC to continue to use blocked space and *ad hoc* charter arrangements with other carriers, Skyservice will have the right of first refusal on any block of seats in excess of fifty (50) on a single aircraft programme provided that the aircraft is one for which Skyservice (rather than any of Skyservice's tour operator customers) bears the liability for filling part or all of the available seats.
- 9.3 Without limiting the generality of the foregoing, in the event that FCC receives a *bona fide* offer (a "Charter Offer") for an aircraft to be used by FCC in connection with its charter business, FCC shall forthwith disclose the Charter Offer to Skyservice. Upon receipt of the Charter Offer, Skyservice shall have thirty (30) calendar days to notify FCC of its agreement to

match the material terms of the Charter Offer. If Skyservice declines to match the material terms of the Charter Offer, FCC shall be entitled to enter into an agreement with the offeror on the terms of the Charter Offer. In the event that Skyservice agrees to match the Charter Offer, FCC and Skyservice shall enter into a Seasonal Charter Agreement or a Year-Round Charter Agreement, as appropriate, as modified by the material terms of such Charter Offer. In no event shall FCC enter into an agreement relating to a Charter Offer prior to expiry of the thirty (30) day notice period described above. The Parties agree that a *bona fide* offer to FCC is any offer of an aircraft by an operator licensed in any jurisdiction.

- 9.4 In the event that First Choice Holidays PLC or any Company in which it holds no less than 25% of the voting capital is licensed to operate as an air carrier in Canada and is capable of and permitted to provide aircraft capacity to FCC, Skyservice's rights set out in this Clause 9 would be subordinate to such air carrier's right to provide FCC with such capacity.

10. CRITICAL DOWNTURN IN BOOKINGS

10.1 Downturn in Canadian Market

- 10.1.1 In respect of any calendar month (the "**Trigger Month**") inclusive tour operator holiday bookings for departure for that calendar month from Canada to the resorts served by the Programme ("**Bookings**") have decreased by 25% or more from both (i) the level of Bookings in the same calendar month in the preceding calendar year (the "**Reference Year**") as reflected in the Conference Board of Canada index (or if no longer existing the most appropriate replacement or substitute index therefor (the "**Canadian Index**"), and (ii) the level budgeted by Skyservice and FCC in setting the budget for the relevant Holiday Year pursuant to Clause 11, then from the Trigger Month the provisions of Clauses 4.1, 4.2, 4.3 and 7.1 (the "**Suspended Clauses**") shall be suspended until the number of Bookings in any calendar month (the "**Resumption Month**") are in excess of 75% of the number of Bookings for the same calendar month during the Reference Year as reflected in either (i) the Canadian Index or (ii) the budgeted number for such month in such Holiday Year.
- 10.1.2 If the suspension of the Suspended Clauses continues for one or more whole Seasons then the Term shall be extended by a period equal to the number of whole Seasons which occurred during the Suspension Period and the definition of Term in this Agreement shall be amended accordingly. The Suspended Clauses shall be reinstated and the amendment shall take effect from the commencement of the Resumption Month.
- 10.1.3 Notwithstanding the suspension of the provisions of the Suspended Clauses, but without prejudice to Clause 6.2.2 for the duration of the Suspension Period, FCC shall pay to Skyservice an amount in respect of Overhead Charges equal to the amount of Overhead Charges payable in accordance with the Chartered Fleet Size that would have been in effect but for the suspension of the Suspended Clauses provided that if during the Suspension Period there occurs a reduction of the SSV Fleet Size (ignoring for these purposes any reduction in the number of Chartered Aircraft other than in accordance with Clause 4.2) in excess of twelve percent (12%) and twenty-four (24) aircraft months then the Overhead Charge shall be recalculated in accordance with Clause 6.2.2 and applied to the Chartered Fleet Aircraft Months actually in effect during the Suspension Period.
- 10.1.4 For the avoidance of doubt if the duration of the suspension pursuant to this Clause 10.1 is less than one Season then no change shall be made to the Term of this Agreement and the Suspended Clauses shall be reinstated with effect from the commencement of the Resumption Month.

10.2 Downturn in UK & Eire Market

- 10.2.1 In respect of any calendar month (the "**UK & Eire Trigger Month**") inclusive tour operator holiday bookings for departure for that calendar month from the UK and Eire to the resorts served by the Programme (the "**UK & Eire Bookings**") have decreased by twenty-five percent (25%) or more from both (i) the level of Bookings in the same calendar month in the preceding calendar year (the "**UK & Eire Reference Year**") as reflected in the AC Nielson index or if no longer existing the most appropriate replacement or substitute index therefor (the "**UK & Eire Index**") and (ii) the level

budgeted by Skyservice and FCC in setting the Budget for the relevant Holiday Year pursuant to Clause 11, then from the Relevant Month the provisions of the Suspended Clauses in so far as they relate to the Year-Round Aircraft that had been designated to be subject to Extended Charter Agreements pursuant to Clause 3.2 shall be suspended until the number of Bookings in any calendar month (the "UK & Eire Resumption Month") are in excess of 75% of either (i) the number of Bookings for the same calendar month during the Reference Year as reflected in the UK & Eire Index or (ii) the budgeted number for such month in such Holiday Year.

- 10.2.2 If the suspension of the Suspended Clauses continues for one (1) or more whole Seasons, then the Term shall be extended by a period equal to the number of whole Seasons which occurred during the Suspension Period and the definition of Term in this Agreement shall be amended accordingly. The Suspended Clauses shall be reinstated and the amendment shall take effect from the commencement of the Resumption Month.
- 10.2.3 Notwithstanding the suspension of the provisions of the Suspended Clauses, but without prejudice to Clause 6.2.2, for the duration of the Suspension Period, FCC shall continue to pay the Overhead Charge on the basis of the Minimum Seat Mile Guarantee under each relevant Charter Agreement on the Chartered Fleet that would have been in effect were it not for the suspension of the Suspended Clauses.
- 10.2.4 For the avoidance of doubt, if the duration of the suspension pursuant to this Clause 10.1 is less than one (1) Season, then no change shall be made to the Term of this Agreement and the Suspended Clauses shall be reinstated with effect from the commencement of the Resumption Month.

11. PROJECTED OPERATING COSTS AND REPORTING REQUIREMENTS

- 11.1 Skyservice shall provide FCC with a copy of the schedule of projected Operating Costs for the Programme for the Chartered Fleet in each Holiday Year broken down by Season no later than six (6) months prior to the commencement of the relevant Season and:
 - 11.1.1 shall provide FCC with all reasonable assistance in understanding such schedule of projected Operating Costs; and
 - 11.1.2 shall take into consideration any reasonable submissions made by FCC in relation to the content of such schedule and provide a revised schedule as applicable.
- 11.2 If, in any Season, there is an increase over the actual amount incurred for such line item in the corresponding Season in the previous Holiday Year equal to or greater than (i) ██████████ of (subject to a *de minimis* level of ██████████) or (ii) ██████████, in each case in any line item specified in Appendix 5 calculated on a per unit cost basis, compared to the relevant Season in the previous Holiday Year and on a normalized Aircraft Month basis, then Skyservice shall substantiate such budgeted cost increase by showing FCC the underlying contractual provision or related invoice as long as Skyservice is not precluded from doing so by reason of a contractual or statutory confidentiality obligation. If Skyservice is prevented from showing FCC the underlying contractual provision or related invoice, then Skyservice shall submit a written explanation of such variance certified to be a true and complete explanation and signed by an officer of the Company. If Skyservice is not able to either (i) substantiate such budgeted cost increase in the manner contemplated above or (ii) explain such increase to FCC's satisfaction, then the proposed budgeted cost increase shall not take effect.

If FCC have reasonable grounds for believing that (i) the budgeted amount for a line item should have been reduced, from the actual amount incurred for such line item in the relevant Season in the previous Holiday Year, by an amount equal to or greater than (i) ██████████ (subject to a *de minimis* level of ██████████) or (ii) ██████████ then FCC shall specify the reasonable grounds for such belief to Skyservice and Skyservice shall substantiate that no such cost reduction has been achieved by showing FCC the underlying contractual provision or related invoice as long as Skyservice is not precluded from doing so by reason of a contractual or statutory confidentiality obligation. If Skyservice is prevented from showing FCC the underlying contractual provision or related invoice, then Skyservice shall submit a written explanation of the cost levels in the budget certified as true and complete and signed by an officer of the Company. If Skyservice is not able to either (i) substantiate the projected

cost levels in the manner contemplated above or (ii) explain such non-reduction to FCC's satisfaction, then the reduction in budgeted cost proposed by FCC shall take effect

- 11.3 The projected schedule of Operating Costs for the Chartered Fleet for each Season in each Holiday Year shall be finalised by the Parties not less than four (4) months prior to the commencement of the relevant Season in that Holiday Year.
- 11.4 The agreed projected schedule of Operating Costs for each Season, projected Profit Charges and projected Overhead Charges for the relevant Season in each Holiday Year shall, when applied to the Programme for each Season in the relevant Holiday Year, form the budget for such Season in such Holiday Year (the "Budget").
- 11.5 FCC and Skyservice shall conduct a reconciliation of actual Operating Costs against the projected schedule of Operating Costs at the end of each Season. FCC shall have the right to require documentary evidence of actual costs incurred in relation to (A) variations over budget or (B) where FCC have reasonable grounds for believing that savings against budget should have been realised, in each case, equal to or greater than either (i) [REDACTED] (subject to a *de minimis* level of [REDACTED] and (ii) [REDACTED], in each case per line item specified in Appendix 5. If Skyservice is prevented from providing such documentary evidence by reason of contractual or statutory confidentiality obligations in relation to such expenditure, then Skyservice shall submit a written explanation of the cost levels actually achieved compared to those budgeted, certified as true and complete and signed by an officer of the Company. If Skyservice is not able to either (i) substantiate the projected cost levels in the manner contemplated above or (ii) explain such non-reduction to FCC's satisfaction then the budgeted cost in the case of (A) or the reduction against budget in the case of (B), shall take effect and Skyservice shall promptly make to FCC the necessary payment. The reconciliation shall be made taking into account accruals for future liabilities on a commercially reasonable basis.
- 11.6 Skyservice shall use all reasonable commercial efforts to negotiate exemptions to its contractual confidentiality provisions for agreements entered into from the commencement date that would enable Skyservice to show the relevant contractual provision and related invoice to FCC as contemplated in Clauses 11.2 and 11.5.
- 11.7 Skyservice will co-operate with FCC and provide FCC with such information as may be required from time to time to enable FCC or FCC's direct and indirect parent Companies, as the case may be, to satisfy its or as the case may be, their tax or regulatory filing requirements and any audit information requests arising from such filings.

12. FORCE MAJEURE, ILLEGALITY AND CONTROL NOTIFICATION

- 12.1 Where an event of Force Majeure prevents Skyservice from performing the Programme in its entirety (a "Global Force Majeure"), the Parties agree that the Suspended Clauses shall be suspended for such period of time as the Global Force Majeure continues up to one (1) year from the commencement of the Global Force Majeure. For the avoidance of doubt, the Overhead Charge shall continue to be payable on the basis of the Minimum Seat Mile Guarantee under each relevant Charter Agreement during any time that the Global Force Majeure is continuing on the Chartered Fleet that would have been in effect were it not for the provisions of this Clause 12.
- 12.1.1 During the continuance of a Global Force Majeure for up to one (1) year, FCC shall have the right to terminate this Agreement by written notice and neither party shall have any liability to the other under this Agreement in respect of the early termination but without prejudice to (i) any pre-existing rights and obligations of the parties and (ii) Termination Costs under any Charter Agreement in effect at the time of such termination which shall be payable by FCC to Skyservice on the basis of the size of the Chartered Fleet that would have been in effect during the Holiday Year in which the termination takes place but for the suspension of the Suspended Clauses.
- 12.1.2 In the event that a Global Force Majeure continues for a period in excess of one (1) year and FCC has not exercised its right to terminate pursuant to Clause 12.1.1, the Profit Charge shall once again be payable; however, such Profit Charges shall be decreased by [REDACTED] until such Global Force Majeure ceases.

- 12.2 Both Parties acknowledge that this Agreement must comply in all respects with all applicable legislation, including the *Canada Transportation Act, 1996* (Canada), the *Aeronautics Act* (Canada) and all regulations adopted thereunder and all requirements of the Canadian Transportation Agency. In the event that any provision of this Agreement is found to contravene any of the foregoing legislation, regulations or requirements, the Parties agree to negotiate in good faith with a view to amending such provision in order to ensure full compliance. In the event that the Parties are unable to reach an agreement on such amendments, this Agreement shall terminate immediately upon receipt of written notice by one Party to the other confirming such failure to amend the Agreement as required and neither party shall have any liability to the other under this Agreement but without prejudice to (i) any pre-existing rights and obligations of the parties and (ii) Termination Costs under any Charter Agreement in effect at the time of termination.
- 12.3 Prior to becoming a publicly listed company, Skyservice agrees to notify FCC in the event that, to Skyservice's knowledge, any Person acquires directly or indirectly control over greater than 10% of the voting capital of Skyservice subsequent to the date of this Agreement. The Parties agree that, in such event, Skyservice shall not be required to disclose the identity of such Person except to the extent that such Person is a competitor of FCC, as described in Appendix 3.

13. INDEMNITY

- 13.1 FCC covenants and agrees to indemnify and hold Skyservice and its directors, officers, employees, agents and representatives (individually an "Indemnified Party" and collectively the "Indemnified Parties") harmless in respect of any Claims incurred directly by any Indemnified Party relating to, arising out of, resulting from or in any way connected with:
- (a) the breach of, or any incorrectness in, any of the representations and warranties made by FCC under this Agreement (other than Clause 15.2(d));
 - (b) any material breach, or any non-fulfilment, of any agreement or covenant on the part of FCC under this Agreement, arising out of the Gross Negligence or wilful misconduct of FCC except any act or omission due or attributable to the Gross Negligence or wilful misconduct of Skyservice. Each of the foregoing paragraphs of this Clause 13.1 shall be treated as a severable contract term and shall not be affected by any invalidity or unenforceability of the provisions of any other contract term; or
 - (c) any Claims incurred by an Indemnified Party under Clause 13.1 of any Charter Agreement shall also include any Tax indemnities (as defined in the Charter Agreement or in the Lease Agreements) incurred pursuant to the Lease Agreements.

Each of the foregoing paragraphs of this Clause 13.1 shall be treated as a severable contract term and shall not be affected by any invalidity or unenforceability of the provisions of any other contract term.

- 13.2 Skyservice covenants and agrees to indemnify and hold FCC and its Affiliates and their respective directors, officers, employees, agents and representatives (individually the "Party Indemnified" and collectively the "Parties Indemnified") harmless in respect of any Claims incurred directly by any such Party Indemnified relating to, arising out of, resulting from or in any way connected with:
- (a) the breach of, or any incorrectness in, any of the representations and warranties made by Skyservice under this Agreement (other than Clause 15.1(d));
 - (b) any material breach, or any non-fulfilment, of any agreement or covenant on the part of Skyservice under this Agreement
 - (c) personal injury, death or property damage that may arise as a result of or be caused by or relate to the possession, use, leasing, operation, maintenance, repair, alteration, storage or delivery of the Aircraft, or the return or other disposition of the Aircraft; or
 - d) any act or failure to act by Skyservice relating to the Aircraft

except where any of a) through d) is caused by any act or omission under this Clause 13.2 due or attributable to the Gross Negligence or wilful misconduct of FCC.

Any indemnity payable by Skyservice under this Clause 13.2 shall be limited in all cases, except in the case of Gross Negligence or wilful misconduct of Skyservice, to the insurance proceeds payable or paid under insurance coverage carried by Skyservice pursuant to Clause 14 of this Agreement.

Each of the foregoing paragraphs of this Clause 13.2 shall be treated as a severable contract term and shall not be affected by any invalidity or unenforceability of the provisions of any other contract term.

- 13.3 The amount of any Claims submitted for indemnification under Clause 13.1 or Clause 13.2 shall bear interest at the Prime Rate from and including the date the Claim was incurred to but excluding the date payment of such Claim is made, and the amount of such interest shall be deemed to be part of such Claim.
- 13.4 Skyservice or FCC (as the case may be) will pay an Indemnitee for Claims pursuant to Clauses 13.1 or 13.2 within five (5) Business Days after receipt of a written demand therefor from such Indemnitee accompanied by a written statement describing in reasonable detail the basis for such indemnity.
- 13.5 Notwithstanding anything in this Agreement to the contrary, the provisions of Clauses 13.1, 13.2, 13.3 and 13.4 will survive the termination of this Agreement and continue in full force and effect notwithstanding any breach by Skyservice or FCC of the terms of this Agreement, the termination of the charter of the Aircraft to FCC under this Agreement or the repudiation by Skyservice or FCC of this Agreement.
- 13.6 Except as otherwise specifically provided to the contrary in this Agreement, neither Party shall be liable or responsible to the other Party in any way for any indirect, special or consequential damages, whether in contract, tort or otherwise (including damages for lost profits or revenues even if such damages were foreseeable or resulted from a fundamental breach of this Agreement).

14. INSURANCE

- 14.1 Skyservice shall at all times during the Term and for a period of not less than two (2) years after the termination of this Agreement maintain combined single-limit policies of aircraft passenger liability insurance, baggage liability insurance, public liability insurance and property damage insurance in the aggregate amount of not less than One Billion Canadian Dollars (Cdn\$1,000,000,000).
- 14.2 Skyservice agrees to have FCC and its Affiliates, as the case may be, named as an additional insured on all such policies which policies shall provide, in addition to the other clauses set forth below, appropriate cross-liability ("severability of interests") clauses and that, except as set forth below, such insurance shall be primary and any similar coverage which FCC may carry shall be excess coverage and non-contributory thereto.
- 14.3 Skyservice's aircraft liability policies shall provide that the full limits of all such policies shall be available to the additional insured (subject to the provisions that the total policy limits are not increased by the inclusion of additional insured).
- 14.4 Every policy of insurance required by this Agreement shall:
- (i) insure FCC's and Affiliates of FCC's interests, as applicable, regardless of any action or inaction of Skyservice or any other Person or any breach or violation of any representations, warranties, declarations or conditions contained in such policies by Skyservice or any other person;
 - (ii) provide that if the insurers cancel such insurance for any reason whatever, or the same is allowed to lapse for non-payment of premium, such cancellation or lapse shall not be effective as to FCC or any Affiliate of FCC for thirty (30) days after receipt by FCC of notice from such insurers of such proposed cancellation or lapse;

- (iii) contain a waiver of any right of the insurers to set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of FCC or its Affiliates, and their respective directors, officers, agents, servants and employees;
- (iv) contain a provision prohibiting Skyservice, without the prior written consent of FCC, from cancelling such insurance or making any change restricting or reducing the coverage;
- (v) contain a provision that the insurers will promptly notify FCC in the event that any premium or instalment of premium shall not be paid when due; and
- (vi) contain no provision for any payment by Skyservice in the form of a deductible other than a deductible provision that is standard as a deductible among insurers of internationally recognized standing in the field of aviation insurance.

14.5 Notwithstanding Clause 14.1, the Parties acknowledge that third party war-risk coverage as of the date hereof is limited to US\$50 million with excess coverage provided by the Canadian Government. In the event the Order in Council described in this Clause 14.5 is revoked or fails to be renewed in due course upon expiry, Skyservice agrees to purchase the required coverage to the extent that it is commercially available in Canada.

15. REPRESENTATIONS AND WARRANTIES

15.1 Skyservice, as of the date of this Agreement and continually thereafter during the Term, represents and warrants to FCC as follows:

(a) Due Incorporation

Skyservice has been duly incorporated and is a subsisting corporation under the laws of Canada.

(b) Due Authorization

Skyservice has all necessary corporate power, authority and capacity to enter into this Agreement and to carry out its obligations hereunder, and the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of Skyservice.

(c) No Breach

The execution, delivery and performance of this Agreement by Skyservice does not (i) contravene, conflict with or constitute a breach of any provision of Skyservice's constituting documents, or (ii) contravene, conflict with or constitute a breach of any material agreement or instrument to which Skyservice is a party or by which it or any of its assets are bound or affected.

(d) Enforceability of Obligations

This Agreement constitutes a valid and binding obligation of Skyservice enforceable against it in accordance with its terms, subject however, to limitations with respect to enforcement imposed by law in connection with bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally and to the extent that equitable remedies such as specific performance and injunctions are only available in the discretion of the court from which they are sought.

(e) Capability

Skyservice has the financial resources, the management and technical expertise and the human resources to carry out and perform the services contemplated hereby and to lease or otherwise acquire the Aircraft for the purposes hereof.

(f) Custody

The Aircraft are and shall be in the legal custody and control of Skyservice. All Persons who at any time have access to or control of the Aircraft shall be employees or authorized agents or representatives of Skyservice.

(g) Control

Skyservice is not in negotiations with a Competitor of FCC in the air carrier, tour operator or travel agency businesses described in Section 1 of Appendix 3 as of the date hereof for the acquisition, either directly or indirectly, of Control of Skyservice by such third party. For this purpose "Control" means the power to appoint and remove a majority of the directors and officers of Skyservice through ownership of voting capital of Skyservice or through the power to vote the voting capital of Skyservice by contract or possession.

15.2 Representations and Warranties of FCC

FCC, as of the date of this Agreement and continually thereafter during the Term, represents and warrants to Skyservice as follows:

(a) Due Incorporation

FCC has been duly incorporated and organized and is a subsisting corporation under the laws of Canada.

(b) Due Authorization

FCC has all necessary corporate power, authority and capacity to enter into this Agreement and to carry out its obligations hereunder, and the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of FCC.

(c) No Breach

The execution, delivery and performance of this Agreement by FCC does not (i) contravene, conflict with or constitute a breach of any provision of FCC's constituting documents, or (ii) contravene, conflict with or constitute a breach of any material agreement or instrument to which FCC is a party or by which it or any of its assets are bound or affected.

(d) Enforceability of Obligations

This Agreement constitutes a valid and binding obligation of FCC enforceable against it in accordance with its terms, subject however, to limitations with respect to enforcement imposed by law in connection with bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally and to the extent that equitable remedies such as specific performance and injunctions are only available in the discretion of the court from which they are sought.

(e) Capability

FCC has the financial resources to perform its obligations hereunder.

15.3 Survival of Representations and Warranties

- (a) The representations and warranties of Skyservice contained in Clause 15.1 shall survive during the entire Term and during such period shall continue in full force and effect for the benefit of FCC, after which time Skyservice shall be released from all of its obligations in respect of such representations and warranties except with respect to (i) any fraud, misrepresentation or breach of warranty resulting from a deliberate concealment of information, or (ii) any Claims asserted by FCC in writing (setting forth in reasonable detail the nature of such Claim) before the expiration of such period.
- (b) The representations and warranties of FCC contained in Clause 15.2 shall survive during the entire Term and during such period shall continue in full force and effect for the benefit of Skyservice, after which time FCC shall be released from all of its obligations in respect of such representation and warranties except with respect to (i) any fraud, misrepresentation or breach of warranty resulting from a deliberate concealment of information, or (ii) any Claims asserted by Skyservice in writing (setting forth in reasonable detail the nature of such Claim) before the expiration of such period.

16. TERMINATION

16.1 Skyservice Termination Events

FCC may terminate this Agreement prior to the expiry of the Term on the occurrence or during the continuance of any Skyservice Termination Event by notice in writing with effect either immediately or at such times as may be specified in such notice provided. The Skyservice Termination Events shall be the following:

- 16.1.1 the termination of all of the Charter Agreements as a result of a breach by Skyservice of its obligations under such Charter Agreements (and such breach has not in turn been caused by an act or omission of FCC) which, if able to be remedied, has not been remedied within the time frame set out in the related Charter Agreement or notice of default, whichever is later;
- 16.1.2 any obligation contained in this Agreement is not complied with by Skyservice in any material respect and if capable of remedy is not cured within ten (10) Business Days' notice from FCC;
- 16.1.3 Skyservice commences a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of its or any substantial part of its property or assets, or consents to any such relief or to the appointment of or the taking possession by any such official or agency in an involuntary case or other proceeding commenced against it, or makes a general assignment for the benefit of creditors, or takes any corporate action to authorize any of the foregoing, or an involuntary case or other proceeding is commenced against Skyservice seeking any of the above and such involuntary case or proceeding remains undismissed or unstayed for thirty (30) days;
- 16.1.4 any execution or distress is levied against, or an encumbrance that takes possession of, any substantial part of the property undertaking or assets of Skyservice;
- 16.1.5 any event occurs under the laws of any jurisdiction that has a similar or analogous effect to any of those referred to in Clauses 16.1.3 or 16.1.4 above; or
- 16.1.6 fraud or other serious misconduct on the part of Skyservice.
- 16.1.7 any Competitor (as such term is defined in Appendix 3 hereto) of FCC in the air carrier, tour operator or travel agency businesses described in Appendix 3 hereto as may be amended from time to time in accordance with such Appendix acquires, either directly or indirectly, Control of Skyservice. For this purpose "Control" means the power to appoint and remove a majority of the directors and officers of Skyservice through ownership of voting capital of Skyservice or through the power to vote the voting capital of Skyservice by contract or possession;

- 16.1.8 a representative of a Competitor (as such term is defined in Appendix 3 hereto) of FCC in the air carrier, tour operator or travel agency businesses described in Appendix 3 hereto as may be amended from time to time is appointed as a director to Skyservice's board of directors or to Skyservice Investments Inc.'s board of directors.

16.2 Consequences of Termination arising from Skyservice Termination Events

In the event of termination by FCC pursuant to Clause 16.1, Skyservice shall on demand pay any amounts owing to FCC pursuant to this Agreement or any Charter Agreement. Upon receipt of all outstanding amounts which Skyservice owes to FCC, FCC shall pay to Skyservice any amounts owing by FCC to Skyservice and from the date of such termination all rights and obligations (other than those expressed to survive termination of this Agreement) between the Parties shall be extinguished. Without prejudice to the provisions of Clause 13.2, the Parties agree that FCC shall not be entitled to rely on any Skyservice Termination Events where such event is a foreseeable consequence of FCC's failure to maintain any of its material obligations hereunder.

16.3 FCC Termination Events

Skyservice may terminate this Agreement prior to the expiry of the Term on the occurrence or during the continuance of any FCC Termination Event by notice in writing with effect either immediately or at such times as may be specified in such notice provided. The FCC Termination Events shall be the following:

- 16.3.1 the termination of all of the Charter Agreements as a result of a breach by FCC of its obligations under such Charter Agreements (and such breach has not in turn been caused by an act or omission of Skyservice) which, if able to be remedied, has not been remedied within the time frame set out in the related Charter Agreement or notice of default, whichever is later;
- 16.3.2 any obligation contained in this Agreement is not complied with by FCC in any material respect and if capable of remedy is not cured within ten (10) Business Days' notice from Skyservice;
- 16.3.3 FCC commences a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of its or any substantial part of its property or assets, or consents to any such relief or to the appointment of or the taking possession by any such official or agency in an involuntary case or other proceeding commenced against it, or makes a general assignment for the benefit of creditors, or takes any corporate action to authorize any of the foregoing, or an involuntary case or other proceeding is commenced against FCC seeking any of the above and such involuntary case or proceeding remains undismissed or unstayed for thirty (30) days;
- 16.3.4 Any execution or distress is levied against, or an encumbrance that takes possession of, any substantial part of the property undertaking or assets of FCC;
- 16.3.5 Any event occurs under the laws of any jurisdiction that has a similar or analogous effect to any of those referred to in Clauses 16.3.3 or 16.3.4 above; or
- 16.3.6 Fraud or other serious misconduct on the part of FCC.
- 16.4 Consequences of Termination arising from an FCC Termination Event**
- 16.4.1 In event of termination of this Agreement by Skyservice pursuant to Clause 16.3, FCC shall be liable to Skyservice for:
- a) the Profit Charges that would have been payable to Skyservice if this Agreement had continued until the end of the Term, discounted to net present value at the Prime Rate as at the date of termination. The Profit Charges shall be calculated on the basis of a Chartered Fleet equivalent in size to the smallest fleet permitted by the operation of Clause 4 is (i.e. the maximum step down of two (2) Year-Round Aircraft and two (2) Seasonal Aircraft is, subject to the Minimum Chartered Fleet Size, assumed to have been exercised pursuant to Clause 4.4 at each applicable date prior

to the expiry of the Term) from the date of termination until the Expiry of the Term and, if terminated prior to 1 November 2008, assuming that the notice to exercise the termination option pursuant to Clause 2.3 would have been served by FCC on Skyservice on or before 1 November 2008;

b) all costs properly paid or properly incurred by Skyservice in each case in connection with this Agreement;

c) where Lease Agreements have been terminated and such termination has been caused as a direct result of the termination of this Agreement, all Claims made by Skyservice in respect of such termination of the Lease Agreements relating to the Charter Agreements in existence at the date of termination; and all costs relating to the terminations of the Lease Agreements relating to the Charter Agreements in effect at the time of termination; and

d) all costs actually incurred by Skyservice relating to the termination of any Lease Agreement relating to the Charter Agreement in effect at the time of termination, including reasonable legal fees and disbursements.

(collectively, (a) through (d) being the "Early Termination Sum")

In the event that FCC is required to pay the Early Termination Sum pursuant to the foregoing, then Skyservice shall use commercially reasonable efforts including co-operating with FCC, to reduce the extent of such Early Termination Sum in addition to Skyservice's general duty to mitigate such costs and expenses. With respect to any third party claim, Skyservice agrees that it will:

- i) make no statement prejudicial to FCC;
- ii) promptly notify FCC in writing of the details of any such claim.
- iii) if requested, subrogate or otherwise give to FCC sole control of the defence of such claim and all related settlement negotiations (subject to FCC being responsible for the costs thereof); and
- iv) give FCC all reasonable assistance in connection therewith.

16.4.2 The Parties agree that the amounts set out in Clause 16.4.1 represent a genuine pre-estimate of such damages and Skyservice agrees in such event to accept payment of such amounts in full and final satisfaction of any and all claims Skyservice may have against FCC in respect of termination of this Agreement prior to expiry of the Term and Skyservice shall have no further recourse against FCC in respect of such early termination. The Parties agree, for greater certainty, that no termination of this Agreement shall be effective until the amounts due under paragraphs (a) and (b) of 16.4.1 have been paid in full to Skyservice. The payments contemplated by paragraphs (c) and (d) of Clause 16.4.1 shall be payable by FCC promptly on demand by Skyservice. For greater certainty the parties expressly agree that the payment obligations under Clause 16.4.1 paragraphs (c) and (d) shall survive the termination of this Agreement.

16.4.3 Except as otherwise specifically provided to the contrary in this Agreement, neither Party shall be liable to the other for any indirect, special, consequential or punitive damages, whether in contract, tort or otherwise, including without limitation, damages for loss of profits or revenues.

16.5 Other Termination Event

16.5.1 In the event that a change in applicable legislation (or any regulations adopted thereunder) including without limitation the *Canada Transportation Act, 1996* (Canada), the *Aeronautics Act* (Canada) and all regulations adopted thereunder and all requirements of the Canadian Transportation Agency, results in non-compliance of this Agreement and/or all of the Charter Agreements therewith, and despite the Parties' good faith negotiation over a period of ninety (90) days or such shorter period as may be set out in any notice from a regulatory agency, the Parties are unable to amend this Agreement and/or the Charter Agreements, as applicable, to achieve compliance, this Agreement shall terminate upon expiry of the aforementioned period (an "Other Termination Event").

16.5.2 If this Agreement is terminated pursuant to Clause 16.5.1, then neither party shall have any liability to the other without prejudice to (i) the existing rights and obligations of the Parties and (ii) the amount of Termination Costs due under each of the Charter Agreements in effect at the time of termination pursuant to Clause 16.5.1.

17. NOTICES

Any notice required or permitted to be given pursuant to this Agreement shall be in writing and shall be effectively given if (a) delivered by hand, (b) sent by electronic or facsimile communication which provides for written time dated confirmation of delivery, or (c) sent by prepaid courier service, addressed:

in the case of notice to FCC as follows:

First Choice Canada Inc.
160 Bloor St. East, Suite 400
Toronto, Ontario
M4W 1B9
Attention: President
Facsimile number: +1 416-969-2699

and in the case of notice to Skyservice as follows:

Skyservice Airlines Inc
31 Fasken Drive
Etobicoke,
Ontario
M9W 1K6
Attention: President
Facsimile number: +1 416-679-5920

with a copy to the same address, Attention: Legal Department, facsimile number: +1 416-679-5912 or in the case of notice under Clause 4.2 with a copy to the same address attention V.P., Commercial Operations, facsimile number +1 416 679 5918.

Any notice so given shall be deemed conclusively to have been given and received (a) when so delivered by hand or sent by electronic communication or facsimile, during normal business hours in the Province of Ontario, otherwise on the next following Business Day, or (b) on the second day following the sending by courier assuming that such day is a Business Day, otherwise on the next following Business Day. Any Party or others mentioned above may change any particulars of its address for notice by notice to the others in the manner aforesaid.

18. EXECUTION AND COUNTERPARTS

This Agreement may be executed by the Parties in counterparts and may be executed and delivered by facsimile and all such counterparts and facsimiles shall together constitute one and the same Agreement.

19. SUCCESSORS AND ASSIGNS

Neither this Agreement nor any rights or obligations under this Agreement shall be assignable by either Party without the prior written consent of the other Party. Subject thereto, this Agreement shall enure to the benefit of and be binding upon the Parties and their respective successors (including any successor by reason of amalgamation of any party and any successor to the business by reason of merger, acquisition, dissolution or winding up or other transaction or series of transactions having the same or a similar effect) and permitted assigns. Any permitted assign of either Party shall be required to agree to assume, observe, perform and discharge all of the assignor's covenants, agreements and obligations under this Agreement, as successor to the assignor under this Agreement, to the same extent as if the assignee had been a party to this Agreement in the place and stead of the assignor.

20. WAIVER

The failure of any Party at any time to require the performance by the other of any of the terms or provisions of this Agreement shall in no way affect the right of that Party thereafter to enforce same, nor shall the waiver by any Party of any breach of any of the terms or conditions hereof be taken to be a waiver of any succeeding breach of any such term or condition.

21. CONFIDENTIALITY

The Parties recognize that this Agreement contains information that is commercially sensitive and agree to keep the entire contents of this Agreement confidential and not to make any disclosures to any third persons other than (i) to such Party's professional advisors, including accountants, financial and legal advisors, bankers or other lenders, (ii) as may be required by law (however in such instance, only to the extent required by law), (iii) as may be required (and in such case, strictly to the extent required) by Skyservice in order to negotiate and agree the appropriate allocation of overheads with other customers to whom Skyservice is proposing to provide charter services on a Total Cost basis, and (iv) with the prior written consent of both Parties. Notwithstanding the foregoing, the Parties agree that Skyservice may disclose FCC's name, the number of Aircraft to which the Agreement relates and the Term provided, however, that Skyservice shall provide FCC with comparable information with respect to other charter programs entered into by Skyservice after the date of this Agreement.

22. GOVERNING LAW AND JURISDICTION

22.1 This Agreement shall be governed by the laws of the Province of Ontario and the laws of Canada.

22.2 The Parties agree to work cooperatively in an effort to resolve any matter, dispute or claim arising out of or in any way relating to or connected with this Agreement or the breach, termination or invalidity thereof (a "Dispute"). In the event that such informal efforts do not result in a resolution of the Dispute, the Parties agree that the Dispute shall be discussed by the President of Skyservice and the President of FCC in an effort to reach a resolution. In the event that the Parties' respective officers are unable to resolve the Dispute within two (2) business days, the Dispute shall be submitted to arbitration in accordance with Appendix 4, which sets out the sole and exclusive procedure for the resolution of Disputes under this Agreement. The resolution of Disputes pursuant to the terms of Appendix 4 shall be final and binding upon the Parties, and there shall be no appeal therefrom, including any appeal to a court on a question of law, a question of fact, or a question of mixed fact and law. For greater certainty, subsection 7(2) of the *Arbitration Act, 1991* (Ontario) shall not apply to arbitration under this Clause 22.2.

23. PRIORITY

In the event of any conflict between the terms of this Agreement and the terms of any Charter Agreement then, unless specifically stated to the contrary, the terms of this Agreement shall prevail. The Charter Agreements are intended to give effect to the commercial terms of this Agreement and should be construed in that context.

24. PARTNERSHIP OR AGENCY

24.1 The Parties hereby acknowledge and agree that it is not the purpose or intention of this Agreement to create, and this Agreement does not create, any relationship of partnership, agency, joint venture or franchise for any purposes whatsoever. The Parties agree that nothing in this Agreement shall be construed to make any Party a partner, legal representative or agent of the other or to create any fiduciary relationship as between them. Each Party further agrees that no representations shall be made or acts taken which could establish any apparent relationship of partnership, agency, joint venture or franchise with the other and that neither Party shall be bound in any manner whatsoever by any agreements, representations or warranties made by the other Party to any other Person or with respect to any other action of the other Party.

24.2 It is understood and agreed that the employees of the respective Parties to this Agreement shall continue to be the employees of that Party. Each Party shall cover its respective employees with workers' compensation insurance as may be required by the laws applicable to such employees.

24.3 FCC has no equity interest, legal or beneficial, in Skyservice and is not entitled to share in the profits or losses of the operations carried on by Skyservice under this Agreement. Page 165 of Motion Record

24.4 Each of the Parties from time to time at the request and expense of the other Party and without further consideration, shall execute and deliver such other instruments and take such further action as such other Party may reasonably require to more effectively complete any matter contemplated by this Agreement.

25. SURVIVAL

Each Party agrees that all of the provisions of this Agreement, other than the representations and warranties contained in Clause 15, shall forever survive the execution, delivery and performance of this Agreement.

26. EXPENSES

Except as otherwise provided herein, each Party shall be responsible for its own legal and other expenses incurred in connection with the negotiation, preparation, execution, delivery and performance of this Agreement and the transactions contemplated hereby.

27. STAND BY SEATS

Skyservice reserves the right to utilise seats on any live Flights on a stand-by basis not utilised by FCC as of flight closure for the transport of Skyservice employees, other individuals entitled to travel benefits pursuant to Skyservice's policies and other non-revenue passengers, subject to an appropriate charge being levied to be agreed from time to time but not to be less than the charge made by FCC to its own staff for the utilisation of stand-by seats by FCC's own staff. For the avoidance of doubt, Skyservice shall be responsible for the payment on its own account of any taxes, surcharges or other costs or expenses associated with such utilisation of seats by Skyservice employees, other individuals entitled to travel benefits pursuant to Skyservice's policies and other non-revenue passengers.

EXECUTED BY:

By:
Name: NICK LONGMAN
Position: PRESIDENT
For and on behalf of:
FIRST CHOICE CANADA INC.



By:
Name: ROBERT BIGNERE
Position: PRESIDENT, COO
For and on behalf of:
SKYSERVICE AIRLINES INC.



**APPENDIX 1
FORM OF YEAR-ROUND OR SEASONAL CHARTER AGREEMENT**

THIS B757 CHARTER AGREEMENT is made as of XXXXXXXXX, 20XX

BETWEEN:

FIRST CHOICE CANADA INC., a corporation existing under the laws of Canada,

(the "Charterer")

- and -

SKYSERVICE AIRLINES INC., a corporation existing under the laws of Canada,

("Skyservice")

RECITALS:

- A. Skyservice is a Canadian air carrier authorized to operate domestic and international air services between points in Canada, between points in Canada and abroad and between points abroad.
- B. Charterer is a Canadian tour operator licensed under the *Travel Industry Act* (Ontario).
- C. The Parties wish to set out the terms under which they agree to enter into charter arrangements for the Program.
- D. Skyservice agrees to make reasonable efforts to ensure that its cost structures in respect of the Program remain competitive in the marketplace and that such costs are regularly benchmarked with other charter airlines operating similar aircraft to the Aircraft in Canada.

NOW THEREFORE in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

**ARTICLE 1
DEFINITIONS**

1.1 Defined Terms

"**Affiliate**" means a Person which directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the Person specified;

"**Agreement**" means this Charter Agreement, including all schedules and all amendments, side letters or restatements as permitted, and references to "**Article**" or "**Section**" or "**Schedule**" mean the specified article or section or schedule of this Agreement;

“Aircraft” means the particular aircraft chartered by Charterer from Skyservice pursuant to this Agreement as more fully described in Section 2.2 and Schedule A as amended from time to time in accordance with this Agreement;

“Business Day” means any day, other than a Saturday or Sunday, on which Royal Bank of Canada in Toronto is open for commercial banking business during normal banking hours;

“Charter Fee” shall have the meaning ascribed to it in Section 4.1;

“Claims” includes any claim, demand, action, suit, cause of action, assessment or reassessment, charge, judgement, debt, liability, expense, cost, damage or loss, contingent or otherwise, including loss of value, reasonable professional fees and all reasonable costs incurred in investigating or pursuing any of the foregoing or any proceeding relating to any of the foregoing;

“Dispute” shall have the meaning ascribed to it in Section 12.12;

“Effective Date” has the meaning ascribed to it in Section 3.1;

“Flight” or **“Flights”** means individually a flight and collectively all flights from one single point to a second point as may be proposed, operated or requested in accordance with this Agreement;

“Force Majeure” shall mean causes which are beyond the control of a Party and which prevent such Party from performing its obligations under this Agreement and include acts of God, strikes, lockouts or other industrial or labour disputes or disturbances (other than those strikes, lockouts, industrial or other labour disputes or disturbances that are foreseeable and that affect only the Party’s operations), wars, blockades, insurrections, riots, earthquakes, typhoons, hurricanes or other severe storms, floods, fires, explosions and acts or omissions of any Governmental Body;

“GAAP” means Canadian generally accepted accounting principles;

“Global Force Majeure” means where an event of Force Majeure prevents Skyservice from performing the applicable Program in its entirety;

“Governmental Body” means any government, parliament, legislature, regulatory authority, governmental department, agency, commission, board or court or other law, rule or regulation making entity having or purporting to have jurisdiction on behalf of any nation or state or province or other subdivision thereof or any municipality, district or other subdivision thereof, including the Department of Transport (Transport Canada) and the Canadian Transportation Agency;

“GST” means the federal goods and services tax;

“Lease Agreement” or **“Lease Agreements”** means one or more aircraft lease agreements pursuant to which Skyservice as lessee leases the Aircraft from time to time;

“Lien” means any and all liens, privileges, mortgages, charges, hypothecs, pledges, security interests, prior assignments, options, warrants or other encumbrances, and any Claims, rights, restrictions, easements, servitudes and other interests of any nature and kind whatsoever which

affect, by way of a conflicting ownership interest or otherwise, in any manner whatsoever, title to or interest in any particular property owned by a Party;

“**Party**” means the Charterer or Skyservice and “**Parties**” means both of them;

“**Person**” means any individual, sole proprietorship, partnership, firm, entity, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate and Governmental Body and, where the context requires, any of the foregoing when they are acting as trustee, executor, administrator or other legal representative;

“**Prime Rate**” means the prime lending rate of interest announced from time to time by the Royal Bank of Canada as its “prime rate” being its reference rate then in effect for determining interest rates on Canadian dollar commercial loans at Toronto;

“**Program**” means the schedules of Flights to be operated by Skyservice during the Term as set out on a Season by Season basis in Schedule B and subject to adjustment as further described in Section 2.3;

“**Rotation**” means a Flight that departs from the Flight base and returns to the Flight base, being a return Flight operated with the Aircraft;

[“**Season**” shall mean either the fall/winter season, being the period between 1st November and 30th April, or the spring/summer season, being the period between 1st May and 31st October, as the case may be;]

“**Seat Mile**” means the number of miles flown by the Aircraft in respect of each seat on the Aircraft;

“**Tariff**” has the meaning ascribed to it in the *Canada Transportation Act, 1996* (Canada) to the extent applicable to Charterer;

“**Tax**” or “**Taxes**” means all taxes, charges, fees, levies or other assessments, including without limitation all income, capital, sales, use, transfer, GST, withholding, applicable payroll taxes, employment, health, education, excise, business, property or other taxes, customs duties, surtaxes, anti-dumping and countervail duties, fees, assessments, charges or governmental imposts of any kind whatsoever (other than taxes imposed on Skyservice’s income or revenue by a Governmental Body), imposed by any Governmental Body;

“**Term**” has the meaning ascribed to it in Section 3.1, unless terminated earlier in accordance with the terms hereof;

“**Termination Costs**” has the meaning ascribed to it in Section 3.2.3;

“**Termination Event**” has the meaning ascribed to it in Section 3.2.1; and

“**Waiver Period**” has the meaning ascribed to it in Section 7.2.

1.2 Certain Rules of Interpretation

In this Agreement:

- (a) **Currency** - Unless otherwise specified, all references to money amounts are to the lawful currency of Canada.
- (b) **Governing Law** - This Agreement is a contract made under and shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the Province of Ontario.
- (c) **Headings** - Headings of Articles, Sections and Schedules are inserted for convenience of reference only and shall not affect the construction or interpretation of this Agreement.
- (d) **Including** - Where the word “including” or “includes” is used in this Agreement, it means “including (or includes) without limitation”.
- (e) **No Strict Construction**– The language used in this Agreement is the language chosen by the Parties to express their mutual intent, and no rule of strict construction shall be applied against any Party.
- (f) **Number and Gender** – Unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.
- (g) **Statutory references** – A reference to a statute includes all regulations made pursuant to such statute and, unless otherwise specified, the provisions of any statute or regulation which amends, supplements or supersedes any such statute or any such regulation.
- (h) **Time** – Time is of the essence in the performance of the Parties’ respective obligations.

1.3 Schedules

The Schedules to this Agreement, as listed below, are an integral part of this Agreement:

| <u>Schedule</u> | <u>Description</u> |
|-----------------|------------------------|
| A | Aircraft |
| B | Program |
| C | Service Levels |
| D | Arbitration Procedures |
| E | Tax Advisory |

ARTICLE 2 CHARTER

2.1 Charter

Skyservice shall charter to Charterer and Charterer shall charter and take from Skyservice the Aircraft, subject to the terms and conditions of this Agreement. Subject to anything to the contrary contained in this Agreement, the Aircraft shall be for the exclusive use of Charterer for the duration of the Term, including freight, subject to capacity after passengers and passenger baggage is considered.

The Parties agree to strictly abide by all laws, statutes and Skyservice policies (and in the case of the Charterer's obligations under this clause, provided a copy of such policies have been provided to Charterer) prohibiting the transportation of certain goods and materials on the Aircraft, including all drugs the possession of which is illegal under applicable laws, hazardous materials or live animals and agree to ensure that the Flights are subject to these restrictions in respect of cargo carriage.

2.2 Aircraft

The Parties hereby acknowledge and agree that, subject to Section 7.2, the Aircraft to be chartered hereunder will be one [B757/A320] aircraft with no less than a [233Y/180Y] configuration, as more particularly described in Schedule A. The Parties acknowledge and agree that the Aircraft shall remain in the legal custody and control of Skyservice at all times during the Term.

2.3 Destination Served by the Aircraft

Skyservice agrees to deploy the Aircraft as may be requested by Charterer for Flights to any destinations that may be served by such aircraft type from Toronto or other Canadian departure points as may be authorized under Skyservice insurance policies and lease agreements that are within the range of the Aircraft, all in accordance with the destinations set forth in the Program.

ARTICLE 3 TERM AND TERMINATION

3.1 Term

3.1.1 This Agreement shall commence as of the date hereof and continue until [April 30/October 31], 20XX at 23:59 p.m. Eastern Standard time (the "Term"); it being understood that the performance of the Program shall commence at 0:01 a.m. Eastern Standard time on [MONTH][DATE], [YEAR] (the "Effective Date").

3.2 Termination and Consequences

3.2.1 Either Party may terminate this Agreement prior to expiry of the Term on or after the occurrence of a termination event (a "Termination Event") by the other Party, by notice

in writing with effect either immediately or at such times as may be specified in such notice provided. The following events shall constitute a Termination Event:

- 3.2.1.1 Charterer fails to pay any amount under this Agreement three (3) Business Days following the date Skyservice notifies Charterer that such amount became due and remains unpaid;
- 3.2.1.2 Any representation or warranty (other than in Sections 5.1 (d) and 5.2 (d)) contained in this Agreement is not complied with or proves to be incorrect in any material respect and if capable of remedy is not cured within ten (10) Business Days' notice from the other Party;
- 3.2.1.3 Any obligation contained in this Agreement (other than performance standards set out in Section 7.1 and the obligation referred to in Section 3.2.1.1 above) is not complied with in any material respect and if capable of remedy is not cured within ten (10) Business Days' notice from the other Party;
- 3.2.1.4 Any security required to be provided to Charterer pursuant to Section 4.3 is terminated or ceases to be effective for any reason and is not cured or replaced with a reasonable alternative form of security within seven (7) days from the date on which Skyservice becomes aware of such termination or cessation of effectiveness;
- 3.2.1.5 Either Party ceases or threatens to cease to carry on business as it is currently conducted;
- 3.2.1.6 Either Party commences a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of its or any substantial part of its property or assets, or consents to any such relief or to the appointment of or the taking possession by any such official or agency in an involuntary case or other proceeding commenced against it, or makes a general assignment for the benefit of creditors, or takes any corporate action to authorize any of the foregoing, or an involuntary case or other proceeding is commenced against either Party seeking any of the above and such involuntary case or proceeding remains undismissed or unstayed for thirty (30) days;
- 3.2.1.7 Any execution or distress is levied against, or an encumbrance that takes possession of, any substantial part of the property undertaking or assets of either Party;
- 3.2.1.8 Any event occurs under the laws of any jurisdiction that has a similar or analogous effect to any of those referred to in clauses 3.2.1.6 or 3.2.1.7 above;
- 3.2.1.9 Either Party purports to assign this Agreement without obtaining the prior written consent of the other Party in accordance with Section 12.9;

3.2.2 The Parties agree that Charterer shall not be entitled to rely on any of the Termination Events in this Section 3.2 where such event is a foreseeable result of Charterer's failure to maintain any of its material obligations hereunder. In the event that Charterer exercises its right to terminate this Agreement as a result of a Termination Event, the Parties agree that Charterer will not be responsible for payment of Termination Costs hereunder, however Charterer will be liable for all amounts owing and liabilities incurred up to the effective date of termination.

The Parties further agree that any right of termination under this Agreement shall be the sole remedy available to Charterer; for greater certainty, in no event shall Skyservice be liable for any damages, costs, losses or expenses, whether foreseen or unforeseeable, direct, indirect, special or consequential damages, and whether in contract, tort or otherwise.

3.2.3 On termination of this Agreement prior to the end of the Term for any reason whatsoever, Charterer shall be responsible and shall reimburse Skyservice for the following (the "Termination Costs"):

(i) all costs properly paid or properly incurred by Skyservice in each case connection with this Agreement;

(ii) all Claims made against Skyservice relating to such termination;

(iii) all costs relating to the termination of the Lease Agreement or incurred in respect of the Lease Agreement subsequent to the date of termination as described in Section 4.1 and Section 9.1, personnel and operations facilities relating to the Aircraft and reasonable legal fees and disbursements; and

(iv) damages as set out herein; the Parties acknowledge and agree that an amount equal to all amounts then owing to Skyservice and an amount equal to Cdn\$XXX,XXX¹ per month for the remainder of the Term discounted to net present value at the Prime Rate as at the date of termination represents a genuine pre-estimate of such damages and Skyservice agrees in such event to accept payment of such fees together with all other Termination Costs referred to above in full and final satisfaction of any and all claims Skyservice may have against Charterer in respect of termination of this Agreement prior to expiry of the Term and Skyservice shall have no further recourse against Charterer in respect of such early termination.

3.2.4 In the event that the Charterer is required to pay the Termination Costs pursuant to the foregoing, Skyservice shall use reasonable efforts, including co-operating with the Charterer to reduce the extent of such Termination Costs, in addition to Skyservice's general duty to mitigate such costs and expenses. With respect to any third party claim, Skyservice agrees that it will:

3.2.4.1 make no statement prejudicial to the Charterer;

¹ Insert amount of profit fee per month for the relevant Holiday Year

3.2.4.2 promptly notify the Charterer in writing of the details of any such claim;

3.2.4.3 if requested, subrogate or otherwise give to Charterer sole control of the defence of such claim and all related settlement negotiations (subject to Charterer being responsible for the costs thereof); and

3.2.4.4 give Charterer all reasonable assistance in connection therewith.

ARTICLE 4 COMPENSATION

4.1 Charter Fee

Charterer shall pay to Skyservice for the services performed hereunder at fees and rates in accordance with Skyservice's Tariff of Cdn\$XX per available seat mile or any revised Tariff agreed between the Parties during the term (collectively, the "Charter Fee").

4.2 Payment

Charterer shall pay to Skyservice the Charter Fee applicable to the Program on a weekly basis. Each weekly payment shall be based on the Charter Fee for the number of Rotations scheduled to be flown in the ensuing week. Any necessary adjustments to take into account the number of actual Rotations operated during the preceding month shall be made within ten (10) days of the end of each month. A final adjustment for the actual number of Rotations and the actual Seat Miles flown by the Aircraft, together with applicable surcharges, shall be made [each Season within ninety (90) days of the end of the first such Season or in the case of the second Season,] within sixty (60) days following the end of the Term.

Throughout the Term, Skyservice agrees to pay its debts in connection with the operation of the Aircraft, including applicable surcharges and departure taxes, on a timely basis. In the event that Charterer becomes aware that Skyservice has failed to pay any of its debts in connection with the operation of the Aircraft, Charterer shall forthwith notify Skyservice of the supplier involved and the nature of the payment to be made. Skyservice shall then have fifteen (15) calendar days to satisfy such payments and to provide Charterer with proof of such payment, failing which, Charterer may make such payment directly to the supplier and set off such amount against amounts owing to Skyservice hereunder, except in the event that Skyservice is contesting in good faith and on reasonable grounds its obligation to pay such amounts, in which case Skyservice shall provide Charterer with its reasons for such protest.

All payments are to be received into Skyservice's bank account in immediately available funds in full, free and clear of any deductions, withholding taxes, duties and levies.

4.3 Advanced Payment Protection

All advance payments made by Charterer under this Agreement shall be secured by Skyservice with a letter of credit, bond or other security as required by law. All limitations on the liability of Skyservice under this Agreement are without prejudice to this Section 4.3 and the rights of Charterer under any security provided pursuant to it. Skyservice will comply with the

requirements of the *Canada Transportation Act, 1996* (Canada) and the regulations adopted thereunder regarding advance payments to air carriers by charter operators and shall provide Charterer on or before the first Flight pursuant to this Agreement a copy of the security instrument issued by a Canadian financial institution establishing that all advance payments for Flights to be made pursuant to this Agreement are fully secured.

ARTICLE 5 REPRESENTATIONS AND WARRANTIES

5.1 Representations and Warranties of Skyservice

Skyservice, as of the date of this Agreement and continually thereafter during the Term, represents and warrants to Charterer as follows:

(a) Due Incorporation

Skyservice has been duly incorporated and is a subsisting corporation under the laws of Canada.

(b) Due Authorization

Skyservice has all necessary corporate power, authority and capacity to enter into this Agreement and to carry out its obligations hereunder, and the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of Skyservice.

(c) No Breach

The execution, delivery and performance of this Agreement by Skyservice does not (i) contravene, conflict with or constitute a breach of any provision of Skyservice's constituting documents, or (ii) contravene, conflict with or constitute a breach of any material agreement or instrument to which Skyservice is a party or by which it or any of its assets are bound or affected.

(d) Enforceability of Obligations

This Agreement constitutes a valid and binding obligation of Skyservice enforceable against it in accordance with its terms, subject however, to limitations with respect to enforcement imposed by law in connection with bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally and to the extent that equitable remedies such as specific performance and injunctions are only available in the discretion of the court from which they are sought.

(e) Capability

Skyservice has the financial resources, the management and technical expertise and the human resources to carry out and perform the services contemplated hereby and to lease or otherwise acquire the Aircraft for the purposes hereof.

(f) Airworthiness of the Aircraft

The Aircraft is and shall be:

- (i) maintained in a safe and airworthy condition and in accordance with Canadian airline industry standards;
- (ii) configured for the purposes intended and fully equipped for operations, all as required by this Agreement;
- (iii) delivered clean in accordance with airline industry standards; and
- (iv) be capable of performing the Program.

(g) Custody

The Aircraft is in the legal custody and control of Skyservice. All Persons who at any time have access to or control of the Aircraft shall be employees or authorized agents or representatives of Skyservice.

5.2 Representations and Warranties of Charterer

Charterer, as of the date of this Agreement and continually thereafter during the Term represents and warrants to Skyservice as follows:

(a) Due Incorporation

Charterer has been duly incorporated and organized and is a subsisting corporation under the laws of Canada.

(b) Due Authorization

Charterer has all necessary corporate power, authority and capacity to enter into this Agreement and to carry out its obligations hereunder, and the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of Charterer.

(c) No Breach

The execution, delivery and performance of this Agreement by Charterer does not (i) contravene, conflict with or constitute a breach of any provision of Charterer's

constituting documents, or (ii) contravene, conflict with or constitute a breach of any material agreement or instrument to which Charterer is a party or by which it or any of its assets are bound or affected.

(d) **Enforceability of Obligations**

This Agreement constitutes a valid and binding obligation of Charterer enforceable against it in accordance with its terms, subject however, to limitations with respect to enforcement imposed by law in connection with bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally and to the extent that equitable remedies such as specific performance and injunctions are only available in the discretion of the court from which they are sought.

(e) **Capability**

Charterer has the financial resources to perform its obligations hereunder.

5.3 Survival of Representations and Warranties

- (a) The representations and warranties of Skyservice contained in Section 5.1 shall survive during the entire Term and during such period shall continue in full force and effect for the benefit of Charterer, after which time Skyservice shall be released from all of its obligations in respect of such representations and warranties except with respect to (i) any fraud, misrepresentation or breach of warranty resulting from a deliberate concealment of information, or (ii) any Claims asserted by Charterer in writing (setting forth in reasonable detail the nature of such Claim) before the expiration of such period.
- (b) The representations and warranties of Charterer contained in Section 5.2 shall survive during the entire Term and during such period shall continue in full force and effect for the benefit of Skyservice, after which time Charterer shall be released from all of its obligations in respect of such representation and warranties except with respect to (i) any fraud, misrepresentation or breach of warranty resulting from a deliberate concealment of information, or (ii) any Claims asserted by Skyservice in writing (setting forth in reasonable detail the nature of such Claim) before the expiration of such period.

5.4 Covenants of Skyservice

Skyservice covenants and agrees as follows:

(a) **Compliance**

For each and every Flight operated pursuant to the Program, the Aircraft shall at all times comply with and be operated in accordance with all laws, rules and regulations of every Governmental Body to which the Aircraft may be subject. Skyservice shall comply with the provisions of all policies of insurance applicable to the Aircraft or to the charter of such Aircraft by the Charterer, and shall maintain and keep in full force and effect all required Licenses and Permits

including the Certificate of Airworthiness and all other licenses required by the *Aeronautics Act (Canada)* or the *Canada Transportation Act, 1996 (Canada)*.

(b) Compliance with Lease Agreement

Skyservice shall comply with all material obligations under the Lease Agreement that are within Skyservice's control.

5.5 Covenant of Charterer

Charterer covenants and agrees that Charterer has complied with and shall comply with all applicable laws, rules and regulations of any Governmental Body to which it is subject, as well as the provisions of any policy of insurance applicable to the Aircraft or to the charter thereof by Charterer.

ARTICLE 6 GOVERNMENTAL AUTHORIZATIONS

6.1 Ongoing Compliance

Both Parties acknowledge that this Agreement must comply in all respects with all applicable legislation, including the *Canada Transportation Act, 1996 (Canada)*, the *Aeronautics Act (Canada)* and all regulations adopted thereunder and all requirements of the Canadian Transportation Agency. In the event that any provision of this Agreement is found to contravene any of the foregoing legislation, regulations or requirements, the Parties agree to negotiate in good faith with a view to amending such provision in order to ensure full compliance. In the event that the Parties are unable to reach an agreement on such amendments, this Agreement shall terminate immediately upon receipt of written notice by one Party to the other confirming such failure to amend the Agreement as required.

6.2 Joint Filings

Skyservice and Charterer agree to file jointly with the Canadian Transportation Agency and relevant foreign government(s) such prospectuses and other documents and information as may be required by the Air Transportation Regulations of Canada and applicable foreign regulations.

6.3 Additional Documentation

Charterer undertakes to submit to Skyservice such documents and information as may be required by the Air Transportation Regulations of Canada and foreign regulations within the time periods specified therefor.

6.4 Permits and Traffic Rights

This Agreement has been entered into upon the express condition that Skyservice obtain, on a timely basis, from the appropriate Canadian and foreign government/airport authorities, the traffic rights and landing permits necessary for the operation of the Flights. Skyservice agrees to use reasonable efforts to obtain such traffic rights and landing permits.

6.5 Efforts to Revise Schedule

In the event Skyservice is unable to obtain such rights and permits, Charterer shall make a reasonable effort to revise the schedule of Flights so as to permit Skyservice to obtain the necessary rights and permits. In the event that despite reasonable efforts, Skyservice is unable to obtain the necessary rights and permits to permit Flights to certain destinations, Skyservice will have no obligation hereunder to fly to those destinations.

Charterer agrees to comply with any applicable Canadian and foreign regulations pertaining to allotment of seats, lists of passengers, disclosure of information or any other relevant matter. All advertising and every ticket issued by Charterer in respect of an international charter flight hereby chartered from Skyservice and not yet authorized by government authorities shall include a notice that the flights in question are subject to the approval of the Canadian Transportation Agency.

Skyservice shall accept Charterer's standard ticket of travel as issued to passengers from time to time; provided always that the same shall comply with governmental regulation and insurance requirements notified from time to time and shall contain standard limitation of liability language.

ARTICLE 7 SERVICES OF SKYSERVICE

7.1 Services to be Provided by Skyservice

Skyservice shall provide or cause to be provided in respect of the Flights to be operated pursuant to the Program, all of the personnel, services and facilities normally associated with charter flights of the same nature as those to be operated by Skyservice pursuant to the Program. Without limiting the generality of the foregoing, Skyservice shall be responsible for the safety, security, regularity, efficiency, reliability, comfort and cleanliness of such Flights as well as for the professional competence of the flight crews and cabin crews and all other Persons providing services to such Flights whether in Canada or elsewhere.

Skyservice shall use reasonable commercial efforts to adhere to the Service Level standards set out in Schedule C as may be amended by the Parties from time to time.

Skyservice shall not for any reason (other than Force Majeure) operate its fleet with departures later than 30 minutes from departure time for more than 15% of its flights calculated for three consecutive months.

Except as specifically contemplated otherwise in this Agreement, Skyservice shall not for any reason (other than Force Majeure) fail to operate flights for 6 consecutive days on which Flights are scheduled during any particular year or, in the aggregate, fail to operate 20 Flights which are scheduled for the Aircraft during any particular year.

The Parties agree that in no event shall a failure by Skyservice to meet the performance standards set out above provide Charterer with a right to terminate this Agreement.

In the event that Skyservice fails to maintain the performance standards set out in this Section 7.1, the Parties shall meet to review Skyservice's performance hereunder and to discuss in good faith what efforts, if any, that are consistent with Skyservice's obligations hereunder, may be implemented in order to attain a level of performance consistent with the standards set out in this Section 7.1. The Parties acknowledge and agree that nothing in this paragraph is intended to increase Skyservice's obligations under this Agreement.

7.2 Failure of Skyservice to Provide Aircraft

Except as specifically contemplated otherwise in this Agreement, if Skyservice fails to provide the Aircraft for any Flight required pursuant to the Program for any reason whatsoever (except in the event of Force Majeure), Skyservice shall arrange any and all alternate air transportation and other accommodations reasonably necessary to transport the passengers in accordance with the schedule for such Flight and shall use reasonable efforts to keep Charterer informed of such arrangements; provided however, that Charterer shall be entitled to waive Skyservice's obligation to arrange alternate air transportation for the anticipated period of time the Aircraft shall be unavailable or any portion thereof which shall not be in excess of a Season (the "Waiver Period"). The Parties agree that, notwithstanding Section 2.3, each Waiver Period during the Term shall be subject to a minimum guarantee of one (1) seat mile in addition to the Minimum Seat Mile Guarantee.

In the event that Skyservice fails to secure arrangements for an alternate aircraft within eighteen (18) hours of the Aircraft becoming unavailable (other than where Charterer has waived Section 7.2), Charterer shall be entitled to make arrangements for an alternate aircraft to perform a Flight; provided, however that Charterer must notify Skyservice immediately of such arrangement, and provided further that Skyservice shall be entitled to perform all Flights upon completing arrangements for an alternate aircraft in accordance with this Section 7.2.

Skyservice shall use its commercially reasonable efforts to ensure that any and all alternate air transportation arranged by Skyservice shall in all material respects be at a level of comfort and service to the passengers that is no less than the level contemplated by the provisions of this Agreement. For greater certainty, upon provision of alternate air transportation in accordance with this Section 7.2 within a reasonable time, Skyservice shall be deemed to have performed the Flights for the purposes of Section 7.1.

ARTICLE 8 INDEPENDENCE OF THE PARTIES

8.1 No Partnership or Agency

The Parties hereby acknowledge and agree that it is not the purpose or intention of this Agreement to create, and this Agreement does not create, any relationship of partnership, agency, joint venture or franchise for any purposes whatsoever. The Parties agree that nothing in this Agreement shall be construed to make any Party a partner, legal representative or agent of the other or to create any fiduciary relationship as between them. Each Party further agrees that no representations shall be made or acts taken which could establish any apparent relationship of partnership, agency, joint venture or franchise with the other and that neither Party shall be bound in any manner whatsoever by any agreements, representations or warranties made by the other Party to any other Person or with respect to any other action of the other Party.

8.2 Employees

It is understood and agreed that the employees of the respective Parties to this Agreement shall continue to be the employees of that Party. Each Party shall cover its respective employees with worker's compensation insurance as may be required by the laws applicable to such employees.

8.3 Disclaimer of Equity Interest

Charterer has no equity interest, legal or beneficial, in Skyservice and is not entitled to share in the profits or losses of the operations carried on by Skyservice under this Agreement.

ARTICLE 9 INDEMNIFICATION

9.1 Indemnity by Charterer

Charterer covenants and agrees to indemnify and hold Skyservice and its directors, officers, employees, agents and representatives (individually an "Indemnified Party" and collectively the "Indemnified Parties") harmless in respect of any Claims incurred directly by any Indemnified Party relating to, arising out of, resulting from or in any way connected with:

- (a) the breach of, or any incorrectness in, any of the representations and warranties made by the Charterer under this Agreement (other than s. 5.2(d)), or
- (b) any material breach, or any non-fulfilment, of any agreement or covenant on the part of the Charterer under this Agreement,

arising out of the gross negligence or wilful misconduct of Charterer except any act or omission due or attributable to the gross negligence or wilful misconduct of Skyservice. Each of the foregoing paragraphs of this Section 9.1 shall be treated as a severable contract term and shall not be affected by any invalidity or unenforceability of the provisions of any other contract term.

9.2 Indemnity by Skyservice

Skyservice covenants and agrees to indemnify and hold Charterer and its Affiliates and their respective directors, officers, employees, agents and representatives (individually the "Party Indemnified" and collectively the "Parties Indemnified") harmless in respect of any Claims incurred directly by any such Party Indemnified relating to, arising out of, resulting from or in any way connected with:

- (a) the breach of, or any incorrectness in, any of the representations and warranties made by Skyservice under this Agreement (other than s. 5.1(d));
- (b) any material breach, or any non-fulfilment, of any agreement or covenant on the part of Skyservice under this Agreement (other than performance standards set out in s. 7.1);

- (c) personal injury, death or property damage that may arise as a result of or be caused by or relate to the possession, use, leasing, operation, maintenance, repair, alteration, storage or delivery of the Aircraft, or the return or other disposition of the Aircraft; or
- (d) any act or failure to act by Skyservice relating to the Aircraft

except any act or omission due or attributable to the gross negligence or wilful misconduct of Charterer. Any indemnity payable by Skyservice under this Section 9.2 shall be limited in all cases to the insurance proceeds payable or paid under insurance coverage carried by Skyservice pursuant to Article 10 hereof except to the extent arising from Skyservice's gross negligence or wilful misconduct. Each of the foregoing paragraphs of this Section 9.2 shall be treated as a severable contract term and shall not be affected by any invalidity or unenforceability of the provisions of any other contract term.

9.3 Interest on Claims

The amount of any Claims submitted for indemnification under Section 9.1 or Section 9.2 shall bear interest at the Prime Rate from and including the date the Claim was incurred to but excluding the date payment of such Claim is made, and the amount of such interest shall be deemed to be part of such Claim.

9.4 Timing of Payment

Skyservice or Charterer (as the case may be) will pay an indemnitee for Claims pursuant to this Article 9 within five (5) Business Days after receipt of a written demand therefor from such indemnitee accompanied by a written statement describing in reasonable detail the basis for such indemnity

9.5 Survival of Obligations

Notwithstanding anything in this Agreement to the contrary, the provisions of this Article 9 will survive the termination of this Agreement and continue in full force and effect notwithstanding any breach by Skyservice or Charterer of the terms of this Agreement, the termination of the charter of the Aircraft to Charterer under this Agreement or the repudiation by Skyservice or the Charterer of this Agreement.

9.6 Limitation of Liability

Except as otherwise specifically provided to the contrary in this Agreement, neither Party shall be liable or responsible to the other Party in any way for any indirect, special or consequential damages, whether in contract, tort or otherwise (including damages for lost profits or revenues even if such damages were foreseeable or resulted from a fundamental breach of this Agreement).

ARTICLE 10 INSURANCE

10.1 Aircraft Hull Insurance

Skyservice represents and warrants to Charterer that Skyservice carries aircraft hull insurance and aircraft hull war risks insurance covering the Aircraft, the whole subject to the terms and conditions of Skyservice Aviation Policy, bearing policy numbers as follows: Hull and Liability Policy A00117A96/Hull and War Policy A00127A96/Hull Deductible Policy ATD016412, subject to the limitation of war-risk coverage as of the date hereof to US\$50 million. Skyservice shall cause its insurers to accept the terms of this Section 10.1 and to waive their rights of subrogation against Charterer and its Affiliates, and their respective directors, officers, agents, servants and employees.

10.2 Liability Insurance

(a) Skyservice represents and warrants to Charterer that Skyservice carries combined single-limit policies of aircraft passenger liability insurance, baggage liability insurance, public liability insurance and property damage insurance in the aggregate amount of not less than One Billion Canadian Dollars (\$1,000,000,000).

(b) Skyservice agrees to have Charterer and its Affiliates, as the case may be, named as an additional insured on all such policies to the extent the Aircraft is being operated on behalf of Charterer or such of its Affiliates, as the case may be, which policies shall provide, in addition to the other clauses set forth below, appropriate cross-liability ("severability of interests") clauses and that, except as set forth below, such insurance shall be primary and any similar coverage which Charterer may carry shall be excess coverage and non-contributory thereto.

(c) Skyservice's aircraft liability policies shall provide that the full limits of all such policies shall be available to the additional insured (subject to the provisions that the total policy limits are not increased by the inclusion of additional insured).

(d) Every policy of insurance required by this Agreement shall:

- (i) insure Charterer's interests regardless of any action or inaction of Skyservice or any other Person or any breach or violation of any representations, warranties, declarations or conditions contained in such policies by Skyservice or any other person;
- (ii) provide that if the insurers cancel such insurance for any reason whatever, or the same is allowed to lapse for non-payment of premium, such cancellation or lapse shall not be effective as to Charterer for thirty (30) days after receipt by Charterer of notice from such insurers of such proposed cancellation or lapse;
- (iii) contain a waiver of any right of the insurers to set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any

liability of Charterer or its Affiliates, and their respective directors, officers, agents, servants and employees;

- (iv) contain a provision prohibiting Skyservice, without the prior written consent of Charterer, from cancelling such insurance or making any change restricting or reducing the coverage;
- (v) contain a provision that the insurers will promptly notify Charterer in the event that any premium or instalment of premium shall not be paid when due; and
- (vi) contain no provision for any payment by Skyservice in the form of a deductible other than a deductible provision that is standard as a deductible among insurers of internationally recognized standing in the field of aviation insurance.

(e) Skyservice agrees that it shall provide evidence of such insurance to Charterer prior to the commencement of any Flights under this Agreement.

10.3 Order in Council

Notwithstanding Section 10.2(a), the Parties acknowledge that third party war-risk coverage as of the date hereof is limited to US\$50 million with excess coverage provided by the Canadian Government. In the event the Order in Council described in this Section 10.3 is revoked or fails to be renewed in due course upon expiry, Skyservice agrees to purchase the required coverage to the extent that it is commercially available in Canada.

ARTICLE 11 FORCE MAJEURE

Neither Party shall be liable to the other Party for any failure to perform its obligations (excluding payment obligations) or to carry out any of the activities contemplated by this Agreement if such failure is caused by an event of Force Majeure provided it has given prompt notice thereof to the other Party. It is expressly agreed that a mechanical failure of the Aircraft does not constitute an event of Force Majeure. The Party suffering an event of Force Majeure shall use its best efforts to minimize the event of Force Majeure with all reasonable dispatch and both Parties shall use commercially reasonable efforts to mitigate costs during such period, provided, however, that the settlement of strikes, lockouts or other industrial or labour disputes or disturbances constituting a Force Majeure shall be within the discretion of the Party having the difficulty and such Party shall not be required to settle such disputes or disturbances when such course appears inadvisable to it. The Parties agree that, notwithstanding Section 2.3, any period during which a Force Majeure (which, for greater certainty includes a Global Force Majeure) occurs shall be subject to a minimum guarantee of one (1) seat mile in addition to the Minimum Seat Mile Guarantee.

ARTICLE 12 GENERAL

12.1 Further Assurances

Each of the Parties from time to time at the request and expense of the other Party and without further consideration, shall execute and deliver such other instruments and take such further action as such other Party may reasonably require to more effectively complete any matter contemplated by this Agreement.

12.2 Survival

Each Party agrees that all of the provisions of this Agreement, other than the representations and warranties contained in Article 5, shall forever survive the execution, delivery and performance of this Agreement.

12.3 Expenses

Except as otherwise provided herein, each Party shall be responsible for its own legal and other expenses incurred in connection with the negotiation, preparation, execution, delivery and performance of this Agreement and the transactions contemplated hereby.

12.4 Taxes

Where Skyservice is responsible for payment of Taxes to a Governmental Body in respect of the operation of the Flights, which Taxes are identified on Schedule E as revised by Skyservice from time to time, Charterer agrees to collect and remit to Skyservice such Taxes within 7 days of invoice. Where Charterer is responsible for collecting and remitting Taxes directly to the appropriate Governmental Body, which Taxes are identified on Schedule F as revised by Skyservice from time to time Charterer agrees to collect and remit such Taxes within the required timeframes. Further, Charterer shall be responsible for all Taxes in connection with any payments owing to Skyservice hereunder.

12.5 Notices

Any notice required or permitted to be given pursuant to this Agreement shall be in writing and shall be effectively given if (a) delivered by hand, (b) sent by electronic or facsimile communication which provides for written time dated confirmation of delivery, or (c) sent by prepaid courier service, addressed, in the case of notice to Charterer as follows:

First Choice Canada Inc.
160 Bloor St East, Suite 400
Toronto, Ontario
M4W 1B9
Attention: President
Facsimile number: 416-969-2699

and in the case of notice to Skyservice as follows:

Skyservice Airlines Inc.
31 Fasken Drive
Etobicoke, Ontario
M9W 1K6

Attention: President
Facsimile number: 416-679-5920

with a copy to the same address, Attention: Legal Department, facsimile number: 416-679-5912.

Any notice so given shall be deemed conclusively to have been given and received (a) when so delivered by hand or sent by facsimile, during normal business hours in the Province of Ontario, otherwise on the next following Business Day, or (b) on the second day following the sending by courier assuming that such day is a Business Day, otherwise on the next following Business Day. Any Party or others mentioned above may change any particulars of its address for notice by notice to the others in the manner aforesaid.

12.6 Successors and Assigns

Neither this Agreement nor any rights or obligations under this Agreement shall be assignable by either Party without the prior written consent of the other Party. Subject thereto, this Agreement shall enure to the benefit of and be binding upon the Parties and their respective successors (including any successor by reason of amalgamation of any party and any successor to the business by reason of merger, acquisition, dissolution or winding up or other transaction or series of transactions having the same or a similar effect) and permitted assigns. Any permitted assign of either Party shall be required to agree to assume, observe, perform and discharge all of the assignor's covenants, agreements and obligations under this Agreement, as successor to the assignor under this Agreement, to the same extent as if the assignee had been a party to this Agreement in the place and stead of the assignor.

12.7 Waiver

The failure of any Party at any time to require the performance by the other of any of the terms or provisions of this Agreement shall in no way affect the right of that Party thereafter to enforce same, nor shall the waiver by any Party of any breach of any of the terms or conditions hereof be taken to be a waiver of any succeeding breach of any such term or condition.

12.8 Confidentiality

The Parties recognize that this Agreement contains information that is commercially sensitive and agree to keep the entire contents of this Agreement confidential and not to make any disclosures to any third persons other than (i) to such Party's professional advisors, including accountants, financial and legal advisors, bankers or other lenders, (ii) as may be required by law (however in such instance, only to the extent required by law), and (iii) with the prior written consent of the other Party. Notwithstanding the foregoing, the Parties agree that Skyservice may disclose the name of the Charterer, the number of aircraft to which the Agreement relates, and the Term, provided however that Skyservice shall provide Charterer with comparable information with respect to other charter programs entered into by Skyservice after the date of this Agreement.

12.9 Arbitration

The Parties agree to work cooperatively in an effort to resolve any dispute or claim arising out of or in any way relating to or connected with this Agreement or the breach, termination or invalidity thereof (a "Dispute"). In the event that such informal efforts do not result in a resolution of the Dispute, the Parties agree that the Dispute shall be discussed by the President of Skyservice and the Chief Executive Officer of Charterer in an effort to reach a resolution. In the event that the Parties' respective officers are unable to resolve the Dispute within two (2) Business Days, the Dispute shall be submitted to arbitration in accordance with Schedule D, which sets out the sole and exclusive procedure for the resolution of Disputes under this Agreement. The resolution of Disputes pursuant to the terms of Schedule D shall be final and binding upon the Parties, and there shall be no appeal therefrom, including any appeal to a court on a question of law, a question of fact, or a question of mixed fact and law. For greater certainty, subsection 7(2) of the *Arbitration Act, 1991* (Ontario) shall not apply to an arbitration under this Section 12.9.

12.10 Execution and Delivery

This Agreement may be executed by the Parties in counterparts and may be executed and delivered by facsimile and all such counterparts and facsimiles shall together constitute one and the same Agreement.

IN WITNESS OF WHICH this Agreement has been executed by the Parties as of the date first written above.

FIRST CHOICE CANADA INC.

By: _____
Name:
Title:

SKYSERVICE AIRLINES INC.

By: _____
Name:
Title:

SCHEDULE A

AIRCRAFT

| | |
|---|---|
| Aircraft Make and Model: | Used Boeing B757 / Airbus A320 |
| Aircraft Manufacturer's Serial Number: | XXXXXX |
| Aircraft Registration Mark: | C- |
| Make and Model of Engines: | Rolls Royce RB211-535E4 / CFM 56-3-B |

SCHEDULE B
PROGRAM

Schedule to be provided in accordance with Article 2.3.

SCHEDULE C

SERVICE LEVEL

Crisis Management Procedures – based on Skyservice operations manual, which will be provided and updated to Charterer.

The intention of the Agreement is that Skyservice operates its fleet of Aircraft and provides the Services in a manner which complements the reputation that Charterer has in the Canadian marketplace.

Without limiting the generality of the foregoing the following are material service standards:

1. Skyservice shall operate a reliable, modern fleet that is competitive in the Canadian market and at a size of fleet level sufficient to meet the terms of this Agreement at all times during the Term and any renewal thereof.
2. Skyservice shall ensure it can always operate the Program and, if substitute aircraft are needed, they are of a type used by other Canadian, U.S. or U.K. airlines and are acceptable to Charterer, acting reasonably.
3. Skyservice shall meet on-board service standards agreed between Charterer and Skyservice annually.
4. On time performance shall be comparable or better than similar airlines, which are competitive in the Canadian market operating into and out of the same gateways.

SCHEDULE D
ARBITRATION PROCEDURES

1. The arbitration shall be commenced by either Party giving written notice to the other Party of the Dispute and requesting agreement on the identity of an arbitrator.
2. The Parties will agree on the appointment of an arbitrator who shall be independent from all Parties.
3. If the Parties are unable to agree upon an arbitrator within twenty (20) days of written notification of the Dispute, each Party will appoint a person as arbitrator, and those two arbitrators will appoint a third arbitrator.
4. The place of the arbitration will be Toronto, Ontario.
5. The Parties may request that the arbitrator(s) decide between final and complete proposals submitted by each of the Parties.
6. The decision of the arbitrator(s) with respect to the Dispute must be rendered, in writing and must contain a brief recital of the facts and principles upon which the decision was made and the reasons therefor.
7. The arbitration, including the existence of the Dispute, the submissions made by the Parties, the evidence submitted, the hearing, any order or decision of the arbitrator(s) and the award, will be confidential and will not be disclosed by either Party or the arbitrator(s) to any person without the prior written consent of both Parties, except as required to enforce the award, as required by law, as required for disclosure to auditors or affiliated companies or as permitted by subsequent order of the arbitrator(s) made pursuant to a motion or application on notice to all Parties.
8. The decision or award of the arbitrator(s) made pursuant to this Schedule is final and binding upon each of the Parties and there is no appeal therefrom. After completion of the arbitration, an action may be initiated by the Parties only for the purpose of enforcing the decision or award and the recovery of costs incidental to the action.
9. The decision or award of the arbitrator(s) will be conclusively deemed to determine the interpretation of this Agreement and the rights and liabilities as between the Parties in respect of the Dispute.
10. Except as may be otherwise agreed by the Parties, or as may be ordered by the arbitrator(s), the arbitrator(s) will be entitled to its or their usual charges for services rendered to be paid equally by the Parties.

**SCHEDULE E
TAX ADVISORY**

**APPENDIX 2
FORM OF EXTENDED CHARTER AGREEMENT**

[SSV-FCA]

THIS AIRCRAFT EXTENDED CHARTER AGREEMENT is made as of _____ XXXXX.20XX

BETWEEN:

- (1) **Skyservice Airlines Inc.**, a Canadian corporation whose address and principal place of business is at 31 Fasken Drive, Etobicoke, Ontario, M9W 1K6 (the "Lessor"); and
- (2) **First Choice Airways Limited**, a company organised under the laws of England and Wales whose address and principal place of business is at Commonwealth House, Chicago Avenue, Manchester Airport, Manchester M90 3DP (the "Lessee").

WHEREAS:

Lessee wishes to charter the Aircraft on an extended basis from Lessor and Lessor is willing to charter the Aircraft on an extended basis to Lessee subject to and in consideration of the general covenants, terms and conditions contained in this Agreement.

IT IS AGREED AS FOLLOWS:

1. **GENERAL**

1.1 **Construction**

- (a) In this Agreement, unless the contrary intention is stated:
 - (i) references to any agreement (including, without limitation, this Agreement) or to any other document shall include references to such agreement, its recitals and its schedules or to such other document as amended, varied, supplemented, replaced and/or restated in any manner from time to time;
 - (ii) subject to Article 18, references to Lessor, Lessee or any other person shall, where relevant, be deemed to be references to or to include, as appropriate, their respective lawful successors, transferees and assigns;
 - (iii) references to any enactment shall be deemed to include references to such enactment as re-enacted, amended or extended and any subordinate legislation made under it;
 - (iv) references to one gender shall include all genders and references to the singular shall include the plural and vice versa;
 - (v) the Schedules to this Agreement form an integral part of it; and
 - (vi) headings and sub-headings are inserted for convenience only and shall be ignored in construing this Agreement.

2. **DEFINITIONS**

Except where the context otherwise requires, the following words have the following meanings for all purposes of this Agreement. The definitions are equally applicable to the singular and plural forms of the words.

2.1 **General Definitions**

"Actual Rent" means the actual amount of Rent payable by Lessee after reconciliation in accordance with Article 6.1(f) and Schedule 7;

"Actual Supplemental Rent" means the aggregate of the sum of \$[XXX] multiplied by the number of actual Flight Hours for which the Aircraft is operated during the Lease Term

and \$[XXX] multiplied by the number of actual cycles for which the Aircraft is operated during the Lease Term.

"Affiliate" means a Person which, directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the Person specified.

"Agreement" means this Aircraft Extended Charter Agreement, any schedules or documents executed pursuant to the Schedules hereto, any side letters and any and all amendments, revisions, supplements and modifications thereto.

"Aircraft" means the Airframe together with the Engines, Parts and Aircraft Documentation and includes where the context permits, a separate reference to the Airframe, any Engine, any Part, the Aircraft Documentation or any part thereof, and any substitute aircraft pursuant to Article 14.

"Aircraft Documentation" means all:

- (a) log books, Aircraft records, manuals and other documents provided to Lessee in connection with the Aircraft; and
- (b) any other documents kept by Lessee or required to be maintained during the Lease Term by the Aviation Authority and this Agreement.

"Airframe" means the airframe listed in Schedule 1 together with all Parts relating thereto (except Engines or engines).

"APU" means the auxiliary power unit of the Aircraft.

"Areas of Operation" means the agreed origins and destinations set out in Schedule 9 as such Schedule may be amended by the parties in writing from time to time.

"Aviation Authority" means Transport Canada ("DOT") or any Government Entity which under the Laws of Canada from time to time has control over civil aviation or the registration, airworthiness or operation of aircraft in Canada. If the Aircraft is registered in a country other than Canada, "Aviation Authority" means the agency which regulates civil aviation in such other country.

"Business Day" means a day other than a Saturday or Sunday on which the banks in London, New York and Toronto are open for the transaction of business of the type required by this Agreement.

"Charter" means any charter agreement in respect of the Aircraft entered into from time to time by Lessee.

"Charterer" means the charterer under a Charter.

"Default" means any event which, upon the giving of notice, the lapse of time and/or a relevant determination, would constitute either a Lessee Event of Default or a Lessor Event of Default, as the context requires.

"Default Rate" means either (a) the rate notified by Lessor to Lessee as being the default rate or equivalent under the Dry Lease or (b) if, no rate is so notified, a rate of interest per annum (based on a 360 day year) equal to LIBOR plus two per cent (2%).

"Delivery" means the provision of the Aircraft by Lessor to Lessee for the purposes of and in accordance with this Agreement subject always to Article 4.7.

"Delivery Conditions" shall mean the delivery conditions contained in Schedule 2.

"Delivery Date" means the actual date during a Summer Season on which Delivery takes place.

"Delivery Location" means Toronto, Canada or such other location as may be agreed in writing by the parties.

"Designated Flights" means the approved origins and destinations set out in Schedule 6 together with such other origins and destinations as Lessor may approve from time to time in accordance with Schedule 6.

"Dollars" and **"\$"** means the lawful currency of the US.

"Dry Lease" means the aircraft lease agreement pursuant to which the Aircraft is leased to Lessor as of the date hereof as well as any subsequent aircraft lease agreements pursuant to which the Aircraft is leased to Lessor.

"Engine" means:

- (a) each of the engines of the manufacture and model described in Schedule 1, installed on the Airframe as of the Delivery Date or such other engines as may be installed on or related to the Airframe from time to time; and
- (b) all Parts installed in or on any of such engines at Delivery (or substituted, renewed or replacement Parts in accordance with this Agreement) so long as title thereto is or remains vested in Owner.

"Expiration Date" means XX XXXXX 20XX (or such other date as the parties may agree) or if earlier, the date upon which this Agreement expires in accordance with its terms for any reason whatsoever provided that if the Lease Term is extended pursuant to Article 17.4, the Expiration Date shall be extended to the date when the Aircraft has been returned to Lessor in full compliance with this Agreement.

"Flight Hour" means in relation to the Aircraft each hour or part thereof (rounded up to the nearest minute) elapsing from the moment the wheels of the Aircraft leave the ground on take off until the wheels of the Aircraft next touch the ground and in relation to an Engine, each hour or part thereof (rounded up to the nearest minute) elapsing from the moment the wheels of an aircraft on which the Engine is installed leaves the ground on take off until the wheels of that aircraft next touch the ground.

"Force Majeure" shall mean causes which are beyond the control of a party and which prevent such party from performing its obligations under this Agreement and includes acts of God, strikes, lockouts, industrial or other labour disputes or disturbances (other than any strikes, lockouts or other industrial or labour disputes or disturbances that are foreseeable and that only affect that party's operations), wars, blockades, insurrections, riots, earthquakes, typhoons, hurricanes or other severe storms, floods, fires, explosions and acts or omissions of any Government Entity.

"Government Entity" means any:

- (a) national, state, provincial or local government;
- (b) regulatory authority, taxing authority, agency, board, commission, bureau, crown corporation, department, division, instrumentality, court, tribunal, arbitration panel or other law, rule or regulation-making or enforcing entity having or purporting to have jurisdiction on behalf of any applicable nation, province, state or other subdivision thereof or any applicable municipality, district or other subdivision or any international taxing authority; or

- (c) association, organization or institution of which any of the entities listed in (a) or (b) is a member or to whose jurisdiction any such entity is subject.

"Gross Negligence" means any act or omission done or omitted to be done with intent to cause damage, death, delay, injury or loss or recklessly and with knowledge that damage, death, delay, injury or loss would probably result.

"Indebtedness" means any obligation for the payment or repayment of money, whether as principal or surety, and whether present or future, actual or contingent, secured or unsecured.

"Insurances" means any and all contracts or policies of insurance required to be effected and maintained under this Agreement.

"Journey Log" means the document issued by the captain of each flight performed hereunder which shall indicate the Flight Hours recorded for each flight.

"Law" means any:

- (a) statute, decree, constitution, regulation, order or any directive of any Government Entity;
- (b) treaty, pact, compact or other agreement to which any Government Entity is a signatory or party; and
- (c) judicial or administrative interpretation or application of any of the foregoing.

"Lease Term" means the period commencing on the Delivery Date and ending on the Expiration Date.

"Lessee Event of Default" means any of the events set out in Article 19.1.

"Lessor Event of Default" means any of the events set out in Article 19.5.

"Lessor's Lien" means any Security Interest created by or through Lessor or Owner in connection with the Aircraft.

"LIBOR" means for any amount and any period, the rate notified by Barclays Bank Plc to Lessor as the rate per annum at which Dollar deposits for the relevant period and in comparable amounts are quoted on Telerate Page 3750 or failing that, the LIBOR page of the Reuters screen, at or about 11.00 am (London time) two Business Days before the first day of such period or failing that the arithmetic mean determined by Lessor (rounded upwards to the nearest four decimal places) of the rates notified to Lessor by Barclays Bank plc as the rate per annum at which Dollar deposits are offered for the relevant period in the relevant amount by leading commercial banks to leading banks in the London inter-bank market at or about 11.00 am (London time) two Business Days before the first day of such period.

"Maintenance Program" means Lessor's maintenance program as approved by the Aviation Authority or such other maintenance program as Lessor may, in its discretion, accept in writing.

"Owner" means the owner from time to time of the Aircraft.

"Part" means any part, component, appliance, system module, engine module, the APU, accessory, material, instrument, communications equipment, furnishing, Lessee furnished or Lessor purchased equipment or other item of equipment (other than complete Engines or engines) for the time being installed in or attached to the Airframe or any Engine or

which, having been removed from the Airframe or any Engine, remains the property of Owner.

"Person" means any individual, firm, partnership, joint venture, trust, corporation, Government Entity, committee, department, authority or any body, incorporated or unincorporated, whether having distinct legal personality or not.

"Rent" means for each calendar month during each Summer Season during the Lease Term the amounts calculated in accordance with Schedule 7.

"Return Date" means the last day of each Summer Season and the Expiration Date;

"Scheduled Delivery Date" has the meaning ascribed to such term in Article 4.1.

"Security Interest" means any encumbrance or security interest, however and wherever created or arising including (without prejudice to the generality of the foregoing) any right of ownership, security, mortgage, pledge, charge, encumbrance, lease, lien, statutory or other right in rem, hypothecation, title retention, attachment, levy, claim or right of possession or detention.

"State of Registration" means Canada or such other country or state of registration of the Aircraft as lessee may request and Lessor may, in its absolute discretion, approve in writing.

"Supplemental Rent" means for each calendar month during the Lease Term the amounts specified in Schedule 7.

"Support Inventory" means any items of Lessor's property, including but not limited to spare parts, components, engines, rotables or materials required or provided by Lessor to Lessee for the maintenance and operation of the Aircraft.

"Taxes" means all taxes, duties, fees, premiums, assessments, imposts, levies, rates, charges, assessments, withholdings, dues, government contributions and other charges of any kind whatsoever imposed by any Government Entity, whether direct or indirect, together with all interest, penalties, fines, additions to tax or other additional amounts imposed in respect thereof including, without limitation, those levied on, or measured by, or referred to as income, gross receipts, profits, turnover, capital, transfer, land transfer, sales, consumption, goods and services, use, value-added, excise, stamp, withholding, business, franchising, property, payroll, employment, health, social services, development, occupation, education and social security taxes, all surtaxes, all customs duties countervail, anti-dumping and import and export taxes, all licence, franchise and registration fees, all provincial workers' compensation payments and all employment insurance, health insurance and Canada, Quebec and other government pension plan premiums.

"Total Loss" means any of the following in relation to the Aircraft, Airframe, or any Engine:

- (a) destruction, damage beyond repair or being rendered permanently unfit for normal use for any reason;
- (b) actual, constructive, compromised, arranged or agreed total loss;
- (c) requisition of title, confiscation, forfeiture or any compulsory acquisition or other similar event;
- (d) sequestration, detention, seizure or any similar event for more than 90 consecutive days;

- (e) requisition for use for more than 180 consecutive days;
- (f) any sale of the Aircraft in connection with a Lessee bankruptcy, whether by an administrator, trustee or court;
- (g) any sale of the Aircraft in connection with Eurocontrol or NAV Canada charges; or
- (h) any other occurrence not permitted under this Lease which deprives Lessee of use or possession for a period of 90 consecutive days or longer.

"US" means the United States of America.

3. AGREEMENT TO LEASE

- 3.1 Subject to the terms and conditions of this Agreement and subject to receipt of approval of the applicable Government Entities for the chartering of the Aircraft hereunder Lessor shall charter the Aircraft to Lessee and Lessee shall charter the Aircraft from Lessor for for the duration of the Lease Term.
- 3.2 In addition to providing the Aircraft to Lessee for the Lease Term, subject to receipt of approval of the applicable Government Entities Lessor agrees to provide Lessee with the personnel and/or services more particularly described in Schedule 5, and agrees that it will have completed training of Lessee cabin crews at a location to be agreed not less than two (2) days before Delivery.
- 3.3 So long as no Event of Default has occurred and is continuing hereunder and no election to terminate has been made by either party pursuant to Article 5 or Article 14, Lessor and Lessee may agree no later than the third anniversary of the date of this Agreement to extend the term of this Agreement for a period of one year after the Lease Term. Thereafter, so long as no Event of Default has occurred and is continuing, and no election to terminate has been made by either party pursuant to Article 5 or Article 14, Lessor and Lessee may agree no later than on each subsequent anniversary of the date of this Agreement to extend the term of this Agreement for further period(s) of one year.

4. DELIVERY

4.1 Scheduled Delivery Date

Lessor will notify Lessee from time to time and in a timely manner of the exact date on which Lessor expects Delivery to take place. Such date is anticipated to be 1 May. Each such date shall be the "Scheduled Delivery Date".

4.2 No Lessor Liability

The Lessor will not be liable for any loss or expense, or any loss of profit, arising from any delay or failure in Delivery to Lessee unless such delay or failure arises as a direct consequence of the wilful misconduct or recklessness of Lessor.

4.3 Delivery of the Aircraft to Lessee

Subject to Lessee having performed all of the conditions precedent to Delivery set forth in Article 7 which have not been expressly waived by Lessor, Lessor will deliver the Aircraft to Lessee at the Delivery Location on the Scheduled Delivery Date or such other date as may be agreed in writing by the parties in an "as is" condition except to the extent that the Aircraft is required to meet the Delivery Conditions. Upon Delivery of the Aircraft by Lessor to Lessee in accordance with the terms hereof, Lessee will accept the Aircraft and the date of delivery by Lessor to Lessee will be deemed to be the Delivery Date for all purposes under this Agreement, (other than the commencement of Lessee's obligation to pay Rent hereunder which shall commence from the relevant Scheduled Delivery Date).

4.4 Delay

If Lessor becomes aware that Delivery will be delayed beyond the Scheduled Delivery Date, it will promptly give notice to Lessee which notice shall be given in any event before the Scheduled Delivery Date. Lessor and Lessee shall then consult as to whether they can mutually agree on a later Scheduled Delivery Date and Lessor shall continue to keep Lessee advised as to the date when the Aircraft will be delivered. If they do so agree in writing such later date shall be the Scheduled Delivery Date. If the parties are unable to agree on a later Scheduled Delivery Date notwithstanding such delay, Lessee will, provided such delay has not been caused by Lessor's Gross Negligence or wilful misconduct, continue to pay Rent hereunder as from the original Scheduled Delivery Date, subject to Lessor making all reasonable commercial efforts to reduce its costs in respect of which Rent is calculated under Schedule 7. Without limitation, if the unavailability of the Aircraft is caused by requisition for hire, Lessor will credit all compensation received by it from the requisitioning authority in reduction of its aforesaid costs.

4.5 Intentionally Left Blank

4.6 Lessee Acceptance of Aircraft

If Lessee fails to:

- (a) comply with the conditions contained in Article 7.1 and, in so far as such requirements are the responsibility of Lessee, Article 7.2 so as to allow Delivery to take place; or
- (b) accept Delivery of the Aircraft when properly offered for Delivery by Lessor in the condition required under this Agreement,

Lessee will indemnify Lessor for all costs and expenses incurred by Lessor as a result thereof, provided, however, that Lessee shall not be responsible for any indirect, special or consequential damages, whether in contract, tort or otherwise, including damages for lost profits or revenues even if such damages were foreseeable or resulted from a fundamental breach of this Agreement.

4.7 Effect of Delivery

Notwithstanding Delivery of the Aircraft, at all times during the Lease Term Lessor shall have operational control of the Aircraft for the purpose of operating Designated Flights and maintenance whilst Lessee shall have commercial control of the Aircraft. For greater certainty "commercial control" shall be interpreted in a manner which is consistent with applicable regulatory requirements and normal extended charter practice.

5. CHANGE IN LAW, CHARTER TERMINATION

5.1 Change in Law

If it is or, as a result of any change in Law or in the interpretation of any Law after the date of this Agreement it becomes, unlawful in any jurisdiction for either party (but excluding any unlawfulness caused by an act or omission of that party) to give effect to any of its obligations as contemplated by this Agreement or to continue this Agreement that party may, by notice in writing to the other, terminate this Agreement, such termination to take effect on the latest date (the "Effective Date") on which Lessor and Lessee may continue the Agreement and such obligations without being in breach of applicable Laws and Lessee shall forthwith redeliver the Aircraft to Lessor in accordance with Article 17 to the extent compliance is within the control of Lessee, acting in a commercially reasonable manner. Without prejudice to the foregoing, Lessor and Lessee will consult in good faith

up to the Effective Date as to any steps that may be taken to restructure the transaction to avoid such unlawfulness and to enter into substitute arrangements that are valid, legal and enforceable and that have the same commercial effect as this Agreement. Each party shall bear its own costs arising from such restructuring. Following termination neither party shall have any further liability to the other hereunder.

5.2 Charter or Dry Lease Termination

- (a) The parties acknowledge that, pursuant to the terms of the Charter and the Dry Lease, the Charter and Dry Lease may terminate before their respective contractual expiry dates.
- (b) if the Charter or Dry Lease terminates, Lessor shall notify Lessee in writing as soon as reasonably possible and Lessee shall forthwith redeliver the Aircraft to Lessor in accordance with Article 17, following which this Agreement shall terminate.

6. RENT AND OTHER PAYMENTS

6.1 Rent and Supplemental Rent

- (a) Lessee will during the Lease Term pay to Lessor Rent and Supplemental Rent with respect to each calendar month of during the Lease Term (pro rated where appropriate, based on a 30 day calendar month) in accordance with Schedule 7.
- (b) Not less than 3 Business Days prior to the applicable Scheduled Delivery Date Lessee shall pay to Lessor the pro rata proportion of Rent and Supplemental Rent payable with respect to the period from the Scheduled Delivery Date up to and including the last day of the month during which the Scheduled Delivery Date occurs.
- (c) Lessee shall also pay Lessor on demand by way of reimbursement of all costs for which Lessee is responsible under Article 8.4(h) but which Lessor has incurred or settled on Lessee's behalf in accordance with Article 6.8;
- (d) Not less than 3 Business Days prior to the first day of each month subsequent to the month in which the Scheduled Delivery Date occurs Lessee shall pay to Lessor 50% of the Rent and Supplemental Rent payable with respect to the immediately forthcoming month. In addition, not less than 3 Business Days prior to the fifteenth day of each month, Lessee shall during the Lease Term pay to Lessor the remaining 50% of the Rent and Supplemental Rent payable with respect to such month during which the Rent and Supplemental Rent are payable.
- (e) Supplemental Rent paid pursuant to Article 6.1(b) and (d) is calculated on the basis of the estimated number of Flight Hours due to be flown by the Aircraft in performance of the Designated Flights as provided pursuant to Schedule 6. Within 30 calendar days of the end of the Lease Term Lessor shall reconcile the sum of the Actual Supplemental Rent against the sum of the Supplemental Rent paid by Lessee. If the sum of the Supplemental Rent paid exceeds the Actual Supplemental Rent, Lessor shall refund the balance to Lessee within 5 Business Days of such reconciliation. If the sum of the Actual Supplemental Rent exceeds the Supplemental Rent paid, Lessee shall within 5 Business Days of a demand being made pay the difference to Lessor.
- (f) Rent is payable in advance on the basis of Lessor's budgets prepared pursuant to Schedule 7. Within 30 calendar days of the end of the Lease Term, Lessor shall reconcile the sum of the Actual Rent against the sum of Rent paid by Lessee pursuant to Article 6.1(b) and (d). If the sum of the Rent paid exceeds the Actual

Rent, Lessor shall refund the balance within 5 Business Days of such reconciliation. If the sum of the Actual Rent exceeds the Rent paid, Lessee shall within 5 Business Days of a demand being made pay the difference to the Lessor.

- (g) Any operational costs properly and reasonably incurred by Lessor in the performance of its obligations under this Agreement and not identified as Rent or Supplemental Rent shall be for Lessee's account. In respect of any such payments relating to engineering personnel, crew, etc., such costs shall be budgeted in advance of the Lease Term and agreed in writing by Lessee.

6.2 Lessor's Bank Account

The Rent, Supplemental Rent and any other payment due under this Agreement will be paid by wire transfer of immediately available US Dollar funds to Lessor's bank account at:

Royal Bank of Canada
33 City Centre Drive
Mississauga Ontario

Account Name: Skyservice Airlines Inc.
Account Number: 400-186-3
Transit: 03132

or to such other bank account as Lessor may from time to time designate by written notice ("**Lessor's Bank**"). When it is stated in this Agreement that an instalment of Rent or any other payment is due or must be paid or made by Lessee hereunder by a specific date, then such payment actually must be received by Lessor's Bank on or before such specific date, even if, in order for such payment to be received by Lessor's Bank by such specific date, Lessee must initiate the wire transfer prior to such specific date.

6.3 Default Interest

If Lessor's Bank does not receive the Rent or any other amount on or before the specific date when due, Lessor will suffer loss and damage the exact nature and amount of which are difficult or impossible to ascertain. The Lessee will pay Lessor as supplemental Rent (by way of agreed compensation and not as a penalty) interest on any due and unpaid amounts payable by Lessee under this Agreement at the Default Rate. Interest will be calculated at the Default Rate in effect on the date on which the amount was originally due for the period from and excluding the date the amount originally was due through and including the date the amount actually is received at Lessor's Bank or, in the case of Lessor's performance of Lessee's obligations hereunder, from the date of payment by Lessor through the date of Lessee's repayment to Lessor. Interest at the Default Rate will accrue on a day to day basis and be compounded monthly.

6.4 No Deductions, Withholdings

(a) No Deductions

All payments by Lessee under the Agreement, including without limitation, any Rent, Supplemental Rent, default interest, fees (including fees, commissions or other amounts in respect of services rendered in the United Kingdom) indemnities or any other item, will be made in full without any deduction or (save as set out in sub-clause (b)) withholding whether in respect of set off (except under Article 6.9), counterclaim or Taxes imposed in the United Kingdom or any jurisdiction from which such payments are made.

(b) Withholdings

In this Article 6.4(b) "Withholding Taxes" means Taxes imposed by any country, political subdivision or taxing authority thereof, but excluding any Taxes of a particular jurisdiction imposed on Lessor by reason of Lessor (i) being organised under the laws of, or being resident in, such jurisdiction, or (ii) having a permanent establishment or being otherwise engaged in the conduct of its business in such jurisdiction other than by reason of entering into this Agreement and enforcing its rights and receiving payments from Lessee hereunder.

Lessee hereby agrees that:

- (i) All payments by Lessee hereunder shall be made free and clear of and without deduction for, or on account of, any Withholding Taxes imposed by any country, political subdivision or taxing authority thereof, unless such deduction is required pursuant to applicable law. In the event that any withholding or deduction from any payment to be made by Lessee hereunder is required in respect of any Withholding Taxes pursuant to applicable law then Lessee will:
 - (1) pay directly to the taxing authority the full amount required to be so withheld or deducted;
 - (2) promptly forward to Lessor an official receipt or other documentation satisfactory to Lessor evidencing such payment to such authority;
- (ii) if Lessee fails to pay any Withholding Taxes when due to the taxing authority or fails to remit to Lessor the required receipts or other required documentary evidence, Lessee shall indemnify, defend and hold harmless Lessor for any incremental Withholding Taxes, interest or penalties that may become payable by Lessor as a result of any such failure;
- (iii) In the event that Withholding Tax is withheld or deducted from any payment hereunder or Withholding Tax is directly assessed against Lessor in respect of any such payment, Lessor shall make reasonable efforts to recover such Withholding Tax through foreign tax credits in the jurisdiction of residence of Lessor, to the extent such foreign tax credits are available to Lessor in respect of such Withholding Tax. If Lessor is not able to fully recover the Withholding Tax, Lessee shall pay to Lessor such additional amount or amounts as is necessary to ensure that the net amount of the payment actually received by Lessor (after all applicable withholdings and deductions in respect of such additional amount or amounts and after taking into account any foreign tax credits recovered by Lessor) equals the full amount Lessor would have received had no such Withholding Tax been withheld, deducted or assessed. The determination of whether any Withholding Tax has been fully or partially recovered shall be solely that of Lessor, acting reasonably, and Lessor shall not be required to disclose any confidential information with respect to its Tax affairs or computations, including the computations of foreign tax credits, nor shall Lessee be entitled to examine any of the books, records, financial statements or tax returns of Lessor. The determination to pay any Withholding Taxes which may be directly assessed against Lessor shall be made by Lessor in its sole discretion.

6.5 Value Added Taxes

Subject to the exceptions set forth in Article 11.2, the Rent and other amounts payable by Lessee under this Agreement are exclusive of Taxes, including without limitation, goods

and services tax, provincial or harmonized sales tax, any value added tax, turnover tax or similar tax or duty.

6.6 Net Lease

- (a) The Lessee's obligation to pay Rent and make other payments in accordance with this Agreement will be absolute and unconditional under each of the following circumstances and regardless of other events:
 - (i) any right of set off (except under Article 6.9), counterclaim, recoupment, defense or other right (including any right of reimbursement) which Lessee may have against Lessor, or any other person for any reason, including any claim Lessee may have for the foregoing;
 - (ii) insolvency, bankruptcy, reorganization, arrangement, readjustment of debt, dissolution, liquidation, receivership, administration or similar proceedings by or against Lessee or Lessor;
 - (iii) invalidity or unenforceability or lack of due authorization of or other defect in this Agreement; or
 - (iv) failure or delay on the part of any party to perform its obligations under this Agreement.
- (b) Nothing in Article 6.6(a) shall reduce or affect Lessee's rights under Articles 19.5 and 19.6.

6.7 Currency Indemnity

If under any applicable Law, whether as a result of a judgment against Lessee or the liquidation of Lessee or for any other reason, any payment under this Agreement is required to be made or recovered in a currency other than Dollars then, to the extent that the payment (when converted into Dollars at the "rate of exchange" on the date of payment or, in the case of a liquidation, the latest date for the determination of liabilities permitted by the applicable Law) falls short of the amount unpaid under this Agreement, Lessee will as a separate and independent obligation, fully indemnify Lessor against the amount of the shortfall. If the amount received by Lessor upon converting the payment into Dollars exceeds the amount payable under this Agreement, Lessor will remit such excess to Lessee. For the purposes of this paragraph "rate of exchange" means the rate at which Lessor is able on the relevant date to purchase Dollars in Toronto, New York or London (at Lessor's option) with such other currency.

6.8 Lessor Performance of Lessee Obligation

- (a) Throughout the Lease Term, Lessee agrees to pay its debts in connection with the operation of the Aircraft, including (without limitation) surcharges and departure taxes, prior to such payments becoming overdue. If Lessor becomes aware that Lessee is overdue with any of its debts in connection with the operation of the Aircraft, Lessor shall notify Lessee of the relevant third party supplier involved and the nature of the payment to be made. The Lessee shall then have fifteen calendar days to satisfy such payments and to provide Lessor with proof of such payment failing which Lessor may (without being in any obligation to do so or responsible for so doing and without prejudice to the ability of Lessor to treat such non-compliance as a default) make such payment directly to such third party supplier on behalf of Lessee whereupon Lessee shall become liable to pay in accordance with sub paragraph (b) any sums expended by Lessor together with all costs and expenses in connection therewith.

The foregoing shall not apply to such debts to the extent such debts are being contested in good faith by appropriate proceedings, Lessee has provided adequate reserves for the payment of such debts and such proceedings or the continued non payment of such debts do not give rise to any likelihood of any lien, sale, forfeiture or other loss of the Aircraft or any interest therein.

- (b) If Lessee fails to perform any other obligation required under this Agreement within the period permitted for the performance of such obligation, Lessor may (but is not required to) at its election and without waiver of its rights perform such obligation. Within seven Business Days after written notice to Lessee of the amount paid by Lessor on behalf of Lessee, Lessee will repay such amount to Lessor together with interest at the Default Rate. Such payment to Lessor will be payable by Lessee to Lessor hereunder. Any payment, performance or compliance by Lessor of a Lessee obligation under this Agreement will not affect the occurrence or continuance of a Default or Lessee Event of Default, as the case may be.

6.9 Set-Off

Lessee may set-off any amounts which are overdue and payable by Lessor, and which are not being disputed in good faith and on reasonable grounds, under any agreement between Lessor and Lessee against any past due obligation or amount owed and payable by Lessee to Lessor and regardless of the place of payment or currency. If the obligations are expressed in different currencies, Lessee is authorised by Lessor to convert either obligation at the market rate of exchange in London for the purpose of the set-off.

7. PRE-DELIVERY AND DELIVERY DOCUMENTARY AND OTHER REQUIREMENTS

7.1 Pre Delivery Requirements

The Lessee will do each of the following prior to the first Scheduled Delivery Date within the time frames set forth below (save to the extent that any of the same are waived or deferred by Lessor):

- (a)
 - (i) On or before execution of this Agreement, Lessee will deliver to Lessor copies of resolutions of the Board of Directors of Lessee or other written evidence of appropriate corporate action, duly certifying and authorizing this Agreement and the execution, delivery and performance of this Agreement and the transactions contemplated hereby, together with an incumbency certificate as to the person or persons authorized to execute and deliver documents on behalf of Lessee hereunder.
 - (ii) an opinion of its in-house English counsel in a form approved by Lessor.
- (b) At least three Business Days prior to each Scheduled Delivery Date, Lessee will do each of the following:
 - (i) pay to Lessor the first instalment of Rent and Supplemental Rent, in accordance with Article 6.1;
 - (ii) provide Lessor with documents evidencing that Lessee has obtained any necessary licenses for the importation and ferrying of the Aircraft into the United Kingdom and that all applicable customs duties, goods and services, taxes and sales taxes in respect of the Aircraft have been

discharged by Lessee (or arrangements satisfactory to Lessor have been made for obtaining or paying for the same);

- (iii) provide Lessor with documents reasonably requested by Lessor evidencing the issuance of each approval, license and consent which may be required in connection with the remittance to Lessor of any amount payable under this Agreement or the performance by Lessee of any of its obligations thereunder (including without limitation any exchange control approval);
- (iv) evidence satisfactory to Lessor acting reasonably that Lessee's process agent has accepted its appointment as such pursuant to Article 21.4; and
- (v) provide to Lessor the insurance certificate and brokers letter of undertaking required under Article 13.

7.2 Delivery Requirements

On the Delivery Date, each of the following will occur:

- (a) Lessee will deliver a certificate signed by an officer of Lessee stating all of the following:
 - (i) the representations and warranties contained in Article 15 are true and accurate on and as of each Delivery Date as though made on and as of such date (except to the extent that such representations and warranties relate solely to an earlier date);
 - (ii) no Default has occurred and is continuing or will result from Lessee's lease of the Aircraft under this Agreement.
- (b) If requested by Lessor, Lessee will provide evidence to Lessor that all filings, recordings and registrations required under the laws of England and Wales have been made and actions have been taken which are necessary or desirable to ensure the validity, effectiveness and enforceability of this Agreement and to establish, perfect and protect the rights and interests of Lessor and Owner in the Aircraft.

8. OPERATION OF AIRCRAFT

- 8.1 The Lessor agrees to maintain, service, repair, modify, overhaul and test the Aircraft so as to keep the Aircraft in good operating condition in accordance with all applicable rules and regulations.
- 8.2 During the Lease Term, Lessee shall not be entitled to require the Aircraft to be flown except by pilots and maintained except by technicians employed by Lessor and only in accordance with the terms of all the certificates, licences and permissions now or hereafter granted to Lessor by the Aviation Authority.
- 8.3 The Lessor will retain for the duration of the Lease Term the sole right to decide and shall be solely responsible for all operational matters in connection with the operation of the Aircraft. Without prejudice to the generality of the foregoing:
 - (a) Lessor will provide 24 hour flight watch and technical control;
 - (b) the Aircraft Captain shall have absolute discretion on any matters relating to the operation of the Aircraft during flight and shall have absolute discretion regarding the initiation and termination of any flight; provided however that Lessor shall cause a report containing reasons for any delay caused in any flight that was

authorised by the Captain thereof in accordance herewith to be delivered to Lessee as soon as reasonably possible thereafter:

- (c) Lessor may perform a flight only according to the terms of the relevant air transport licence issued to Lessor by the Aviation Authority;
- (d) Lessor shall at the written request of Lessee replace any flight crew member with a suitable substitute should such crew member be proven to Lessor's reasonable satisfaction to have performed any act of misconduct which, if proven, would give to Lessor the right to dismiss such flight crew member.

8.4 The Lessee shall:

- (a) provide for each flight all food, drink and other consumable on-board stores as determined by Lessee including related administrative duties of purchasing, customer complaints and merchandise credits and returns;
- (b) provide fuelling facilities and provide all fuel, oil and lubricants for each flight;
- (c) provide all passenger baggage and aircraft ground handling including administrative duties regarding misdirected or lost baggage and pay for all associated costs;
- (d) obtain all necessary formalities and clearances required by Customs authorities in the United Kingdom required in connection with this Agreement, the Aircraft, Lessor's personnel required in connection with this Agreement and Support Inventory both at the start of the Lease Term and at return of the Aircraft at its end;
- (e) obtain all arrival and departure slots at the relevant airports in order to conduct Designated Flights;
- (f) clean the interior of the Aircraft after every landing;
- (g) promptly inform Lessor's Operations Department (details of which will be provided by Lessor to Lessee) by telephone, confirmed by facsimile, of any circumstance or event of which Lessee has knowledge and which could lead to the cancellation of a Designated Flight;
- (h) arrange, incur and be responsible for all direct operating costs (excluding those items set out in Schedule 7) associated with the operation of the Aircraft during the Lease Term, and for timely settlement of the relevant costs, (save that where the Lessor is required/permitted to settle such amounts pursuant to this Agreement the Lessor may also demand reimbursement of such costs) including but not limited to:
 - (1) All ferry and positioning flight costs relating to maintenance positioning and delivery flights to and from Canada to United Kingdom airport(s) of Delivery and Redelivery.
 - (2) Costs and expenses with respect to provision of on board catering for passengers and crew, dry stores and provision of on board bars and duty free goods.
 - (3) All costs and expenses relating to passenger and baggage check in and handling, cargo handling, ramp handling including but not limited to provision of ground power, de-icing, push back, tow bars, passenger steps, loading and unloading of passenger baggage and catering equipment, interior cleaning of Aircraft and servicing

potable water and toilets, security, hangarage, safe storage and parking of the Aircraft when not engaged in performing Designated Flights.

- (4) Overflying, landing, airport, navigation and communication fees, ramp and parking charges, route licences, operating permissions, airport slots, passenger taxes, security charges, passenger tickets, and airway bills.
 - (5) All insurance premiums for passenger and cargo liability insurance for which Lessee is responsible under Article 13.2
 - (6) Customs, duties, taxes or levies.
 - (7) Rental costs of hangar for performance of "A" and "2A" checks.
 - (8) Deadhead positioning and depositioning of Lessor's crew over Lessee's network as required to fulfil the Designated Flights or other permitted flights.
 - (9) Fuel, oil and lubricants.
 - (10) Flight communications and CFP (via the Lessors SITA access code), WXR, NOTAMS.
 - (11) Office and stores accommodation for Lessor's engineers and aircraft spares (including fax, networked PC, SITA and an international telephone line).
 - (12) Travel costs to and from the United Kingdom, hotel accommodation and per diems for Lessor's training staff required to train Lessee Cabin Crew to Lessor's operational standards, costs of training material and the provision of and costs of suitable training accommodation.
 - (13) Such hire or supply of car or van as appropriate for transportation of Lessor's staff between their place of accommodation and place of work.
 - (14) Accommodation costs (including breakfast) for pilots and cabin crew during stopovers outside the United Kingdom as a result of performing Designated Flights.
 - (15) All publicity material for the Aircraft of the nature generally used by the Lessee in its own operations identifying Lessee as carrier.
 - (16) All costs of any third party or Government Entity in connection with the operation of the Aircraft which would be payable by Lessee if the Aircraft was owned and operated by Lessee.
- (i) At all times during the Lease Term when the Aircraft is not under the control of the Lessor's flight deck crew pursuant to Article 8.3 for the purpose of operating Designated Flights or under the control of Lessor's engineering personnel for carrying out maintenance tasks, Lessee shall arrange the safe storage, parking, hangarage and security of the Aircraft.
- (j) Lessee will pay to Lessor monthly in arrear third party war risk liability premium surcharges. Payments shall be made on the later of the two dates in each month on which Rent is payable.

8.5 The Lessee shall ensure that each passenger to be carried on the Aircraft shall be supplied with a passenger ticket and baggage check of Lessee in a form acceptable to Lessor showing the passenger's name and places of departure and destination and any agreed stopping places and that any air waybill required to be issued shall be supplied to the relevant parties correctly completed in accordance with the provisions of the Warsaw Convention. The Lessee shall further ensure that all such passenger tickets and baggage checks comply with any relevant requirements of the International Air Transport Association and of all applicable regulations and that all air waybills have been correctly completed as aforesaid and meeting any International Air Transport Association or other requirements.

8.6 The Lessor shall not be liable to Lessee for any liability, claim, loss, damage or expense of any kind or nature caused by any delay in providing or failure to provide any service Lessor is required to provide hereunder or any interruption or loss of service or use of the Aircraft or any loss of profit, business or other consequential loss or damage or any loss or damage whatsoever and howsoever caused as a result of such loss of use of the Aircraft, unless caused by the Gross Negligence, wilful misconduct or recklessness of Lessor. Without prejudice to the generality of the foregoing, Lessor shall not be liable to supply an aircraft in lieu if the Aircraft or any part thereof is lost, damaged, rendered unfit for use, confiscated, seized, requisitioned, restrained or appropriated.

8.7 Lessee further undertakes, acknowledges, understands and agrees with Lessor as follows:

(a) **Information concerning the Aircraft**

Lessee will promptly provide Lessor with such information regarding the location, operation, use, insurance, maintenance and condition of the Aircraft as Lessor may from time to time reasonably require, including, without limitation, details of any incident or damage which could affect the airworthiness, safe operation, or serviceability of the Aircraft and copies of any agreement relating to the Aircraft in Lessee's possession subject to any confidentiality obligations in any such agreement;

(b) **Pilots**

that the Aircraft shall not be operated otherwise than by pilots to be provided by Lessor as more particularly described in Schedule 5;

(c) **Engineers**

that the Aircraft is not to be maintained otherwise than by qualified, authorised and duly licensed technicians under the supervision of the engineering staff to be provided by Lessor as more particularly described in Schedule 5;

(d) **Cabin crew**

Lessor shall train Lessee cabin crew to perform Designated Flights on the Aircraft. Lessee will procure that the Aircraft is not operated otherwise than with cabin crew to be provided by Lessee and who have successfully completed Lessor training and shall provide such cabin crew as are necessary for the performance of Designated Flights in accordance with the following terms and conditions:

(i) all Lessee cabin crew shall be fully qualified on the Aircraft and fluent in the English language. Lessee shall on request provide Lessor with information regarding background, qualifications and employment history of all such cabin crew;

- (ii) all cabin crew shall be and remain employees of Lessee and accordingly the responsibility of Lessee during the Lease Term;
 - (iii) Lessee shall appoint a senior cabin crew supervisor who is trained to Lessor's standard (above and hereinafter, Lessee cabin crew supervisor). The Lessee cabin crew supervisor shall forward all safety-related concerns to the Lessor's Flight Attendant Manager;
 - (iv) all cabin crew shall be required to complete satisfactorily all applicable provisions of Lessor's training programme for cabin crew for the purpose of performing Designated Flights upon the Aircraft. All training shall be conducted by Lessor;
 - (v) Lessee agrees to supply sufficient number of suitable cabin crew for training by Lessor so as to fully staff the Aircraft at all times in contemplation of employee vacation, illness, discharge from service and in recognition that such cabin crew must be solely dedicated to this Aircraft (and no other aircraft for which Lessee supplies cabin crew) for the Lease Term and that no substitute cabin crew from any other aircraft will be permitted to perform upon the Aircraft at any time during the Lease Term;
 - (vi) all cabin crew shall at all times be subject to, and shall comply with, all applicable rules, regulations and procedures and whilst on the Aircraft shall be subject to the authority, supervision and direction of the captain of the Aircraft;
 - (vii) at the discretion of the captain of the Aircraft in consultation with Lessee's cabin crew supervisor, any cabin crew member may be discharged from service to Lessor. A discharged cabin crew member shall not be eligible for subsequent service on the Aircraft. If a cabin crew member is discharged, Lessee shall promptly provide a replacement in accordance with the provisions of this Article;
 - (viii) Lessee represents that the provision of cabin crew in accordance with the terms of this Agreement will not violate any applicable Laws, rules, regulations or policies applicable to Designated Flights or any cabin crew association agreement or other agreement to which it is a party or otherwise may be bound;
 - (ix) Lessee shall provide a full cabin crew for each Designated Flight and in any event the minimum number of cabin crew required by applicable safety and regulatory requirements for each Designated Flight;
 - (x) Lessee uniforms shall be worn by cabin crew on the Aircraft during the Lease Term; and
 - (xi) Lessee shall be responsible for cabin crew rostering. Such rostering and rostering times will comply with whichever of (1) Canadian flight time regulations and guidelines or (2) United Kingdom flight time regulations and restrictions, are more restrictive;
- (e) **Traffic documents**
- Lessee will be responsible for all traffic documents including (but not limited to) passenger tickets, baggage checks and airway bills and all other documents required under any applicable Law; shall ascertain and comply with and ensure that all passengers and any owners having or claiming any interest in any cargo carried in the Aircraft comply with the conditions of carriage contained or referred

to in Lessee's regulations and directions made by the Aviation Authority or any other Government Entity; and shall procure that all such conditions, licences, laws, regulations and directions referred to in this clause shall be incorporated in all contracts it makes with any passengers or freight shippers for any flight pursuant to this Agreement;

(f) **Passenger documentation**

Lessee will procure that all passengers hold all necessary passports, visas, health and other certificates to secure transit through any intermediate points and entry into the country of destination of each flight pursuant to this Agreement and in the event that any authority refuses entry to any passenger(s) in any circumstances then the costs of transporting that passenger(s) to any point deemed appropriate by such authorities together with the cost of accommodation, fines and charges of whatsoever nature arising from denied entry will be the sole responsibility of Lessee;

(g) **Insurances**

- (i) the Aircraft shall not be used or operated in violation of the terms of any insurance policies relating to the Aircraft required by this Agreement or its operation or in any geographical area not covered by such policies of insurance or in any manner which will suspend the coverage of or make applicable any exclusion provision of such policies of insurance;
- (ii) Lessee shall not do, or omit to do, or permit to be done, or leave undone anything whereby any required insurance would or might reasonably be expected to be rendered, in whole or in part, invalid or unenforceable and, without prejudice to the foregoing, shall not use or keep or permit the Aircraft or any part thereof to be used or kept for any purpose, in any manner or in any place not covered by the required insurance; or
- (iii) Lessee shall not cause or permit the Aircraft to be employed, used, kept or located in any place or in any manner for any purpose inconsistent with the terms of or outside the coverage provided by any required insurances;

(h) **Designated Flights**

Lessee acknowledges and agrees that the Aircraft is not to be flown other than within the Areas of Operation and on Designated Flights.

If Lessee wishes the Aircraft to be operated outside the Areas of Operation, Lessee shall notify Lessor of its request in writing at least fifteen (15) business days prior to the intended flight and Lessor shall promptly reply by accepting or denying the Lessee's request (such acceptance or denial to be in Lessor's sole discretion, acting reasonably);

(i) **Licences etc.**

Subject to Article 8.8, Lessee shall obtain all necessary permits and licences from the competent authorities in the relevant jurisdictions for each Designated Flight; and

(j) **Access to Aircraft**

Lessor shall permit (i) authorised representatives of Lessee to fly in the cockpit of the Aircraft as observers from time to time, subject to applicable Law; and (ii) Lessee and any person designated by Lessee to visit and inspect the Aircraft and the records maintained in connection therewith, in each case (a) at Lessee's sole

risk and expense (b) so as not to interfere with the operation or maintenance of the Aircraft.

8.8 Lessor's Authorities

Throughout the Lease Term Lessor shall use its reasonable commercial efforts to obtain all necessary permits and licenses from the competent authorities in the State of Registration for:

- (a) training of Lessee's cabin crew;
- (b) Delivery of the Aircraft;
- (c) provision of Lessor's personnel required to perform its obligations hereunder; and
- (d) initial Support Inventory on or before the applicable Delivery Date.

Should any such permits or authorisations or licences not be available at any time because of the refusal or cancellation of same by the relevant authority, such event may be treated as an event of Force Majeure by Lessor.

9. SUBLEASES

Lessee will not sublease or otherwise permit any other Person to have possession of the Aircraft or any part thereof except for the purposes of maintenance or repairs permitted under this Agreement without the prior written consent of Lessor.

10. TITLE AND REGISTRATION

Lessee shall have no right, title or interest in or to the Aircraft and/or the Engines except as provided herein. The Lessee at its sole cost and expense shall do all filings, recordings or acts and things which Lessor or any Owner may require in the United Kingdom to preserve the title and interests of Lessor and Owner to the Aircraft.

11. TAXES

11.1 General Obligation of Lessee

Except as set forth in Article 11.2, Lessee agrees to pay to the relevant Government Entity on a timely basis and to indemnify and hold harmless Lessor on an after-tax basis from all present or future Taxes and any interest or penalties with respect to or resulting from any delay or omission to pay such Taxes, however or wherever imposed (whether imposed upon Lessee, Lessor, or Owner on all or part of the Aircraft, the Engines or otherwise), by any Government Entity upon or with respect to, based upon or measured by any of the following:

- (a) the Aircraft, Engines or any Parts;
- (b) the use, operation or maintenance of the Aircraft or carriage of passengers or freight during the Lease Term and services rendered in relation thereto;
- (c) the Dry Lease, this Agreement, all payments made thereunder and hereunder and the terms and conditions thereof and hereunder;

Where Taxes for which Lessor is indemnified under this Article 11.1 have been paid by Lessor or Owner, Lessee agrees to indemnify Lessor on an after-tax basis for the full amount of any and all such Taxes and any liabilities (including penalties, interest and expenses) of Lessor and or Owner arising from or with respect to such Taxes, whether or not such Taxes or liabilities were correctly or legally asserted. Payment under this indemnification will be made within ten (10) business days from the date Lessor makes written demand for it. A certificate as to the amount of such Taxes submitted to Lessee by Lessor will be conclusive evidence, absent manifest error, of the amount due from Lessee to Lessor.

11.2 Exceptions to Indemnity

The indemnity provided for in Article 11.1 does not extend to any of the following Taxes:

- (a) Taxes which are imposed by (1) the United Kingdom or (2) Canada (or any province, state or territory thereof) on the net income, gross receipts, capital, net worth, capital gains, corporate franchise, turnover or net worth of Owner and Lessor respectively;
- (b) Taxes which are imposed by any state or jurisdiction with respect to or measured by the net income, gross receipts, capital, net worth, capital gains, corporate franchise or turnover of Lessor or Owner and which arise solely from Lessor's or Owner's business and operations in such state or jurisdiction other than with respect to the Aircraft, this Agreement and the Dry Lease and related services rendered in the United Kingdom;
- (c) Taxes which are imposed on the sale or other transfer of Lessor's or Owner's interest in the Aircraft, this Agreement and the Dry Lease (other than any sale or other transfer arising as a result of an Event of Default);
- (d) Taxes attributable to the period in respect of a period prior to Delivery or after return of the Aircraft to Lessor in accordance with this Agreement; or
- (e) Taxes attributable to Lessor's or Owner's Gross Negligence, wilful misconduct or breach of this Agreement or the Dry Lease.

11.3 After Tax Basis

The amount which Lessee is required to pay with respect to any Taxes indemnified against under Article 11.1 is an amount sufficient to restore Lessor and/or Owner on an after tax basis to the same position Lessor and/or Owner would have been in had such Taxes not been incurred. In respect of payment of an amount that is subject to Taxes that are indemnified against under Article 11.1 hereof, including, without limitation, payments referred to in Article 6.3 hereof, payment on an after-tax basis means the amount of such payment plus such additional amount as may be necessary to ensure that the recipient receives a net amount equal to the full amount that would have been received had the payment not been subject to Taxes indemnified against under Article 11.1. For the purposes of determining the amount of Taxes which may be eligible in any particular circumstances, no regard will be had to any permitted deductions, offsets or other benefit available to or deducted by the recipient in computing its income, taxable income or Taxes.

11.4 Timing of Payment

Any amount payable to Lessor pursuant to this Article 11 will be paid within ten days after receipt of a written demand therefore from Lessor accompanied by a written statement describing in reasonable detail the basis for such indemnity and the computation of the

amount so payable provided, however, that such amount need not be paid by Lessee prior to the earlier of:

- (a) the date any Tax is payable to the appropriate Government Entity or taxing authority; or
- (b) in the case of amounts which are being contested by Lessee in good faith or by Lessor pursuant to Article 11.5, the date such contest is finally resolved.

11.5 Contests

If claim is made against Lessor for Taxes with respect to which Lessee is liable for a payment or indemnity under this Agreement, Lessor will promptly give Lessee notice in writing of such claim provided, however, that Lessor's failure to give notice will not relieve Lessee of its obligations under this Agreement unless such failure materially impairs or precludes Lessee's ability to contest the claim. So long as:

- (a) a contest of such Taxes does not involve any danger of the sale, forfeiture or loss of the Aircraft or any interest therein;
- (b) if Lessor so requests, Lessee has provided Lessor with an opinion of independent tax counsel that a reasonable basis exists for contesting such claim; and
- (c) adequate reserves have been made for such Taxes or, if required, an adequate bond has been posted, then Lessor at Lessee's written request will in good faith, with due diligence and at Lessee's expense, contest (or permit Lessee to contest in the name of Lessee or Lessor) the validity, applicability or amount of such Taxes.

11.6 Refunds

Upon receipt by Lessor of a refund of all or any part of any Taxes (including any additional amounts in respect of Withholding Taxes referred to in Article 6.4(b)) which Lessee has paid, Lessor will pay to Lessee the net amount of such Taxes refunded. The determination of whether any refund of Taxes received by Lessor is in respect of Taxes which Lessee is obligated to indemnify Lessor against and which Lessee has paid shall be made by Lessor in its sole discretion.

11.7 Cooperation in Filing Tax Returns

Lessee and Lessor will cooperate with one another in providing information which may be reasonably required to fulfil each party's tax filing requirements and any audit information request arising from such filing.

11.8 Mitigation

In the event that Lessee is obligated to indemnify Lessor for any Tax pursuant to Article 11.1, at Lessee's request, Lessor and Lessee will cooperate to restructure the leasing of the Aircraft under this Agreement in order to avoid or mitigate such indemnification liability, provided that such restructuring does not alter the fundamental rights, obligations and risks of the parties hereunder. The cost of any such restructuring will be borne by Lessee.

11.9 Survival of Obligations

The representations, warranties, indemnities and agreements of Lessee provided for in this Article 11 will survive the Termination Date.

12. INDEMNITIES

12.1 Lessor Indemnity

- (a) Lessor shall be responsible for damage caused to the Aircraft during the Lease Term and shall defend and hold Lessee harmless against any claims for damage so caused, subject to Article 12.2 below.
- (b) Lessor hereby agrees to assume liability for and to defend, indemnify and hold Lessee and its officers, directors, agents and employees harmless from and against any and all liabilities, claims, demands, suits, judgements, damages and losses including the costs, expenses and reasonable legal fees connected therewith or incident thereto ("Losses"), asserted, brought or claimed against Lessee by any third parties or other persons in connection with Lessor's performance of its obligations under this Agreement excluding:
 - (i) those Losses arising out of claims or demands made by, or in relation to, passengers, baggage, cargo and mail,
 - (ii) those Losses arising out of the Gross Negligence and/or wilful misconduct of Lessee, its officers, directors, agents or employees, and
 - (iii) those Losses for which Lessee has otherwise assumed liability under the terms and conditions of this Agreement.
- (c) Lessor hereby agrees to assume liability for and to defend, indemnify and hold Lessee and its officers, directors, agents and employees harmless from and against all Losses asserted, brought or claimed against Lessee for death of or injury to any officer, director, agent or employee of Lessor provided that such death or injury does not arise out of or involve any Gross Negligence and/or wilful misconduct of Lessee, its officers, directors, agents or employees.

12.2 Lessee Indemnity

- (a) Lessee shall be responsible for any damage, destruction or maintenance failure caused to the Aircraft occurring as a result of, an act or omission of Lessee or of Lessee's officers, directors, contractors, agents or employees.
- (b) Lessee hereby agrees to assume liability for and to defend, indemnify and hold Lessor, Owner and their respective officers, directors, agents and employees (the "Indemnified Parties") harmless from and against any and all Losses asserted, brought or claimed against any one or more of the Indemnified Parties arising from Lessee's performance of its obligations under or in connection with this Agreement, in the following instances:
 - (i) for death of or injury to passengers and/or the loss of, or damage to property on board the Aircraft (excluding the Aircraft), including baggage, cargo and mail;
 - (ii) for death of or injury to any officer, director, agent or employee of Lessee
provided that such death or injury does not arise out of or involve any Gross Negligence and/or wilful misconduct on part of Lessor or Owner or their respective officers, directors, agents or employees.

12.3 After Tax Basis

The amount which Lessor or Lessee (as the case may be) will be required to pay with respect to any Losses indemnified against under Article 12.1 or Article 12.2 (in such

capacity an "Indemnifying Party") that is subject to Taxes in the hands of the indemnitee will be the aforesaid amount plus such additional amount as may be necessary to ensure that indemnitee receives a net amount equal to the full amount that would have been received had the payment not been subject to such Taxes. For the purposes of determining the amount of Taxes which may be payable in any particular circumstances, no regard will be had to any permitted deductions, offsets or other benefit available to or deducted by the indemnitee in computing its income, taxable income or Taxes.

12.4 Timing of Payment

Lessee or Lessor (as the case may be) will pay an indemnitee for Losses pursuant to this Article 12 within seven Business Days after receipt of a written demand therefor from such indemnitee accompanied by a written statement describing in reasonable detail the basis for such indemnity.

12.5 Subrogation

Upon the payment in full of any indemnity pursuant to this Article 12 by the Indemnifying Party, the Indemnifying Party will be subrogated to any right of the Indemnitee in respect of the matter against which such indemnity has been made.

12.6 Notice

Each indemnitee and each Indemnifying Party will give prompt written notice one to the other of any liability of which such party has knowledge for which an Indemnifying Party is, or may be, liable under Article 12.1 provided, however, that failure to give such notice will not terminate any of the rights of indemnitees under this Article 12 except to the extent that an Indemnifying Party has been materially prejudiced by the failure to provide such notice.

12.7 Refunds

If any indemnitee obtains a recovery of all or any part of any amount which an Indemnifying Party has paid to such indemnitee, such indemnitee will pay to such an Indemnifying Party the net amount recovered by such indemnitee.

12.8 Defense of Claims

An Indemnifying Party and its insurers will have the right (in each such case at such an Indemnifying Party's sole expense) to investigate or, provided that such Indemnifying Party or its insurers have not reserved the right to dispute liability with respect to any insurance policies pursuant to which coverage is sought, defend or compromise any claim covered by insurance for which indemnification is sought pursuant to Article 12 and each indemnitee will cooperate with the Indemnifying Party or its insurers with respect thereto. If the Indemnifying Party or its insurers are retaining attorneys to handle such claim, such counsel must be reasonably satisfactory to the indemnitees. If not, the indemnitees will have the right to retain counsel of their choice at the Indemnifying Party's expense.

12.9 Survival of Obligation

Notwithstanding anything in this Agreement to the contrary, the provisions of this Article 12 will survive the Termination Date and continue in full force and effect notwithstanding any breach by Lessor or Lessee of the terms of this Agreement, the termination of the lease of the Aircraft to Lessee under this Agreement or the repudiation by Lessor or the Lessee of this Agreement.

13. **INSURANCE**

13.1 The Lessor shall carry and maintain, at its sole cost and expense and throughout the Lease Term, and provide Lessee with evidence of the following insurances:

- (a) **"All Risks"** hull insurance on the Aircraft including all flight and ground risks and ingestion coverages in United States Dollars on an agreed value basis for such amount as the Lessor shall deem appropriate;
- (b) **"War Risks"** hull insurance which shall include confiscation, requisition, hijacking, strikes, riots, malicious damage and civil commotion and any other risks excluded from the **"All Risks"** insurance described in Article 13.1(a) by any exclusion therein of these and/or similar risks in United States Dollars on an agreed value basis for such amount as the Lessor shall deem appropriate;
- (c) **"Aircraft Third Party and aircraft general third party liability"** insurance (bodily injury/property damage) for a combined single limit of not less than \$750,000,000 for any one accident or series of accidents arising out of one event (but excluding Passenger (including passenger's baggage and personal effects), cargo and mail legal liability), (including to the fullest extent available from the leading international insurance markets, War & Allied Perils). Such insurance shall:
 - (i) include the Lessee and the Owner and their respective directors, officers, employees, agents and servants as additional named assureds ("**Lessee Additional Assureds**");
 - (ii) provide that all the provisions thereof, except the limits of liability, shall operate to give the Lessee Additional Assureds the same protection as if there were a separate policy issued to the Lessee Additional Assureds;
 - (iii) be primary and without right of contribution from other insurance which may be available to the Lessee;
 - (iv) provide that the insurance shall not be invalidated, so far as concerns the Lessee Additional Assureds, by any act or omission (including non-disclosure and misrepresentation) by the Lessor or any other person and insure the interests of the Lessee Additional Assureds regardless of any breach or violation by the Lessor or any other person of any term, condition or warranty contained in such policy, provided that the Lessee Additional Assureds have not caused, contributed to or knowingly condoned the said act or omission;
 - (v) provide for worldwide coverage (subject only to such exceptions as the Lessor may notify Lessee in writing);
 - (vi) provide that the insurers shall waive any right of subrogation against the Lessee Additional Assureds;
 - (vii) provide that the Lessee Additional Assureds shall not be liable for any premiums in respect thereof, and that the insurers shall not exercise any right set-off or counterclaim (other than in respect of unpaid premiums with respect to the Aircraft) against the interest of the Lessee Additional Assureds;
 - (viii) provide that the Lessee Additional Assureds will be promptly notified in the event of cancellation or of any material change in the Insurances or in the event that any premium or instalment of premium shall not be paid when due and that the Insurances shall continue unaltered for the benefit of the Lessee Additional Assureds for at least 30 days after issue by the insurers

of any such notification, except in the case of War Risks for which seven days' notice (or such lesser period as may be customarily available in respect of War Risks or Allied Perils) will be given, or in the case of war between any of the five great powers, or Nuclear Peril for which termination is automatic; and

- (ix) shall have no deductible other than one which is standard amongst insurers of internationally recognised standing in the field of aviation insurance.

13.2 The Lessee shall carry and maintain, at its sole cost and expense throughout the Lease Term, and provide Lessor with evidence satisfactory to Lessor of passenger, baggage, mail, cargo and legal liability insurance in respect of this Agreement and the Aircraft for a combined single limit of not less than \$750,000,000 any one occurrence for bodily injury and property damage. Such insurance shall:

- (a) include the Lessor and Owner and their respective directors, officers, agents, servants and employees as additional named assureds ("**Lessor Additional Assureds**");
- (b) provide that all the provisions thereof, except the limits of liability, shall operate to give the Lessor Additional Assureds the same protection as if there were a separate policy issued to the Lessor Additional Assureds;
- (c) be primary and without right of contribution from other insurance which may be available to the Lessor Additional Assureds;
- (d) [Provide that the insurance shall not be invalidated, so far as concerns the Lessor Additional Assureds by any act or omission (including non-disclosure and misrepresentation) by the Lessee, or any other person and insure the interests of the Lessor Additional Assureds regardless of any breach or violation by the Lessee or any other person of any term, condition or warranty contained in such policy, provided that the Lessor Additional Assureds have not caused, contributed to or knowingly condoned the said act or omission;
- (e) provide for worldwide coverage (subject only to such exceptions as the Lessor may agree in writing);
- (f) provide that the insurers shall waive any right of subrogation against the Lessor Additional Assureds;
- (g) provide that the Lessor Additional Assureds shall not be liable for any premiums in respect thereof, and that the insurers shall not exercise any right set-off or counterclaim (other than in respect of unpaid premiums with respect to the Aircraft) against the interest of the Lessor; and
- (h) provide that the Lessor Additional Assureds will be promptly notified in the event of cancellation or of any material change in the Insurances or in the event that any premium or instalment of premium shall not be paid when due and that the Insurances shall continue unaltered for the benefit of the Lessee and its, directors, officers, agents and employees for at least 30 days after issue by the insurers of any such notification, except in the case of War Risks for which seven days' notice (or such lesser period as may be customarily available in respect of War Risks or Allied Perils) will be given, or in the case of war between any of the five great powers, or Nuclear Peril for which termination is automatic.

- 13.3 Notwithstanding Article 13.1, the parties acknowledge that third party war risk coverage as of the date of this Agreement is limited to \$50 million with excess coverage provided by the Government Entity in the State of Registration.

If such cover ceases to be available from or through the relevant Government Entity in the State of Registration, Lessor will obtain such cover as is available on commercially reasonable terms from the applicable insurance markets on at least the same basis as other operators of commercial passenger aircraft.

14. UNAVAILABILITY AND TOTAL LOSS

14.1 Unavailability

- (a) If the Aircraft becomes unavailable to perform Designated Flights, Lessor shall promptly notify Lessee of such unavailability and Lessee may arrange for and provide during such period of unavailability a substitute aircraft to perform the Designated Flights.
- (b) Lessor and Lessee shall consult throughout the period of unavailability with a view to avoiding or reducing such unavailability and Lessor shall continue to keep Lessee advised as to the date when the Aircraft shall be available again.
- (c) Notwithstanding the unavailability of the Aircraft or the arrangement of a substitute aircraft, Lessee will continue to pay Rent hereunder, subject to Lessor taking all reasonable efforts to reduce its costs in respect of which Rent is calculated under Schedule 7. Without limitation, if the unavailability of the Aircraft is caused by requisition for hire, Lessor will credit all compensation received by it from the requisitioning authority in reduction of its aforesaid costs. Further, the parties agree that if the unavailability has been directly caused by the Gross Negligence or wilful misconduct of Lessor, Rent for the period of unavailability shall be reduced by the amount of the fee referred to at Schedule 7 paragraph 2(o) pro rata.

14.2 Total Loss

In the event of a Total Loss prior to or during the Lease Term, this Agreement shall terminate in which event neither party shall have any further liability to the other under this Agreement.

15. REPRESENTATIONS, WARRANTIES AND COVENANTS OF LESSEE

15.1 Representations and Warranties

Lessee represents and warrants the following to Lessor as of the date of execution of this Agreement and as of each Delivery Date and thereafter throughout the Lease Term:

- (a) **Corporate Status:** Lessee is a corporation duly incorporated under the Laws of England and Wales. It has the corporate power and authority to carry on its business as presently conducted and to perform its obligations hereunder;
- (b) **Governmental Approvals:** No authorization, approval, consent, license or order of, or registration with, or the giving of notice to the Aviation Authority or any other Government Entity is required for the valid authorization, execution, delivery and performance by Lessee, of its obligations pursuant to this Agreement except as will have been duly effected as of the Delivery Date or, as necessary, promptly thereafter;

- (c) **Binding:** Lessee's Board of Directors has authorized Lessee to enter into this Agreement, any side letters to this Agreement and any other documentation in connection with the leasing of the Aircraft from Lessor. This Agreement has been duly executed and delivered by Lessee and constitutes the valid, binding and enforceable obligations of Lessee except as enforceability may be limited by bankruptcy, insolvency, reorganization or other Laws of general application affecting the enforcement of creditors' rights and except as such enforceability may be subject to the application of equitable principles in any proceeding, legal or equitable;
- (d) **No Breach:** The execution and delivery of this Agreement, the consummation by Lessee of the transactions contemplated by it and compliance by Lessee with the terms and provisions thereof do not and will not contravene any Law applicable to Lessee, or result in any breach of or constitute any default under or result in the creation of any Security Interest upon any property of Lessee, the Aircraft or this Agreement pursuant to any indenture, mortgage, chattel mortgage, deed of trust, conditional sales contract, bank loan or credit agreement, memorandum and articles of association or other agreement or instrument to which Lessee is a party or by which Lessee or its properties or assets may be bound or affected;
- (e) **Filings:** Except for any filing or recording that may be required with the Aviation Authority, and any charges which may be created pursuant to this Agreement, no filing or recording of any instrument or document (including the filing of any financial statement) is necessary under the Laws of England and any applicable provinces in order for this Agreement to constitute a valid and perfected extended charter agreement of record relating to the Aircraft;
- (f) **Licenses:** Lessee holds all licenses, certificates and permits from applicable Government Entities in the United Kingdom for the conduct of its business as a certificated air carrier and performance of its obligations under this Agreement;
- (g) **No Suits:** To the best knowledge of Lessee, there are no suits, arbitrations or other proceedings pending or threatened before any court or administrative agency against or affecting Lessee which, if adversely determined, would have a material adverse effect on the business, assets or condition (financial or otherwise) of Lessee or its ability to perform under this Agreement;
- (h) **No Withholding:** Under the Laws of United Kingdom Lessee will not be required to deduct any withholding or other Tax from any payment it may make to Lessor under this Agreement;
- (i) **General Obligations:** The obligations of Lessee under this Agreement are direct, general and unconditional obligations of Lessee and rank or will rank at least pari passu with all other present and future unsecured and unsubordinated obligations (including contingent obligations) of Lessee, with the exception of such obligations as are mandatorily preferred by law and not by reason of any encumbrance;
- (j) **No Sovereign Immunity:** Lessee, under the Laws of England and Wales or of any other jurisdiction affecting Lessee, is subject to private commercial law and suit. Neither Lessee nor its properties or assets is entitled to sovereign immunity under any such Laws. Lessee's performance of its obligations under this Agreement constitute commercial acts done for commercial purposes;
- (k) **Tax Returns:** All returns, elections, filings, forms, statements and any other documents or undertakings related to Taxes have been delivered by Lessee to all relevant Government Entities in the jurisdiction of its incorporation and Lessee is not in default in the payment of any Taxes due and payable;

- (l) **No Material Adverse Effect:** Lessee is not in default under any agreement to which it is a party or by which it may be bound which would have a material adverse effect on its business, assets or condition;
- (m) **No Default under this Agreement:** At the time of execution of this Agreement, no Default has occurred and is continuing;
- (n) **Solvency:** Lessee is solvent, being able to meet its obligations as they become due.

15.2 General Covenants

Lessee covenants to Lessor that it will comply with the following throughout the entire Lease Term:

- (a) **Licensing:** Lessee will hold all licenses, certificates and permits from applicable Government Entities in the United Kingdom for the conduct of its business as a certificated air carrier and performance of its obligations under this Agreement. Lessee will advise Lessor promptly in the event any such licenses, certificates or permits are cancelled, terminated, revoked or not renewed;
- (b) **Sovereign Immunity:** Lessee, under the Laws of England and Wales or of any other jurisdiction affecting Lessee, will continue to be subject to private commercial law and suit. Neither Lessee nor its properties or assets will be entitled to sovereign immunity under any such Laws. Lessee's performance of its obligations hereunder will constitute commercial acts done for commercial purposes. Lessee will advise Lessor promptly of any change in the foregoing;
- (c) **Information about Suits:** Lessee will promptly give to Lessor a notice in writing of any suit, arbitration or proceeding before any court, administrative agency or Government Entity which, if adversely determined, would materially adversely affect Lessee's financial condition, affairs, operations or its ability to perform under this Agreement;
- (d) **No Security Interests:** Lessee will not create or agree to or permit to arise any Security Interest (other than Lessor Liens) on or with respect to the Aircraft, title thereto or any interest therein. Lessee will forthwith, at its own expense, take all action as may be necessary to discharge or remove any such Security Interest if it exists at any time. Lessee will within 24 hours after becoming aware of the existence of any such Security Interest give written notice thereof to Lessor;
- (e) **Disposal and Encumbrance of the Aircraft:** Lessee will not attempt to hold itself out as having any power to sell, charge, lease or otherwise encumber or dispose of the Aircraft nor create, incur or suffer to exist any Security Interest over the Aircraft;
- (f) **Operation:** Lessee will not require Lessor to operate the Aircraft for any purpose for which it is not designed, certified or reasonably suited or for any purpose or in any manner not fully covered by the insurances, or outside any geographical limit imposed by the Insurances;
- (g) **Prevention of Arrest:** Lessee will not do, and will use all reasonable commercial endeavours to prevent, any act which could reasonably be expected to result in the Aircraft being arrested, confiscated, seized, taken in execution, impounded, forfeited, detained in exercise or purported exercise of any possessory lien or other claim;

- (h) **No pledging of credit:** Lessee will not pledge the credit of Lessor or Owner for any fees, costs or expenses connected with this Agreement or the Aircraft or for any other purpose whatsoever;
- (i) **Protection of rights in the Aircraft:** Lessee will not do or permit to be done any act of thing which might jeopardise the title, rights and interests of Lessor or Owner in the Airframe and/or the Engines and/or it will not omit or permit to be omitted to be done any act which might prevent that title and those rights and interest from being jeopardised.

16. REPRESENTATIONS AND WARRANTIES OF LESSOR

16.1 Representations and Warranties

Lessor represents and warrants the following to Lessee as of the date of execution of this Agreement and as of each Delivery Date and ALL OTHER WARRANTIES, EXPRESS OR IMPLIED HAVE BEEN WAIVED:

- (a) **Corporate Status:** Lessor is a corporation duly incorporated under the Laws of Canada. It has the corporate power and authority to carry on its business as presently conducted and to perform its obligations hereunder;
- (b) **Licences etc:** Lessor is a certificated air carrier and holds (or will hold prior to Delivery) all licences, certificates and permits from applicable government authorities for the conduct of its business as a certificated air carrier and the performance of its obligations under this Agreement;
- (c) **Binding:** The Agreement has been duly authorized, executed and delivered by Lessor and represent the valid, enforceable and binding obligations of Lessor except as enforceability may be limited by bankruptcy, insolvency, reorganization or other Laws of general application affecting the enforcement of creditors' rights;
- (d) **No Breach:** The execution and delivery of this Agreement, the consummation by Lessor of the transactions contemplated by this Agreement and compliance by Lessor with the terms and provisions of this Agreement do not and will not contravene any Law applicable to Lessor, or result in any breach of or constitute any default under any indenture, mortgage, chattel mortgage, deed of trust, conditional sales contract, bank loan or credit agreement, corporate charter, by law or other agreement or instrument to which Lessor is a party or by which Lessor or its properties or assets may be bound or affected;
- (e) **Sovereign Immunity:** Lessor, under the Laws of the State of Registration or of any other jurisdiction affecting Lessor will continue to be subject to private commercial law and suit. Neither Lessor nor its properties or assets will be entitled to sovereign immunity under any such Laws. Lessor's performance of its obligations hereunder will constitute commercial acts done for commercial purposes. Lessor will advise Lessee promptly of any change in the foregoing;
- (f) **Possession:** During the Lease Term Lessor will lawfully be entitled to charter the Aircraft on an extended basis to Lessee.

16.2 Waiver

SUBJECT TO THE DELIVERY CONDITIONS AND ARTICLE 16.1(F) LESSEE EXPRESSLY ACKNOWLEDGES AND AGREES THAT NO CONDITION, REPRESENTATION, WARRANTY OR COVENANT OF ANY KIND IS OR HAS BEEN GIVEN BY OR ON BEHALF OF THE LESSOR IN RESPECT OF THE AIRCRAFT OR

ANY PART THEREOF AND ACCORDINGLY THE LESSEE CONFIRMS THAT IT HAS NOT, IN ENTERING INTO THIS AGREEMENT, RELIED ON ANY CONDITION, WARRANTY OR REPRESENTATION BY THE LESSOR OR ANY PERSON ON LESSOR'S BEHALF, EXPRESS OR IMPLIED (WHETHER STATUTORY OR OTHERWISE) AS TO THE DESCRIPTION, AIRWORTHINESS, MERCHANTABILITY, FITNESS FOR ANY PURPOSE, VALUE, CONDITION, DESIGN OR OPERATION OF ANY KIND OR NATURE OF THE AIRCRAFT OR ANY PART THEREOF AND THE BENEFIT OF ANY SUCH CONDITION, WARRANTY OR REPRESENTATION BY THE LESSOR IS HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVED BY LESSEE. TO THE EXTENT PERMISSIBLE UNDER APPLICABLE LAW, THE LESSEE HEREBY ALSO WAIVES ANY RIGHTS WHICH IT MAY HAVE IN TORT IN RESPECT OF ANY OF THE MATTERS REFERRED TO ABOVE AND IRREVOCABLY AGREES THAT LESSOR SHALL HAVE NO GREATER LIABILITY IN TORT IN RESPECT OF ANY SUCH MATTERS THAN IT WOULD HAVE IN CONTRACT AFTER TAKING ACCOUNT OF ALL OF THE FOREGOING EXCLUSIONS. NO THIRD PARTY MAKING ANY REPRESENTATION OR WARRANTY RELATING TO THE AIRCRAFT OR ANY PART THEREOF IS THE AGENT OF THE LESSOR NOR HAS ANY SUCH THIRD PARTY AUTHORITY TO BIND THE LESSOR THEREBY.

16.3 **Lessor's Covenants:**

Lessor covenants to Lessee that it will comply with the following throughout the Lease Term:

- (a) **Licensing:** Lessor will hold all licenses, certificates and permits from applicable Government Entities in the State of Registration for the conduct of its business as a certificated air carrier and performance of its obligations under this Agreement. Lessor will at all times cause the Aircraft to remain duly registered in the name of Lessor with the Aviation Authority, cause the Aircraft to have a valid certificate of Airworthiness issued by the Aviation Authority and ensure that each member of the cockpit crew shall hold all necessary licenses for the operation of the Aircraft. Lessor will advise Lessee promptly in the event any such licenses, certificates or permits are cancelled, terminated, revoked or not renewed;
- (b) **Sovereign Immunity:** Lessor, under the Laws of the State of Registration or of any other jurisdiction affecting Lessor, will continue to be subject to private commercial law and suit. Neither Lessor nor its properties or assets will be entitled to sovereign immunity under any such Laws. Lessor's performance of its obligations hereunder will constitute commercial acts done for commercial purposes. Lessor will advise Lessee promptly of any change in the foregoing;
- (c) **Compliance with Manufacturer's Recommendations:** Lessor shall throughout the Lease Term cause the Aircraft to be operated, maintained, crewed (subject to Lessee's responsibility to supply sufficient number of cabin crew) and controlled in accordance with the manufacturer's recommendations contained in the flight manual of the Aircraft, as approved by the Aviation Authority and with the observance of all applicable Laws and regulations of the State of Registration;
- (d) **Support Inventory:** Lessor shall use its reasonable commercial efforts to provide the Support Inventory over the Lease Term required for the maintenance of the Aircraft. Lessor shall not be held liable for any damages whatsoever if due to reasons beyond its reasonable control, any required Support Inventory cannot be obtained or made available in due time;
- (e) **Records for Customs:** Lessor shall monitor, keep proper records and perform all other necessary functions in order to ensure compliance with the required customs formalities for the movement of Support Inventory;

- (f) **Assistance with Customs Formalities:** Lessor shall assist Lessee as required with customs formalities respecting the Aircraft and Lessor's personnel required in the United Kingdom and in any other relevant country by promptly providing required information;
- (g) **Aircraft Journey Log:** Lessor shall use its reasonable endeavours to provide to Lessee a copy of the Aircraft Journey Log daily in arrears but in any event shall provide to Lessee a copy of the Aircraft Journey Log no less than monthly;
- (h) **Aircraft Safety Literature:** Lessor shall furnish the Aircraft with all appropriate Lessor passenger literature related to the Aircraft safety;
- (i) **Prevention of Arrest:** Lessor will not do, and will use all reasonable commercial endeavours to prevent, any act which could reasonably be expected to result in the Aircraft being arrested, confiscated, seized, taken in execution, impounded, forfeited, detained in exercise or purported exercise of any possessory lien or other claim.

17. RETURN OF AIRCRAFT

17.1 Date of Return

Lessee shall ensure that the Aircraft is not scheduled for any further flights on or following the Return Date and as of the Return Date, Lessee shall no longer have any right to receive, and Lessor shall have no further obligation to perform, any of the services or make available the Aircraft or any personnel to be provided by Lessor under this Agreement. If Lessee has, notwithstanding the foregoing, scheduled further flights on or following the Return Date, and Lessor has agreed to perform such further flights, or if a Lessee Event of Default occurs prior to the Expiration Date or either party terminates this Agreement pursuant to Article 5.1, the return requirements set forth in this Article 17 nonetheless must be met on the date the Aircraft is actually returned to Lessor, to the extent, in the case of Article 5.1, within Lessee's control acting in a commercially reasonable manner.

17.2 Return Location

The Return Location shall be Toronto, Canada or such other airport as may reasonably be agreed between Lessee and Lessor. Lessee shall make all necessary arrangements for and bear the cost of a return flight scheduled as reasonably agreed with Lessor so as to enable the carriage of Lessor's personnel and equipment (including Support Inventory) to the Return Location and upon arrival there will relinquish commercial control over and redeliver the Aircraft.

17.3 Redelivery Condition

The condition of the Aircraft shall in all respects be such as to demonstrate that:

- (a) Lessee has in all respects material to the condition of the Aircraft on redelivery complied with the obligations on its part contained in this Agreement; and
- (b) Intentionally left blank;
- (c) the interior shall be clean in accordance with airline industry standards; and
- (d) the Aircraft shall have installed the full complement of cabin equipment, galley equipment (including five (5) shipsets), parts, accessories, furnishings and loose

equipment thereof as were installed on the Aircraft at Delivery to the extent such items are within Lessee's control hereunder; and

- (e) be free and clear of all Security Interests other than Lessor Liens.

17.4 Lessee's Continuing Obligations

In the event that Lessee does not make available the Aircraft to Lessor on the Return Date and in the condition required by this Article 17 for any reason (whether or not the reason is within Lessee's control) other than a Lessor Event of Default:

- (a) the obligations of Lessee under this Agreement will continue in full force and effect on a day to day basis until such return. This will not be considered a waiver of Lessee's Event of Default or any right of Lessor hereunder.
- (b) Lessee will until such time as the Aircraft is made available to Lessor at the Return Location and put into the condition required by this Article 17, pay Rent for each day from the scheduled Return Date until the Aircraft is returned (the monthly Rent payable under Article 6.1(a) will be prorated based on the actual number of days in the applicable month).
- (c) If Lessee has failed to put the Aircraft in the condition required by this Article 17 at the time required by this Agreement, Lessor may elect, in its sole and absolute discretion, to accept the return of the Aircraft prior to the Aircraft being put in the condition required by this Article 17 subject either to (i) Lessee paying to Lessor such sum as Lessor shall reasonably require in order to correct such discrepancy or (ii) have any such non conformance corrected at such time as Lessor may deem appropriate (but within 30 days following the return of the Aircraft) in either case at commercially reasonable rates. Any direct expenses incurred by Lessor for such correction will become payable by Lessee within 15 days following the submission of a written statement by Lessor to Lessee, identifying the items corrected and setting forth the expense of such corrections. Lessee's obligation to pay such sums will survive the Return Date.

17.5 Airport and Navigation Charges

Lessee will ensure that at return of the Aircraft any and all airport, navigation and other charges for which Lessee is responsible which give rise or may if unpaid give rise to any lien, right of detention, right of sale or other Security Interest in relation to the Aircraft, Engine or any Part, whether incurred in respect of the Aircraft or any other aircraft operated by Lessee, have been paid and discharged in full and will at Lessor's request produce evidence thereof satisfactory to Lessor.

17.6 Intentionally Left Blank

17.7 Fuel Adjustment

Upon return of the Aircraft in accordance with the terms of this Agreement at the end of the Lease Term, an adjustment shall be made between Lessor and Lessee in respect of fuel on board the Aircraft at the time of Delivery and at the time of redelivery at the price prevailing at the time of redelivery at the Return Location.

18. ASSIGNMENT

18.1 No Assignment

NO ASSIGNMENT, NOVATION, TRANSFER, MORTGAGE OR OTHER CHARGE MAY BE MADE BY EITHER PARTY OF ANY OF ITS RESPECTIVE RIGHTS WITH RESPECT TO THE AIRCRAFT, ENGINE OR PART OR THIS AGREEMENT WITHOUT THE PRIOR WRITTEN CONSENT OF THE OTHER.

19. EVENTS OF DEFAULT

19.1 Lessee Events of Default

The occurrence of any of the following will constitute a Lessee Event of Default and material breach of this Agreement by Lessee:

- (a) Lessee fails to take delivery of the Aircraft when obligated to do so under the terms of this Agreement;
- (b) Lessee fails to make a Rent or other payment due hereunder in the manner and by the date provided in this Agreement and fails to make such payment within three Business Days after receipt of notice from Lessor;
- (c) Lessee fails to comply with the requirements of the Insurances or if any insurer in respect of any part of such Insurances cancels any part of the Insurances or disclaims or repudiates liability by reason of any action of Lessee;
- (d) The Aircraft is not made available to Lessor on the Return Date in accordance with Article 17;
- (e) Lessee fails to observe or perform any of its other material obligations hereunder and fails to cure the same within 10 Business Days after written notice thereof to Lessee;
- (f) any representation or warranty of Lessee herein proves to be untrue in any material respect;
- (g) the registration of the Aircraft is cancelled as a result of a negligent act or omission of Lessee other than as permitted pursuant to the terms of this Agreement;
- (h) Lessee permits any Person to take control or possession of the Aircraft or Engines, except as otherwise permitted by this Agreement;
- (i) Lessee threatens to or temporarily or permanently discontinues business or sells or otherwise disposes of all or substantially all of its assets;
- (j) a material adverse change occurs in the financial condition of Lessee which materially impairs Lessee's ability to perform under this Agreement;
- (k) any consent, authorisation, licence or approval of or registration with or declaration to governmental or public bodies or authorities or courts required by Lessee to authorise, or required by Lessee in connection with, the execution, delivery, validity, enforceability or admissibility in evidence of this Agreement or the performance by Lessee of its obligations under this Agreement is modified in a manner unacceptable to Lessor or is withheld or is not granted or is revoked, suspended, cancelled, withdrawn, terminated or expires and is not renewed or otherwise ceases to be in full force and effect;
- (l) Lessee (i) suspends payment on its debts or other obligations, (ii) is unable to or admits its inability to pay its debts or other obligations as they fall due, (iii) is

adjudicated or becomes bankrupt or insolvent or (iv) proposes or enters into any composition or other arrangement for the benefit of its creditors generally;

- (m) any proceedings, resolutions, filings or other steps are instituted or threatened with respect to either party relating to the bankruptcy, liquidation, reorganization or protection from creditors of Lessee or a substantial part of Lessee's property. If instituted by Lessee, the same will be an immediate Lessee Event of Default. If instituted by another Person, the same will be a Lessee Event of Default if not dismissed, remedied or relinquished within 30 days;
- (n) any order, judgment or decree is entered by any court of competent jurisdiction appointing a receiver, trustee or liquidator of Lessee or a substantial part of its property, or if a substantial part of Lessee's property is to be sequestered. If instituted by or done with the consent of Lessee, the same will be an immediate Lessee Event of Default. If instituted by another Person, the same will be a Lessee Event of Default if not dismissed, remedied or relinquished within 60 days;
- (o) Eurocontrol or other applicable authority has notified Lessor that there are unpaid charges due from Lessee (unless such charges are being contested in good faith and by appropriate proceedings, an adequate bond has been provided and such proceedings do not involve any danger of the detention, interference with the use or operation, sale, forfeiture or loss of the Aircraft) and Lessee has failed to provide Lessor with satisfactory evidence of their discharge within 30 days of notice from Lessor provided that such 30 day grace period will not apply if there is a danger of detention, interference with the use or operation, sale, forfeiture or loss of the Aircraft;
- (p) any Indebtedness of Lessee which is material in relation to Lessee becomes due or capable of being declared due prior to the date when it would otherwise have become due whether or not such breach or default shall be waived by the person to whom the same is payable or is not paid on the due date and in the opinion of Lessor the ability of Lessee to perform all or any of its obligations under, or otherwise to comply with the terms of this Agreement shall or may reasonably be expected to be materially adversely prejudiced as a consequence thereof;
- (q) a creditor or encumbrancer attaches or takes possession of, or a trustee, administrator, administrative receiver, receiver or similar officer is appointed in respect of, or a distress, execution, sequestration or other process is levied or enforced upon or sued against any of the undertakings, business, assets, rights or revenues of Lessee and is not discharged within 14 days;
- (r) all or a material part of the undertakings, assets, rights or revenues of or shares or other ownership interests in, Lessee are seized, nationalised, expropriated or compulsorily acquired by or under the authority of any government;
- (s) the existence, validity, enforceability or priority of the rights of Lessor in respect of the Aircraft hereunder or the Insurances are challenged by Lessee or any other person claiming through it;
- (t) the material obligations of Lessee under this Agreement become invalid, ineffective or unenforceable for any reason;
- (u) Lessee repudiates any of its obligations under this Agreement or does or causes or permits to be done any act or thing evidencing an intention to repudiate any of its obligations under this Agreement; or

- (v) if Lessee sells or executes any bill of sale affecting the Aircraft or any interest therein or agrees or purports to do any of the same, or contests in any legal proceedings Lessor's or Owner's interest or ownership of the Aircraft.

19.2 Lessor's General Rights

Upon the occurrence of any Lessee Event of Default, all rights of Lessee hereunder will immediately cease and terminate (but Lessee's obligations hereunder will continue). Lessor may do all or any of the following at its option (in addition to such other rights and remedies which Lessor may have by statute or otherwise but subject to any requirements of applicable Law):

- (a) terminate this Agreement by giving written notice to Lessee;
- (b) require that the Aircraft immediately be moved to an airport or other location designated by Lessor;
- (c) for Lessee's account, do anything that may reasonably be required to cure any default and recover from Lessee all reasonable costs, including legal fees and expenses incurred in doing so and interest thereon at the Default Rate;
- (d) proceed as appropriate to enforce performance of this Agreement and to recover any damages for the breach hereof, including the amounts specified in Article 19.3; or
- (e) enter upon Lessee's premises where the Aircraft is located without liability and to sell, lease or otherwise deal with the Aircraft as if this Agreement had never been made

provided that Lessor shall, in exercising such rights, act in a commercially reasonable manner.

19.3 Lessee Liability for Damages

- (a) If a Lessee Event of Default occurs, in addition to all other remedies available at law or in equity, and subject always to its duty to mitigate any losses arising from such Lessee Event of Default, Lessor has the right to recover from Lessee and Lessee will pay Lessor within two Business Days after Lessor's written demand, all of the following:
 - (i) all amounts which are then due and unpaid hereunder and which become due prior to the earlier of Lessor's recovery of possession of the Aircraft or Lessee making an effective tender thereof;
 - (ii) all costs associated with Lessor's exercise of its remedies hereunder, including but not limited to repossession costs, legal fees, Aircraft storage costs, Aircraft re lease or sale costs and Lessor's internal costs and expenses (including the cost of personnel time calculated based upon the compensation paid to the individuals involved on an annual basis and a general Lessor overhead allocation);
 - (iii) any amount of interest, fees or other sums paid or payable on account of funds borrowed in order to carry any unpaid amount;
 - (iv) any loss, cost, expense or liability sustained by Lessor due to Lessee's failure to redeliver the Aircraft in the condition required by this Agreement; and

- (v) any other loss, damage, expense, cost or liability which Lessor suffers or incurs as a result of the Lessee Event of Default and/or termination of this Agreement;
- (b) In calculating Lessor's damages hereunder, upon a Lessee Event of Default all Rent, and other amounts which would have been due hereunder during the Lease Term if a Lessee Event of Default had not occurred will be calculated on a present value basis using a discounting rate of six percent (6%) per annum discounted to the earlier of the date on which Lessor obtains possession of the Aircraft or Lessee makes an effective tender thereof but that all income which Lessor is able to obtain from any subsequent use of the Aircraft during the Lease Term shall be taken into account in calculating Lessor's damages;

19.4 Waiver of Default

By written notice to Lessee, Lessor may at its election waive any Default or Lessee Event of Default and its consequences and rescind and annul any prior notice of termination of this Agreement. The respective rights of the parties will then be as they would have been had no Default or Lessee Event of Default occurred and no such notice been given.

19.5 Lessor Events of Default

The occurrence of any of the following will constitute a Lessor Event of Default and material breach of this Agreement by Lessor:

- (a) (subject to Article 4.2) Lessor fails to Deliver the Aircraft when obliged to do so under the terms of the Agreement;
- (b) Lessor fails to comply with the requirements of Article 13.1 in respect of Insurances or if any Insurer in respect of any part of such Insurances cancels or disclaims or repudiates liability by reason of any action of Lessor;
- (c) Lessor fails to observe or perform any of its other material obligations hereunder and fails to cure the same with 10 Business Days after written notice thereof from Lessee;
- (d) any representation or warranty of Lessor proves to be untrue in any material respect;
- (e) Lessor threatens to or temporarily or permanently discontinues business or sells or otherwise disposes of all or substantially all of its assets;
- (f) a material adverse change occurs in the financial condition of Lessor which materially impairs Lessor's ability to perform under this Agreement;
- (g) any consent, authorisation, licence or approval of or registration with or declaration to governmental or public bodies or authorities or courts required by Lessor to authorise, or required by Lessor in connection with, the execution, delivery, validity, enforceability or admissibility in evidence of this Agreement or the performance by Lessor of its obligations under this Agreement is modified in a manner unacceptable to Lessee or is withheld or is not granted or is revoked, suspended, cancelled, withdrawn, terminated or expires and is not renewed or otherwise ceases to be in full force and effect;
- (h) Lessor (i) suspends payment on its debts or other obligations, (ii) is unable to or admits its inability to pay its debts or other obligations as they fall due, (iii) is adjudicated or becomes bankrupt or insolvent or (iv) proposes or enters into any composition or other arrangement for the benefit of its creditors generally;

- (i) any proceedings, resolutions, filings or other steps are instituted or threatened with respect to either party relating to the bankruptcy, liquidation, reorganization or protection from creditors of Lessor or a substantial part of Lessor's property. If instituted by Lessor, the same will be an immediate Lessor Event of Default. If instituted by another Person, the same will be a Lessor Event of Default if not dismissed, remedied or relinquished within 30 days;
- (j) any order, judgment or decree is entered by any court of competent jurisdiction appointing a receiver, trustee or liquidator of Lessor or a substantial part of its property, or if a substantial part of Lessor's property is to be sequestered. If instituted by or done with the consent of Lessor, the same will be an immediate Lessor Event of Default. If instituted by another Person, the same will be a Lessor Event of Default if not dismissed, remedied or relinquished within 60 days;
- (k) the material obligations of Lessor under this Agreement become invalid, ineffective or unenforceable for any reason;
- (l) Lessor repudiates any of its obligations under this Agreement or does or causes or permits to be done any act or thing evidencing an intention to repudiate any of its obligations under this Agreement.

19.6 Lessor Liability

If a Lessor Event of Default occurs, Lessee may do all or any of the following at its option (in addition to such other rights and remedies which Lessee may have by statute or otherwise but subject to any requirements of applicable law):

- (a) terminate this Agreement by giving written notice to Lessor;
- (b) subject always to its duty to mitigate any losses arising from such Lessor Event of Default, do anything that may reasonably be required to cure such Lessor Event of Default or recover from Lessor all reasonable costs, including legal fees and expenses, incurred in doing so with interest thereon at the Default Rate.

19.7 Lessee Termination

Lessee's right to terminate this Agreement pursuant to Article 19.6 shall be subject to Lessee:

- (a) first having paid to Lessor all amounts whatsoever then due and owing to Lessor under this Agreement but which are unpaid; and
- (b) Lessee having made available to Lessor the Aircraft in accordance with Article 17.

19.8 Limitation

Neither party shall be responsible to the other for any indirect, special or consequential damages, whether in contract or in tort or otherwise, including damages for lost profits or revenues even if such damages were foreseeable or resulted from a fundamental breach of this Agreement.

20. NOTICES

20.1 Manner of Sending Notices

Any notice, request or information required or permissible under this Lease will be in writing and in English. Notices will be delivered in person or sent by fax, letter (mailed airmail, certified and return receipt requested), or by expedited delivery addressed to the parties as set forth in Article 20.2. In the case of a fax, notice will be deemed received upon actual receipt (and the date of actual receipt will be deemed to be the date set forth on the confirmation of receipt produced by the sender's fax machine immediately after the fax is sent) provided however that if the date of actual receipt is not a Business Day, then notice will be deemed received on the next following Business Day. In the case of a mailed letter, notice will be deemed received on the tenth (10th) day after mailing. In the case of a notice sent by expedited delivery, notice will be deemed received on the date of delivery set forth in the records of the Person which accomplished the delivery. If any notice is sent by more than one of the above listed methods, notice will be deemed received on the earliest possible date in accordance with the above provisions.

20.2 Notice Information

Notices will be sent:

If to Lessor: Skyservice Airlines Inc.
31 Fasken Drive
Etobicoke
Ontario
M9W 1K6

Attention: President

Fax: + 1 416 679 5920
Telephone: + 1 416 679 5700

with copy to: address as above

Attention: Legal Department

Fax: + 1 416 679 5912
Telephone: + 1 416 679 5855

If to Lessee: First Choice Airways Limited
Commonwealth House
Chicago Avenue
Manchester Airport
Manchester
M90 3DP

Attention: Managing Director

Fax: +44 161 908 2270
Telephone: +44 161 489 0862

with copy to:

Legal Department

or to such other places and numbers as either party directs in writing to the other party.

21. Governing Law and Jurisdiction

21.1 Governing Law

This Lease will in all respects be governed by and construed in accordance with the Laws of the Province of Ontario and the Federal Laws of Canada applicable therein.

21.2 Arbitration

The parties agree to work cooperatively in an effort to resolve any dispute or claim arising out of or in any way relating to or connected with this Agreement or the breach, termination or invalidity thereof (a "Dispute"). In the event that such informal efforts do not result in a resolution of the Dispute, the parties agree that the Dispute shall be discussed by the Chief Executive Officer of each party in an effort to reach a resolution. In the event that the parties' respective Chief Executive Officers are unable to resolve the Dispute within two (2) Business Days, the Dispute shall be submitted to arbitration in accordance with Schedule 8, which sets out the sole and exclusive procedure for the resolution of Disputes under this Agreement. The resolution of Disputes pursuant to the terms of Schedule 8 shall be final and binding upon the parties, and there shall be no appeal therefrom, including any appeal to a court on a question of law, a question of fact, or a question of mixed fact and law. For greater certainty, subsection 7(2) of the *Arbitration Act, 1991* (Ontario) shall not apply to an arbitration under this Section 21.2.

21.3 Submission to Jurisdiction

- (a) Subject to the terms of this Agreement, the parties agree that the Courts of Ontario shall have jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise under and/or relating to and/or in connection with this Agreement and for such purpose irrevocably submits to the jurisdiction of such courts;
- (b) The submission to the jurisdiction of the Ontario courts shall not (and shall not be construed so as to) limit the right of Lessor to take proceedings against Lessee in any other court of competent jurisdiction nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.

21.4 Agent for Service

Lessee undertakes to maintain during the Lease Term an agent for service of legal process in Ontario and undertakes to make such appointment as soon as reasonably practicable after execution of this Agreement and in any event before Delivery.

21.5 Prevailing Party in Dispute

If any legal action or other proceeding is brought in connection with or arises out of any provisions in this Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees and other costs incurred in such action or proceedings. The prevailing party will also, to the extent permissible by Law, be entitled to receive pre and post judgment interest at the Default Rate.

22. FORCE MAJEURE

- 22.1 Neither party shall be liable to the other party for any failure to perform its obligations (excluding payment obligations) or to carry out any of the activities contemplated by this Agreement if such failure is caused by an event or Force Majeure provided it has given prompt notice thereof to the other party. It is expressly agreed that a mechanical failure of

the Aircraft does not constitute an event of Force Majeure. If an event of Force Majeure occurs which prevents Lessor from performing all Designated Flights, and which, in Lessee's reasonable opinion, will continue beyond the expiry of the Summer Season in which such event arises, the Lessee shall be entitled to terminate this Agreement in which event Lessee shall return the Aircraft to Lessor in the condition required by Article 17, and neither party shall have any further liability hereunder. The party suffering an event of Force Majeure shall use its best endeavours to minimise the event of Force Majeure with all reasonable dispatch, provided, however, that the settlement of strikes, lockouts or other industrial or labour disputes or disturbances constituting Force Majeure shall be within the discretion of the party having the difficulty and such party shall not be required to settle such disputes or disturbances when such course appears inadvisable to it.

- 22.2 Where Lessor is affected by a Force Majeure event, Lessee may, at its own cost, make such alternative arrangements pursuant to Article 14.1 as it thinks fit for the provision of the services and Lessor shall offer, at the cost of Lessee, all reasonable co-operation and support to Lessee to assist in making those alternative arrangements.

23. MISCELLANEOUS

23.1 Lessor Performance for Lessee

The exercise by Lessor of its remedy of performing a Lessee obligation hereunder is not a waiver of and will not relieve Lessee from the performance of such obligation at any subsequent time or from the performance of any of its other obligations hereunder.

23.2 Lessor's Payment Obligations

Any obligation of Lessor under this Agreement to pay or release any amount to Lessee is conditional upon (a) all amounts then due and payable by Lessee to Lessor under this Agreement or under any other agreement between Lessor and Lessee having been paid in full and (b) no by Lessee Default having occurred and continuing hereunder at the time such payment or release of payment is payable to Lessee.

23.3 Application of Payments

Any amounts paid or recovered in respect of Lessee liabilities hereunder may be applied to Rent, Default Interest, fees or any other amount due hereunder in such proportions, order and manner as Lessor determines.

23.4 Delegation by Lessor

Lessor may delegate to any Person(s) all or any of the rights, powers or discretion vested in it by this Agreement and any such delegation may be made upon such terms and conditions as Lessor in its absolute discretion thinks fit. Lessor shall notify Lessee of its nominated delegate as soon as practicable.

23.5 Rights of Parties

The rights of the parties under this Agreement are cumulative, not exclusive, may be exercised as often as each party considers appropriate and are in addition to its rights under general Law. The rights of one party against the other party are not capable of being waived or amended except by an express waiver or amendment in writing. Any failure to exercise or any delay in exercising any of such rights will not operate as a waiver or amendment of that or any other such right any defective or partial exercise of any such rights will not preclude any other or further exercise of that or any other such right and no act or course of conduct or negotiation on a party's part or on its behalf will in any way

preclude such party from exercising any such right or constitute a suspension or any amendment of any such right.

23.6 Invalidity of any Provision

If any of the provisions of this Agreement become invalid, illegal or unenforceable in any respect under any Law, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired.

23.7 Time is of the Essence

Subject to any applicable grace period, time is of the essence in the performance of all obligations of the parties under this Agreement and, consequently, all time limitations set forth in the provisions of this Agreement will be strictly observed.

23.8 Counterparts

This Agreement may be executed in any number of identical counterparts, each of which will be deemed to be an original, and all of which together will be deemed to be one and the same instrument when each party has signed and delivered one such counterpart to the other party.

23.9 Delivery of Documents by Fax

Delivery of an executed counterpart of this Agreement or of any other documents in connection with this Agreement by fax will be deemed as effective as delivery of an originally executed counterpart. Any party delivering an executed counterpart of the Lease or other document by fax will also deliver an originally executed counterpart, but the failure of any party to deliver an originally executed counterpart of this Agreement or such other document will not affect the validity or effectiveness of this Agreement or such other document.

23.10 Entire Agreement

This Agreement constitutes the entire agreement between the parties in relation to the leasing of the Aircraft by Lessor to Lessee and supersedes all previous proposals, agreements and other written and oral communications in relation hereto. The parties acknowledge that there have been no representations, warranties, promises, guarantees or agreements, express or implied, except as set forth herein.

23.11 Subordination

Lessor and Lessee acknowledge and agree that this Agreement and the leasing of the Aircraft hereunder are subject and subordinate to the provisions of the Dry Lease and the rights of the Owner thereunder. Accordingly, each of Lessor and Lessee acknowledges and agrees that:

- (a) the leasing of the Aircraft under this Lease Agreement may not extend beyond the period during which Lessor is entitled to lease the Aircraft pursuant to the Dry Lease; and
- (b) Lessee's obligation to lease the Aircraft from Lessor hereunder and the leasing of the Aircraft by Lessee hereunder shall automatically terminate upon the expiration or earlier termination of the leasing of the Aircraft under the Dry Lease for any reason whatsoever.

IN WITNESS WHEREOF, Lessee and Lessor have caused this Agreement to be executed by their respective officers as of XXXXX 20XX.

SKYSERVICE AIRLINES INC.

By: _____

Its: _____

FIRST CHOICE AIRWAYS LIMITED

By: _____

Its: _____

SCHEDULE 1

Description of the Aircraft

Airframe

Manufacturer: [Airbus Industrie / Boeing]
Model: [A320 / B757-200]
Manufacturer's Serial No: [XXXX]

Engines

Manufacturer: [CFM International SA / Rolls Royce]
Model: [CFM 56 / RB211]

MTOW: XXXXXX kgs

SCHEDULE 2

Delivery Conditions

1. The Aircraft will:
 - (a) not be scheduled to undergo a C Check in block format during the Summer Season of the Lease Term;
 - (b) be in good operating condition;
 - (c) be clean in accordance with airline industry standards;
 - (d) have installed the full complement of equipment, parts, accessories, furnishings and loose equipment as normally installed in the Aircraft for continued regular service;
 - (e) be in Lessor livery;
 - (f) have a valid Certificate of Airworthiness;
 - (g) be airworthy in accordance with the requirements of the Aviation Authority;
 - (h) be in compliance with Lessor's maintenance program (including the corrosion prevention program);
 - (i) be in compliance with all applicable airworthiness directives issued by the State of Registration as of the Delivery Date;
 - (j) have fuselage, wings, empennage, windows and doors in a serviceable condition in accordance with Lessor's maintenance manual limits and with all external repair in compliance with the structural repair manual or other data approved by the Aviation Authority;
 - (k) have, to Lessor's knowledge, no "No Go" log book snags or temporary repairs outstanding that could affect the airworthiness of the Aircraft;
 - (l) the Engines shall comply with Lessor's in-service limits for such engines;
 - (m) have installed a complete set of HF radios; and
 - (n) have five (5) shipsets of loose galley equipment.

SCHEDULE 3

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SCHEDULE 4

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SCHEDULE 5

Personnel

1. PERSONNEL

- (a) For the duration of the Lease Term, Lessor will provide such number of sets of flight deck crew, (each such crew to comprise one Captain and one First Officer) as in the reasonable opinion of Lessor are necessary for the operation of the Designated Flights and subject to such adjustments to Rent which reflect this number of crews.
- (b) No cabin crew shall be provided by Lessor.
- (c) For the duration of the Lease Term, Lessor will provide such number of engineers as Lessee and Lessor agree are necessary for the operation of the Designated Flights and subject to such adjustments to Rent which reflect this number of engineers.

2. ROSTERING

Lessor shall be responsible for rostering its flight deck and Lessee's cabin crew in connection with this Agreement at all times within the regulations contained in the Skyservice Operations Manual and in compliance with Aviation Authority regulations. Lessor will change its personnel connected with the operation and support of this Agreement from time to time in accordance with its internal policies.

3. TRAINING

Lessor shall provide training to Lessee cabin crew at a location to be agreed between the parties which shall be completed no later than 2 days before the applicable Scheduled Delivery Date.

SCHEDULE 6

Designated and other Permissible Flights

The Designated Flights to be performed during the Lease Term will be determined by the Lessee and communicated to Lessor not less than four (4) months before the applicable Scheduled Delivery Date and shall operate between the sectors set out in the attached Appendix.

Lessee may vary any or all of the Designated Flights if:

- (a) such flight or flights as varied are within the operational criteria of Lessor; and
- (b) Lessor can roster the flight crew in accordance with all applicable laws and regulatory requirements.

APPENDIX TO SCHEDULE 6

Designated and other Permissible Flights

SCHEDULE 7

The amount of Rent payable by Lessee to Lessor shall be Cdn\$XX per calendar month

Supplemental Rent shall be payable pursuant to Article 6 as follows:

- (c) **Airframe Supplemental Rent:** US\$XXX per Airframe Flight Hour, allocated as follows:
 - (i) 1 'C' Check - [REDACTED] per Flight Hour
 - (ii) 5/10 Year Checks - [REDACTED] per Flight Hour including landing gear and thrust reversers;
- (d) **APU Supplemental Rent:** [REDACTED] per Flight Hour.
- (e) **Engine LLP Supplemental Rent:** [REDACTED] per Engine cycle for each Engine (payable when the Engine is utilised on the Aircraft or another aircraft).
- (f) **Engine Performance Restoration Supplemental Rent:** [REDACTED] per Engine Flight Hour to be adjusted upwards on an annual basis by 3% per annum by way of agreed adjustment for inflation.

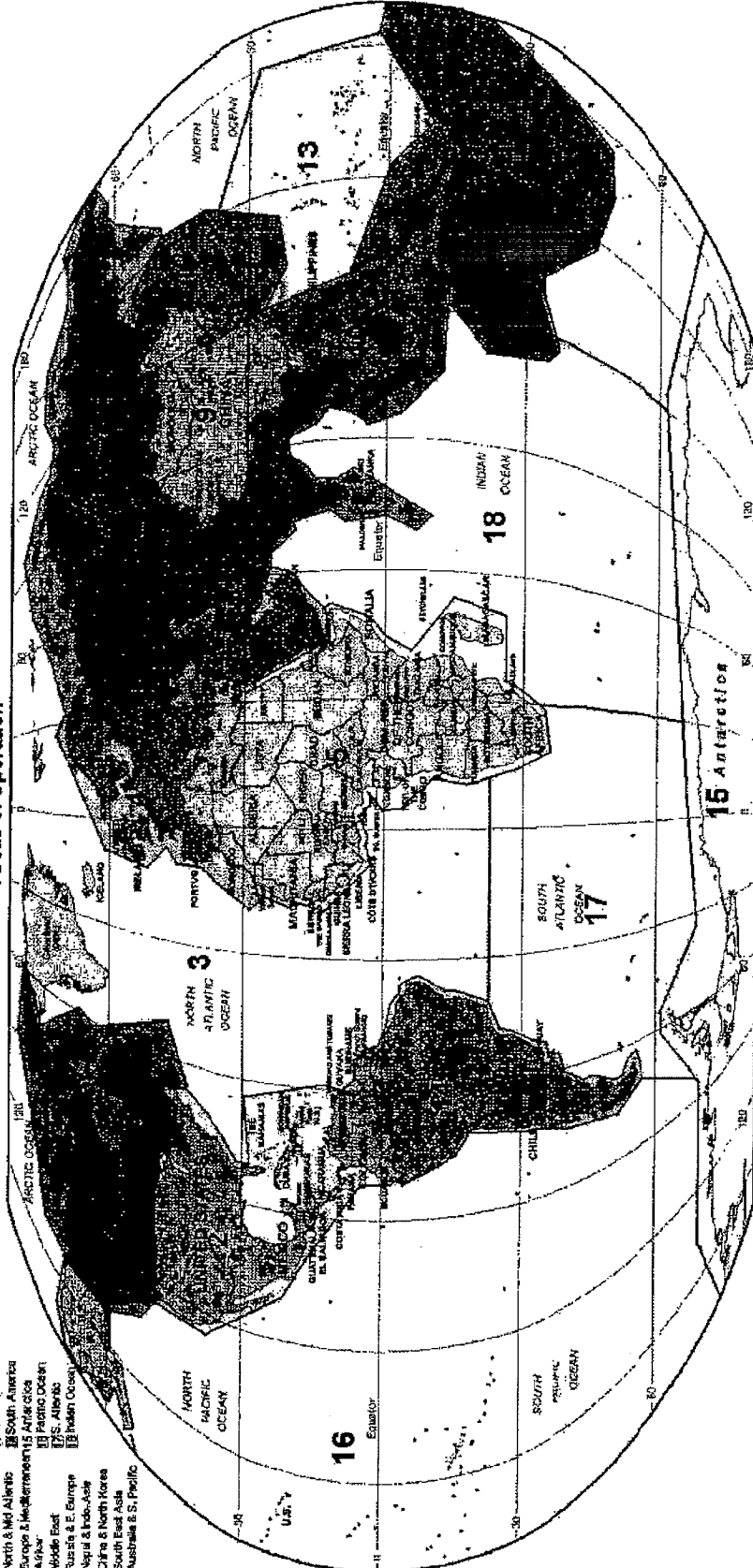
SCHEDULE 8
Arbitration Procedures

1. The arbitration shall be commenced by either party giving written notice to the other party of the Dispute and requesting agreement on the identity of an arbitrator.
2. The parties will agree on the appointment of an arbitrator who shall be independent from all parties.
3. If the parties are unable to agree upon an arbitrator within twenty (20) days of written notification of the Dispute, each party will appoint a person as arbitrator, and those two arbitrators will appoint a third arbitrator.
4. If one party refuses to appoint an arbitrator within twenty (20) days of the expiry of the period described in paragraph 3 then the arbitrator appointed by the other party shall be deemed to have been appointed on behalf of both parties.
5. The place of the arbitration will be Toronto, Ontario.
6. The parties may request that the arbitrator(s) decide between final and complete proposals submitted by each of the parties.
7. The decision of the arbitrator(s) with respect to the Dispute must be rendered, in writing and must contain a brief recital of the facts and principles upon which the decision was made and the reasons therefor.
8. The arbitration, including the existence of the Dispute, the submissions made by the parties, the evidence submitted, the hearing, any order or decision of the arbitrator(s) and the award, will be confidential and will not be disclosed by either party or the arbitrator(s) to any person without the prior written consent of both parties, except as required to enforce the award, as required by law, as required for disclosure to auditors or affiliated companies or as permitted by subsequent order of the arbitrator(s) made pursuant to a motion or application on notice to all parties.
9. The decision or award of the arbitrator(s) made pursuant to this Schedule is final and binding upon each of the parties and there is no appeal therefrom. After completion of the arbitration, an action may be initiated by the parties only for the purpose of enforcing the decision or award and the recovery of costs incidental to the action.
10. The decision or award of the arbitrator(s) will be conclusively deemed to determine the interpretation of this Agreement and the rights and liabilities as between the parties in respect of the Dispute.
11. Except as may be otherwise agreed by the parties, or as may be ordered by the arbitrator(s), the arbitrator(s) will be entitled to its or their usual charges for services rendered to be paid equally by the parties.

SCHEDULE 9

Areas of Operation

- Legend**
- Canada
 - Japan & South Korea
 - U.S. & Central America
 - Micronesia
 - North & West Africa
 - South America
 - Europe & Mediterranean
 - Africa
 - Middle East
 - Russia & E. Europe
 - Nepal & Ind.-Asia
 - China & North Korea
 - South East Asia
 - Australia & S. Pacific



Areas of Operation agreed between Lessor and Lessee: 4

DATED

MARCH

2005

**SKYSERVICE AIRLINES INC.
(AS LESSOR)**

- and -

**FIRST CHOICE AIRWAYS LIMITED
(AS LESSEE)**

AIRCRAFT EXTENDED CHARTER AGREEMENT

- for -

**ONE AIRBUS [B757/A320]
MANUFACTURER'S SERIAL NUMBER XXXX,
REGISTRATION MARKS XXXX/XXXX
(SUMMER SEASON)**

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**APPENDIX 3
DEFINITION OF COMPETITORS**

1. For the purposes of this Agreement, "Competitor" means:

(a) Any one or more of the following:

- (i) TUI AG
- (ii) Thomas Cook AG
- (iii) MyTravel Group plc
- (iv) Club Mediterranee
- (v) Kuoni Travel Holding Ltd
- (vi) Holidaybreak plc
- (vii) Transat A. T. Inc
- (viii) Westjet Airlines
- (ix) Go Go Travel
- (x) Apple Vacations
- (xi) Liberty Travel
- (xii) IAC (Expedia)
- (xiii) Cendant
- (xiv) Travelocity
- (xv) Yahoo
- (xvi) Google
- (xvii) Amadeus
- (xviii) Galileo
- (xix) Sabre
- (xx) Any corporation or group of Persons carrying on the business of air carriers, outbound tour operators or travel agents in Canada (other than Skyservice and its Affiliates at the date hereof).

together with any of their successors, and any of their Affiliates.

2. On or prior to each anniversary of the Commencement Date FCC shall request the addition to the list in paragraph 1 of any other Person that it reasonably and in good faith considers has acquired, directly or indirectly or as a result of one or more acquisitions at any time holds, 10 per cent or more of the total air carrier, outbound tour operator or travel agency market (as the case may be) in any of United Kingdom, Ireland, France, Germany, Spain, Scandinavia or Canada.

Skyservice shall, within 10 Business Days of request, notify FCC whether it agrees or, if it reasonably and in good faith considers no such market share has been acquired, disputes (by notice specifying the basis for the dispute) the addition.

If no notification is received or if Skyservice agrees the addition, such Person shall be deemed to have been included in the list in paragraph 1 from the date of request

**APPENDIX 4
ARBITRATION PROCEDURES**

1. The arbitration shall be commenced by either Party giving written notice to the other Parties of the Dispute and requesting agreement on the identity of an arbitrator.
2. The Parties will agree on the appointment of an arbitrator who shall be independent from all Parties.
3. If the Parties are unable to agree upon an arbitrator within twenty (20) days of written notification of the Dispute, each Party will appoint a person as arbitrator, and those two arbitrators will appoint a third arbitrator.
4. If one party refuses to appoint an arbitrator within twenty (20) days of the expiry of the period described in paragraph 3 then the arbitrator appointed by the other party shall be deemed to have been appointed on behalf of both parties.
5. The place of the arbitration will be Toronto, Ontario.
6. The Parties may agree that the arbitrator(s) decide between final and complete proposals submitted by each of the Parties
7. The decision of the arbitrator(s) with respect to the Dispute must be rendered, in writing and must contain a brief recital of the facts and principles upon which the decision was made and the reasons therefore.
8. The arbitration, including the existence of the Dispute, the submissions made by the Parties, the evidence submitted, the hearing, any order or decision of the arbitrator(s) and the award, will be confidential and will not be disclosed by any of the Parties or the arbitrator(s) to any person without the prior written consent of all of the Parties, except as required to enforce the award, as required by law, as required for disclosure to auditors or affiliated companies or as permitted by subsequent order of the arbitrator(s) made pursuant to a motion or application on notice to all Parties.
9. The decision or award of the arbitrator(s) made pursuant to this Appendix is final and binding upon each of the Parties and there is no appeal therefrom. After completion of the arbitration, an action may be initiated by the Parties only for the purpose of enforcing the decision or award and the recovery of costs incidental to the action.
9. The decision or award of the arbitrator(s) will be conclusively deemed to determine the interpretation of this Agreement and the rights and liabilities as between the Parties in respect of the Dispute.
10. Except as may be otherwise agreed by the Parties, or as may be ordered by the arbitrator(s), the arbitrator(s) will be entitled to its or their usual charges for services rendered to be paid equally by the Parties.

APPENDIX 5

SCHEDULE OF OPERATING COSTS

1. For the purposes of this Agreement, "Operating Costs" shall mean: all costs (including, but not restricted to) associated with operating the Aircraft and performing the Programme pursuant to that Charter Agreement (including the costs of positioning flights), as more particularly set out below:
 - a. Aircraft lease costs, including without limitation:
 - Rental
 - Maintenance reserves (to the extent that these are not recovered at the end of the lease term);
 - Insurance
 - Taxes and indemnities payable by Skyservice pursuant to the lease; and
 - All charges associated with the return of the Aircraft in accordance with the lease terms;
 - b. Aircraft maintenance and repair costs;
 - c. Fuel and oil costs;
 - d. Ground handling costs, including without limitation:
 - Aircraft, passenger, baggage and cargo handling
 - De-icing
 - Aircraft cleaning and catering
 - Security;
 - e. Airport, government and navigation fees; and
 - f. Flight and cabin crew salaries and expenses.; and
 - g. Irregular operations, welfare costs and sub-chartering of replacement aircraft (irregular operations and subservice)

Any costs or charges falling within the categories set out above shall not be considered to be Operating Costs to the extent that they are incurred by Skyservice as a result of the Gross Negligence or wilful misconduct of Skyservice or to a breach by Skyservice of its obligations pursuant to a lease.

APPENDIX 6

SCHEDULE OF QUALIFYING OVERHEADS

The Overhead Charge shall consist of charges in respect of the following line items only:

Finance
Executive Administration
Legal Administration
Human Resources
Safety Management System
Commercial Planning & Sales
Project Management Office
Distribution
QA Flight Operations
Ground Operations
Crew Scheduling
Travel Services
Dispatch and Operations
Operational Safety
All Airports Administration
Management Information Services
Telecommunications
Customer Relations
Facilities
Bath Road Training Center
Amortization in accordance with IAS GAAP

Any one-off or exceptional costs falling within the categories described above, projected to be incurred in the Holiday Year 2006/7 or any subsequent Holiday Year in which the Overhead Charge is to be recalculated pursuant to Clause 6.2.2, shall be excluded from the cumulative Overhead Costs.

APPENDIX 7

PROFIT CHARGE CALCULATION

In respect of any Holiday Year that there are (A) the number of Year-Round Aircraft specified in Column 1 and (B) the number of Seasonal Aircraft specified in Column 2 of the table in this Appendix 7 the applicable Profit Charge per Aircraft per month shall be that set out in Column 3 of the Table. The amounts set out in the table have been calculated by calculating the blended and weighted average of the underlying rates agreed between the parties in respect of any Holiday Year of

- First Three Year-Round Aircraft in any Holiday Year:
- Fourth and subsequent Year-Round Aircraft in any Holiday Year:
- First Seasonal Aircraft:
- Second Seasonal Aircraft:
- Third and subsequent Seasonal Aircraft:



The Profit charges set out in the table below shall be subject to escalation on each anniversary of the Commencement date by a percentage amount equal to the percentage increase (if any) in the Consumer Price Index.

In the event that there are more Year-Round Aircraft or more Seasonal Aircraft in any Holiday Year than contemplated by the table in this Appendix 7 then the applicable Profit Charge per Aircraft Month shall be calculated by extending the table on the principle set out above and in accordance with the formula below to the extent necessary to contemplate the relevant numbers and mix of Year-Round or Seasonal Aircraft for that Holiday Year.

| No. of Year-Round Aircraft | No. of Seasonal Aircraft | Profit Charge Cdn\$ |
|----------------------------|--------------------------|---------------------|
| 3 | 2 | |
| 3 | 3 | |
| 3 | 4 | |
| 3 | 5 | |
| 3 | 6 | |
| | | |
| 4 | 2 | |
| 4 | 3 | |
| 4 | 4 | |
| 4 | 5 | |
| 4 | 6 | |
| | | |
| 5 | 2 | |
| 5 | 3 | |
| 5 | 4 | |
| 5 | 5 | |
| 5 | 6 | |
| | | |
| 6 | 2 | |
| 6 | 3 | |
| 6 | 4 | |
| 6 | 5 | |
| 6 | 6 | |

The amounts set out column 3 above are calculated on the assumptions that (A) the Charter Agreements relating to the Seasonal Aircraft have an average term of 4.5 months and (B) each Charter Agreement for a Year-Round Aircraft starts on the commencement of a Holiday Year and terminates at the end of that Holiday Year. In the event that it is determined at the end of any relevant Holiday Year that either of the foregoing assumptions has proved to be incorrect then the applicable Profit Charge per aircraft month for the Holiday Year shall be adjusted in accordance with the formula set out below and that if (i) as a result of such adjustment the amount paid in respect of profit charges under the Charter Agreements during the Holiday Year to date exceeds the amount that would have been paid by applying the adjusted Profit Charge to the Aircraft Months then Skyservice shall pay the excess to FCC forty five (45) days or (ii) as a result of such adjustment the amount paid in respect of Profit Charges under the Charter Agreements during the Holiday Year to date is less than that which would have been paid using the adjusted rate FCC shall pay the shortfall to Skyservice within forty five (45) days of the receipt of an invoice for the same (the excess or shortfall as the case may be being an "Adjustment Payment")

$$X = \frac{(A \times B) + (C \times D)}{E}$$

Where

X is the applicable Profit charge

A is the blended and weighted¹ average rate of profit charge applicable to the number of Year-Round Aircraft operated during the Holiday Year

B is the total number of Aircraft Months of Year-Round Aircraft in that Holiday Year

C is the blended average rate of profit charge applicable to Seasonal Aircraft

D is the total number of Aircraft Months for Seasonal Aircraft in that Holiday Year

E is the total number of Aircraft Months for that Holiday Year (being the sum of B and D).

The Parties have agreed that the minimum average duration of each Charter Agreement relating to Seasonal Aircraft will be 4.5 months there will therefore be no adjustment to the charges set out above if for any season the average duration of Charter Agreements relating to Seasonal Aircraft is less than 4.5 months.

Worked Example - for illustration purposes only

At the commencement of a Holiday Year it is projected that the average duration of the 3 charter agreements relating to Seasonal Aircraft shall be 4.5 months and that there shall be 4 Year-Round Aircraft producing a profit charge per aircraft month for that Holiday Year of [REDACTED]. At the end of the Holiday Year it is (i) determined that the average duration of charter agreements relating to Seasonal Aircraft has in fact been 4.8 months and (ii) the parties agree that a 5th Year-Round Aircraft was added with effect from 1st May in that Holiday Year. The following calculation shall be made.

$$X = \frac{[REDACTED] + (85 \times 14.4)}{68.4}$$

Produce an X value of [REDACTED]

¹ See worked example for explanation of blended and weighted

Producing an adjustment payment of Cdn\$165,648 due to FCC from Skyservice at the end of the Holiday Year.

NB: the calculation of AxB has two elements to produce the weighted blended rate as the blended rate for Year-Round Aircraft applicable in this holiday year has changed mid-year. The 4 Year-Round Aircraft blended rate $((75+75+75+50)/4 = 68.75)$ is applicable to the winter season during which there were 24 aircraft month and the 5 yr round aircraft blended rate $((75+75+75+50+50) / 5 = 65)$ is applicable to the summer season during which there were 30 aircraft months

i.e. $AxB = (68.75 \times 24) + (65 \times 30)$.

**APPENDIX 8
CHARTER FEE**

Tariff

The Tariff under each Charter Agreement shall be calculated on the following basis. The Charter Fee shall be an amount equal to the quotient of:

(A) the sum of (i) the applicable Profit Charge determined in accordance with Clause 7, *pro-rated* daily for the Term; (ii) all projected Operating Costs associated with operating the relevant Aircraft and performing the part of the Programme applicable to that Aircraft in accordance with the budget for the relevant Holiday Year agreed in accordance with Clause 11 and (iii) the Overhead Charge determined in accordance with Clause 6.2.

Without limiting the generality of the foregoing, the amounts payable pursuant to (ii) shall include, without limitation, the following:

- The relevant Aircraft lease costs (including without limitation Taxes and indemnity obligations (including currency indemnity) pursuant to the Lease Agreement, return of the Aircraft in accordance with the Lease Agreement, and costs associated with enforcement of warranties relating to the Aircraft)
- Fuel and oil
- Maintenance and Repair
- Aircraft, passenger, baggage and cargo handling, Airport and Government Fees
- Catering and Commissary
- De-Icing
- Navigation Fees
- Flight Crew and Cabin Crew Salaries and Expenses
- Administration
- Aircraft Positioning Expenses
- Security
- Insurance
- Irregular Ops and subservice

divided by:

- (B) the Seat Miles planned by FCC for the applicable Holiday Year, subject always to the Minimum Seat Mile Guarantee.

**APPENDIX 9
BONUS STRUCTURE**

(A) In relation to any Holiday Year in which the total unit costs in respect of Operating Costs for the Holiday Year are less than or equal to the total projected unit costs in respect of Operating Costs in the Budget for that Holiday Year, in addition to the Charter Fee payments in respect of such Holiday Year FCC shall pay to SSV the sum of [REDACTED]

For the purposes of making the calculations in this paragraph (A), a) amounts in relation to fuel shall be removed for the bonus calculation b) any costs attributable to iROPs will be removed for the bonus calculation and c) accrual releases must be added back in.

(B) In relation to any Holiday Year in which the aggregate of the total unit costs in respect of Controllable Operating Costs are less than the projected aggregate total unit costs in respect of Controllable Operating Costs in the Budget for that Holiday Year, in addition to the Charter Fee payments in respect of such Holiday Year and any payment that may be made pursuant to paragraph (A) FCC shall pay to SSV an amount equal [REDACTED] of the amount (if any) by which the aggregate of the Controllable Operating Costs in the relevant Holiday Year are less than the projected aggregate Controllable Operating Costs for such Holiday Year as set out in the Budget for that Holiday Year.

For the purposes of making the calculations in this paragraph (B), a) any costs attributable to iROPs will be removed for the bonus calculation and b) accrual releases must be added back in.

The parties agree that only the following line items from the Operating Cost line items shall be "Controllable Operating Costs" for the purposes of this Appendix 9.

- Cabin Crew Salaries and Expense
- Crew Movements
- Catering and Commissary
- Non-contracted Repair and Overhaul
- Inflight Sales
- Miscellaneous Revenue
- Ground Handling & Airport Fees
- Line Maintenance
- Line Maintenance recovery
- Hangar 6 and 6A
- Insurance
- Pilot Salaries and Expenses
- Aircraft Delivery Expenses
- Adhoc Sales

TAB 6

Written Questions for Receiver

- 1. What is the total amount of allowed secured and unsecured claims as of this date? What is the total amount of claims that remain undetermined, other than the Sunwing claim?**

The Receiver (capitalized terms as defined in the Tenth Report of the Receiver) continues to review and adjudicate the outstanding secured and unsecured claims filed in accordance with the Skyservice claims procedure (the "Claims Procedure"), including certain alleged trust and property claims. Many of the claims that have been submitted are complex and require significant accounting and legal analysis. In addition, a number of the claims were filed without providing sufficient information or supporting evidence. After reviewing such claims the Receiver identified missing information and has either disallowed such claims or followed up with many of these claimants to request the information required for the Receiver to adjudicate these claims. The Receiver has reviewed and continues to review the additional information and evidence when provided. The Receiver has also undertaken its own inquiries of former Skyservice personnel and a review of Skyservice information and documentation as required to respond to certain claims. For all of these reasons, adjudication of claims has been time consuming and remains ongoing. Based on the current information, however, which is subject to change as claims are resolved and/or adjudicated, the total amount of allowed secured and unsecured claims and the total claims that remain undetermined are set out in the attached Schedule A.

- 2. What are the estimated cent/dollar realizations for creditors if Sunwing's trust motion is successful?**
- 3. What are the estimated cent/dollar realizations for creditors if Sunwing's trust motion is unsuccessful?**

At this stage, it is difficult to provide an answer to questions #2 and #3 with any degree of accuracy. Accordingly, the Receiver has prepared a schedule of four different scenarios based on the current information, including that there remain a number of claims that have not been resolved and/or adjudicated, as set out above, such that the size of the claims and amount available for distribution may vary significantly. Please see the attached Schedule B.

- 4. Who are Skyservice's 10 biggest creditors, what is the amount of each of these creditors' claims, and what percentage of the total claims do each of these creditors represent?**

Since not all of the claims filed in accordance with the Claims Procedure have been resolved and/or adjudicated, there has not been a final determination of Skyservice's 10 biggest creditors. Attached at Schedule C is a list of the claimants with the 10 biggest claims whose claims have been accepted to date and the claimants with the 10 biggest claims whose claims remain unadjudicated.

- 5. Were any advance payments scheduled to be made to Skyservice by any party other than Sunwing for charter flight services or other services scheduled to be provided on or after March 31, 2010? If so, who were they? Were any advance payments received by Skyservice from any parties other than Sunwing in the two weeks prior to March 31, 2010 for charter flight services scheduled to be provided on or after March 31, 2010? If so, what were the dates of the related invoices, dates of payment(s) and who made the payment(s)? What happened to those payments?**

As set out in the Receiver's Tenth Report, Skyservice employees identified four separate amounts that related entirely to future flying that Skyservice was contracted to perform. In addition to Sunwing, the parties and relevant details are as follows:

- Canag Travel: \$270,000 was received by Skyservice from Canag Travel via three separate payments received on February 4, 2010, February 24, 2010 and March 10, 2010, respectively;
- RN International Travel: \$15,000 was received by Skyservice from RN International Travel on March 4, 2010; and
- Canadian Broomball Association: \$117,329.76 was received by Skyservice from Canadian Broomball Association on March 29, 2010.

In each case, these amounts were transferred from the Skyservice Canadian General Account to the In-Flight Collections Account and no portion has been distributed to those third parties to date. The Receiver is not aware of any other payments received (or, subject to the discussion below, scheduled to be received) by Skyservice in the two weeks prior to March 31, 2010 that related to flying to be provided on or after March 31, 2010.

- 6. In particular, was Thomas Cook scheduled in the month prior to March 31, 2010 to provide any advance payments to Skyservice for flights after March 31, 2010, pursuant to Charter Agreements, Charter Transportation Agreements, or otherwise? If so, were such payments made? If such payments were scheduled but were not made, why not? What is the date of the last payment made by Thomas Cook to Skyservice with respect to charter flight services? What flights were related to these payments? Were changes made to the scheduled payments as a result of the cancellation of flights scheduled after March 31, 2010?**

To the best of the Receiver's knowledge, in February 2010 Thomas Cook did have some limited flights scheduled to take place in April 2010 and the charter tariff payments for those flights would have been due approximately seven days prior to the flights. However, the schedule was revised in or about February, 2010 such that no April flying was scheduled and therefore no charter tariff payments were due after March 23, 2010. The last charter tariff payment was made by Thomas Cook on March 23, 2010 in respect of flights to occur after that date and up to March 30, 2010. The Receiver understands that the March 23, 2010 invoice issued by Skyservice included amounts calculated with reference to flights previously scheduled for April, 2010, that the full invoice was paid by

Thomas Cook, and that Skyservice corrected the invoice on March 25, 2010 by the issuance of a credit note to Thomas Cook. The Receiver understands that no cash was paid by Skyservice to Thomas Cook in relation to that credit note.

- 7. The affidavit of Karim Nensi sworn March 31, 2010 states at paragraph 31 that Skyservice and Thomas Cook agreed to enter into the First Amending Agreement to the Credit Agreement dated March 12, 2010 in order to adjust the tariff payable by Thomas Cook to Skyservice “to reflect a change in the flight schedule”. Was the “change in the flight schedule” referred to in the affidavit a cancellation of all flights subsequent to March 31, 2010? Please produce a copy of the schedule to First Amending Agreement to the Credit Agreement dated March 12, 2010 and any correspondence between Skyservice and Thomas Cook regarding the reasons for these changes. Is there any other record of an agreement or arrangement to cancel flights for Thomas Cook subsequent to March 31, 2010, and when was such agreement or arrangement made?**

Given the confidentiality provisions in the contractual arrangements between Thomas Cook and Skyservice, the Receiver wrote to Thomas Cook to determine if Thomas Cook had any objection to the Receiver producing the requested schedule to Sunwing. Thomas Cook’s counsel advised that the requested schedule - Exhibit ‘1’ to the First Amending Agreement - replaced Schedule ‘C’ of the February 12, 2010 Amended and Restated Agreement (also attached to the Karim Nensi March 31, 2010 affidavit) and that, in each case, the schedule in question was not disclosed because it references commercially sensitive information, which information Thomas Cook’s counsel asserts continues to be commercially sensitive. For this reason, Thomas Cook has objected to the Receiver providing a copy of the schedule. However, Thomas Cook does not object to the disclosure of the scheduled payment dates under both schedules provided that no information is disclosed regarding the quantum of such payments. Accordingly, please find attached as Schedule D a list of the scheduled payment dates under both schedules.

The Receiver did not participate in drafting or negotiating the amending agreement. As set out above, the Receiver understands that the Thomas Cook Flight schedule was revised in or about February, 2010 such that no Thomas Cook flights were scheduled for April, 2010. The Receiver is not aware of any correspondence or written agreements that reflect that change to, or that outline the reasons for, the Thomas Cook flight schedule in relation to flights previously scheduled for dates after March 31, 2010.

- 8. It appears that preparations for the appointment of a Receiver by Thomas Cook commenced at least as early as March 9, 2010. What is the earliest date on which Skyservice management knew of the impending receivership? What documentation evidences this? Please provide copies of such documents.**

The Receiver cannot speak definitively to knowledge held by Skyservice management prior to the receivership. However, it is the Receiver’s understanding that the receivership remained only one of several possibilities right up to the Date of Receivership or shortly before, with Skyservice attempting to negotiate alternatives to the receivership.

- 9. Aside from knowledge of the fact of a receivership, when was Skyservice management aware that there was a risk that Skyservice would not be continuing to operate and providing flights after March 31, 2010?**

See above.

- 10. At paragraph 93 of the Receiver's Tenth Report, it is indicated that the Receiver sought to obtain evidence of parties as to their recollection of why certain funds were isolated. Who decided to and who gave the instructions to segregate the funds? Who advised the Receiver that the funds were transferred (1) out of an abundance of caution, and (2) because they related solely to future flying and should therefore have been refundable? Is there any documentation of these responses? Please provide names and contact information.**

Paragraph 93 of the Receiver's Tenth Report states:

93. The Receiver further sought to obtain evidence of parties as to their recollection of why the funds were isolated. Various rationales were provided -the funds were transferred to another account out of an abundance of caution, they were transferred to ensure the funds were protected from misuse or misappropriation, and they were transferred because they related solely to future flying and should therefore have been refundable (although note this latter view does not appear to coincide with the operation of the Agreements as described above). Rob Giguere, a former Skyservice principal who was involved at the time the funds were moved to the In-Flight Collections Account, informed the Receiver that these funds were transferred to keep track of the funds as they were not certain if there would be a receivership (and any associated timing) and there was never any intention on the part of Skyservice to create a trust. Mr. Giguere further advised that they had created trusts for other monies at the same time, understood the difference between establishing a trust and simply transferring the funds to a different account (recognizing that by moving the funds to a different account rather than creating a trust, the funds remained in the control of Skyservice to be used by Skyservice, without restriction), and made a decision to not create a trust with these funds. The Receiver confirms there were trusts created by Skyservice in favour of Skyservice employees, the Worker's Compensation Board of Manitoba, and the Receiver General of Canada (in relation to an Air Traveller's Security Charge) as well as a trust in relation to a Key Employee Retention Plan. Each such trust was established at around the time the funds were transferred, which trusts were documented and which trust funds were held in a trust account with external legal counsel.

The Receiver understands from Rob Giguere, the President of Skyservice from October 17th, 2007 to March 31, 2010, that he and his management team were of the view that it would be prudent to keep track of the funds received by Skyservice that related entirely to future flying that Skyservice was contracted to perform. According to Mr. Giguere, in order to keep track of these funds, the Skyservice accounting staff (Barb Syrek & Percy Gyara) were instructed: a) to identify payments that had been made to Skyservice that related entirely to future flying that Skyservice was contracted to perform; and b) to

transfer any such amounts to a separate Skyservice account so Skyservice could keep track of those funds.

Mr. Giguere is also the source of the information set out in paragraph 93 of the Receiver's Tenth Report that the funds were transferred to another account out of an abundance of caution and they were transferred to ensure the funds were protected from misuse or misappropriation. The Receiver notes that, in response to the request by Sunwing, the Receiver asked Mr. Giguere to swear an affidavit setting out these points. While the Receiver understood that Mr. Giguere had agreed to do so, the Receiver has been unable to contact Mr. Giguere in recent weeks to finalize the swearing of the affidavit. Accordingly, we are attaching, at Schedule E, copies of the e-mails from Mr. Giguere, or relevant excerpts therefrom, confirming his statements and agreement with the language set out in the Receiver's Tenth Report. Should Sunwing wish to seek to examine Mr. Giguere as a witness in this matter, the Receiver is willing to cooperate in attempts to contact Mr. Giguere, noting of course that Mr. Giguere is no longer employed by Skyservice, not retained or employed by the Receiver and not under the Receiver's control or direction.

The source of the information that the funds were transferred because they related solely to future flying and should therefore have been refundable was provided to the Receiver by Graham Bailey, who was the Skyservice CFO prior to the receivership. Mr. Bailey provided this statement to the Receiver in a written memorandum requested in contemplation of this litigation. Without waiving any privilege relating thereto, the relevant portion of the memorandum stated as follows: "The rationale [sic] for isolating these amounts was that no part of the deposits would have been consumed in preparation for future flying and should therefore have been refundable in their entirety." As noted in the Receiver's Tenth Report, this view does not appear to coincide with the operation of the Agreements. The Receiver does not have Mr. Bailey's current contact details.

11. Is there any record that Skyservice made Sunwing aware of its financial difficulties or that it might not have financing to continue operations after March 31, 2010?

Skyservice commenced an application against Sunwing in 2009 in which Skyservice made clear that its continued existence was threatened by the proposed amalgamation of First Choice Canada Inc. with a subsidiary of Sunwing Travel Inc., which amalgamation was ultimately completed. For instance, in the affidavit of Robert Giguere, sworn on December 14, 2009, in relation to the application, Mr. Giguere stated as follows at paragraph 33:

"Skyservice's business model is dependent on its relationship with tour operators. In point of fact, Skyservice has only two main clients, Thomas Cook and First Choice, representing 47% and 44%, respectively, of Skyservice's total revenues. If First Choice is able to consummate the transaction with Sunwing Travel without Skyservice's consent, the result will be the loss of a significant portion of Skyservice's business, thus ultimately threatening Skyservice's continued existence."

Schedule A – Current Secured and Unsecured Claims

CAD \$000's

| Claim Adjudication Summary | Number | Value |
|-----------------------------------|---------------|----------------------|
| Secured/Trust/Property: | | |
| Accepted | 14 | \$ 110.68 |
| Under Review ² | 3 | 37,095.19 |
| | <u>17</u> | <u>37,206</u> |
| Unsecured: | | |
| Accepted | 1,081 | 11,784.25 |
| Under Review | 23 | 52,230.75 |
| | <u>1,104</u> | <u>64,015</u> |
| Total^{1,3} | 1,121 | \$ 101,220.87 |

¹ Former employee claims have been separated out from their union and association groupings and into individual claims

² In the event that a claim was submitted as both secured and unsecured, the amounts have been presented in the Secured/Trust/Property claim category only to avoid duplication of claimed amounts.

³ Skypac marker claim not included

Schedule B – Possible Distribution Scenarios

| Scenario | 1a | 1b |
|--|----------|----------|
| CAD \$000's | | |
| Distribution Range Estimate | Min | Max |
| Estate Funds ² | \$ 8,801 | \$ 8,801 |
| Completion Cost (Est.) ³ | 1,000 | 500 |
| Funds Available to Secureds ⁴ | 7,801 | 8,301 |
| Secured/Trust/Property: ⁵ | | |
| Accepted | 111 | 111 |
| Under Review | 37,095 | - |
| | 37,206 | 111 |
| Distributions to Secureds(%) | 21% | 100% |
| Funds Available to Unsecureds | - | 8,190 |
| Unsecured: | | |
| Accepted | 11,784 | 11,784 |
| Under Review ⁶ | 52,231 | 14,786 |
| | 64,015 | 26,570 |
| Distributions to Unsecureds(%) | 0% | 31% |

- ¹ Excludes potential payments from Trust and any potential additional realizations that are not quantifiable at this time.
- ² Includes \$47K transferred to a segregated estate account from the Trust for potential distributions.
- ³ Actual costs could be greater than or lower than estimate range.
- ⁴ Additional realizations could have a positive impact on distributions.
- ⁵ Relative security amongst the secured/trust/property claims has yet to be assessed.
- ⁶ SkyPAC marker claim not included

Scenario Assumption Legend:

| Scenario 1a | Per Creditor | Per Receiver |
|-------------------|--------------|--------------|
| Priority of claim | ✓ | |
| Quantum of claim | ✓ | |

| Scenario 1b | Per Creditor | Per Receiver |
|-------------------|--------------|--------------|
| Priority of claim | ✓ | |
| Quantum of claim | | ✓ |

| Scenario | 2a | 2b |
|--|----------|----------|
| CAD \$000's | | |
| Distribution Range Estimate | Min | Max |
| Estate Funds ² | \$ 8,801 | \$ 8,801 |
| Completion Cost (Est.) ³ | 1,000 | 500 |
| Funds Available to Secureds ⁴ | 7,801 | 8,301 |
| Secured/Trust/Property: ⁵ | | |
| Accepted | 111 | 111 |
| Under Review | - | - |
| | 111 | 111 |
| Distributions to Secureds(%) | 100% | 100% |
| Funds Available to Unsecureds | 7,690 | 8,190 |
| Unsecured: | | |
| Accepted | 11,784 | 11,784 |
| Under Review ⁶ | 89,326 | 14,786 |
| | 101,110 | 26,570 |
| Distributions to Unsecureds(%) | 8% | 31% |

- ¹ Excludes potential payments from Trust and any potential additional realizations that are not quantifiable at this time.
- ² Includes \$47K transferred to a segregated estate account from the Trust for potential distributions.
- ³ Actual costs could be greater than or lower than estimate range.
- ⁴ Additional realizations could have a positive impact on distributions.
- ⁵ Relative security amongst the secured/trust/property claims has yet to be assessed.
- ⁶ SkyPAC marker claim not included

| Scenario 2a | Per Creditor | Per Receiver |
|-------------------|--------------|--------------|
| Priority of claim | | ✓ |
| Quantum of claim | ✓ | |

| Scenario 2b | Per Creditor | Per Receiver |
|-------------------|--------------|--------------|
| Priority of claim | | ✓ |
| Quantum of claim | | ✓ |

Schedule C - Claimants

Top Ten Claims In Dispute

Receivership of Skyservice Airlines Inc.

| Name of Claimant | Amount Claimed ¹ | Accepted To Date ² | Disallowed and Agreed | To Be Determined |
|--|-----------------------------|-------------------------------|-----------------------|------------------|
| 1 Thomas Cook Canada Inc. | \$ 42,508,772.99 | \$ - | \$ - | \$ 42,508,772.99 |
| 2 Sunwing Tours Inc. c/o Blake, Cassels & Graydon LLP | \$ 20,984,609.53 | \$ - | \$ - | \$ 20,984,609.53 |
| 3 International Lease Finance Corporation | \$ 12,321,223.10 | \$ - | \$ - | \$ 12,321,223.10 |
| 4 Thomson Airways Limited c/o Blake, Cassels & Graydon LLP | \$ 11,631,509.14 | \$ - | \$ - | \$ 11,631,509.14 |
| 5 MCAP Europe Limited | \$ 5,383,115.96 | \$ 650,044.72 | \$ - | \$ 4,733,071.24 |
| 6 Thomas Cook Airlines Limited and subsidiary companies | \$ 3,510,047.40 | \$ - | \$ - | \$ 3,510,047.40 |
| 7 IAI V, Inc. | \$ 1,719,675.91 | \$ 91,232.34 | \$ - | \$ 1,731,830.43 |
| 8 CIT Leasing Corporation | \$ 2,041,759.88 | \$ 237,434.90 | \$ 1,759,019.54 | \$ 45,305.44 |
| 9 Robert Read | \$ 257,674.42 | \$ 165,997.27 | \$ - | \$ 257,674.42 |
| 10 Thomas Cook Airlines Scandinavia A/S | \$ 154,696.19 | \$ - | \$ - | \$ 154,696.19 |

¹ Total amount of claims do not include duplicated amounts (ie. claims made as secured and as unsecured)

² Amounts accepted by the Receiver may still be in dispute by the Claimant

Top Ten Accepted and Agreed to Claims

Receivership of Skyservice Airlines Inc.

| Name of Claimant | Amount Claimed | Accepted and Agreed |
|--------------------------------------|------------------|---------------------|
| 1 Robert G. Giguere | \$ 941,260.51 | \$ 702,043.00 |
| 2 SITA INC NV | \$ 11,095,609.25 | \$ 633,296.34 |
| 3 Servisair Inc. | \$ 586,701.27 | \$ 582,726.97 |
| 4 XL Airways France SA | \$ 566,704.80 | \$ 566,704.80 |
| 5 DINERS CLUB INTERNATIONAL | \$ 401,526.14 | \$ 336,788.51 |
| 6 Air Canada | \$ 290,783.09 | \$ 275,741.97 |
| 7 CanAg Travel Services Ltd | \$ 252,924.12 | \$ 252,657.74 |
| 8 Air Transat A.T. Inc. ¹ | \$ 249,634.13 | \$ 238,249.13 |
| 9 Sun Life Financial | \$ 250,606.92 | \$ 237,327.41 |
| 10 Dryden Air Services | \$ 247,154.57 | \$ 229,285.77 |

¹ Set off to claim still in dispute

Schedule D – Thomas Cook Scheduled Payment Dates

Payment schedule from the First Amending Agreement to the Credit Agreement, dated as of March 12, 2010 – Exhibit 1 – Agreed Payments

- Tue Feb 16
- Tue Feb 23
- Tue Mar 09
- Tue Mar 16
- Tue Mar 23

Payment schedule from the Amended and Restated Credit Agreement dated February 12, 2010, Schedule “C” – Agreed Payments

- Tue Feb 16
- Tue Feb 23
- Tue Mar 02
- Tue Mar 09
- Tue Mar 16
- Tue Mar 23

Schedule E – Giguere E-mails

-----Original Message-----

From: robertgiguere@rogers.com [mailto:robertgiguere@rogers.com]
Sent: Friday, June 25, 2010 7:52 AM
To: Engen, Jamie
Cc: Sabah Mirza
Subject: Signature Deposits

Jamie,

Signature (and all others) paid their deposits into our general accounts.

There was NO segregation or trust contemplated. This was the same for all customers.

The monies were paid out of general funds for almost all items with no breakdown or specific allocation; Nav Fees, Ground Handling, Overheads, Hangar costs, Labour including Pilot, Mntc and Cabin. Crew, Catering, etc etc.

These items were then reconciled at a much later date (months) to break down costs between customers based on formulas related to aircraft months or seat miles actually flown.

At time of payment the only items I can think of that were paid for specifically allocated to a customer might be aircraft leases that were paid generally the 1st of every month.

I wouldn't accept any argument that these funds were trust accounts put aside for a specific purpose.

If you need more let me know.

Rob.

Sent from my BlackBerry device on the Rogers Wireless Network

From: ROBERT GIGUERE [mailto:robertgiguere@rogers.com]
Sent: Thursday, July 29, 2010 8:55 PM
To: Engen, Jamie
Subject: Re: Sunwing Expenses

Jamie,

I have reviewed the document. From my perspective it is very well written, completely accurate and correctly reflects our practice in regard to our relationship with Signature/Sunwing.

I have no recommendations for revisions in style or accuracy. Excellent points throughout which capture the essence of the business relationship and day to day practice.

Rob

From: "Engen, Jamie" <Jamie.Engen@fticonsulting.com>
To: robertgiguere@rogers.com
Sent: Thu, July 29, 2010 11:09:24 AM
Subject: RE: Sunwing Expenses

Thanks

Could you read through this report for accuracy.

Thanks

Jamie

From: robertgiguere@rogers.com [mailto:robertgiguere@rogers.com]
Sent: Tuesday, December 07, 2010 10:57 AM
To: Engen, Jamie
Subject: Re: Separate Funds

Jamie.

Your understanding is correct.

A trust was created for some funds however these deposits were isolated for tracking as we were not certain of timelines with the receivership.

Rob.

Sent from my BlackBerry device on the Rogers Wireless Network

From: "Engen, Jamie" <Jamie.Engen@fticonsulting.com>
Date: Tue, 7 Dec 2010 13:14:18 -0500
To: <robertgiguere@rogers.com>
Subject: Separate Funds

Rob,

Following up on our phone conversation. I understand that the Sunwing funds for flights that were to have taken place after the receivership were moved into a separate account, along with three other deposits for flying that had not taken place. This was done so that you could keep track of those monies separately, but it was not your intention to create a trust. As you were creating trusts for other monies you understood the difference and made a decision to not create a trust with these funds.

Please let me know if my understanding is accurate.

Thanks,

Jamie T. Engen
Managing Director
FTI Consulting
604.673.6025 direct
604.417.7375 cell
604.696.5571 fax
Jamie.Engen@fticonsulting.com

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