C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Commercial Division)

NO: 500-11-042345-120

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./AVEOS PERFORMANCE AÉRONAUTIQUE

-and-

AERO TECHNICAL US, INC.

Debtors/Respondents

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

AIR CANADA

Petitioner

-and-

CRÉDIT SUISSE AG., CAYMAN ISLANDS BRANCH, as Administrative Agent

Intervening party

CONTESTATION TO PETITIONER'S *DE BENE ESSE* MOTION FOR AN ORDER LIFTING THE STAY OF PROCEEDINGS TO CONFIRM THE TERMINATION OF CERTAIN CONTRACTS

TO THE HONOURABLE JUSTICE MARK SHRAGER, J.S.C., OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN THE COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE INTERVENING PARTY, CRÉDIT SUISSE AG. CAYMAN ISLANDS BRANCH, AS ADMINISTRATIVE AGENT, IN CONTESTATION TO PETITIONER'S MOTION STATES AS FOLLOWS:

1. It admits paragraphs 1 to 4 of the Petitioners' *de bene esse* Motion for an Order lifting the stay of proceedings to confirm the termination of certain contracts (the "**Motion**");

2. With regards to the paragraph 5 of the Motion, it refers to the *Order Approving the Divestiture Process* and prays act of the admission of Air Canada that they are ready, willing and able to cooperate and work collaboratively with the potential MRO providers while pointing out that this position is not consistent with the request made by Air Canada to terminate the existent agreements between Air Canada and Aveos Fleet Performance Inc. ("**Aveos**");

3. It ignores paragraphs 6 and 7 of the Motion while adding that, during his examination, the affiant who executed the affidavit in support of the Motion, clearly stated that, in the weeks preceding Aveos filing, Air Canada deferred sending maintenance work to Aveos since Air Canada had been informed of the financial problems that Aveos was then experiencing [Examination by attorney for Aveos, q. 45-48, 68-69];

4. It admits paragraphs 8 and 9 of the Motion other than it is unable to state what maintenance work is critical to the operations of Air Canada;

5. It denies paragraph 10 of the Motion, and further adds that, in light on the ongoing *Divestiture Process*, it is both inappropriate and premature for Air Canada to attempt to terminate the agreements which govern its relationship with Aveos;

6. With regards to paragraph 11 of the Motion, it admits that Air Canada seeks an order lifting the stay of proceedings but denies the fact that the *General Terms Agreement for Technical Services* would have been terminated prior to the filing of the Motion;

7. With respect to paragraph 12 of the Motion, it refers to exhibits P-2 and P-4, denying any and all allegations which are not in strict conformity therewith;

8. With regards to paragraph 13 of the Motion, it refers to exhibits P-6, P-8 and P-9, and denies any and all allegations which are not in strict conformity therewith;

9. With respect to paragraph 14 of the Motion, it refers to exhibits P-5 and P-7 and denies any and all allegations which are not in strict conformity therewith;

10. With regards to paragraph 15 of the Motion, it refers to the GTA (Exhibit P-1) and denies any and all allegations which are not in conformity therewith;

11. It admits paragraph 16 of the Motion;

12. It denies paragraph 17 of the Motion as drafted, as there is no evidence that one or more purchasers will not emerge from the *Divestiture Process* who will be in a position to provide to Air Canada the services that were formerly provided to it by Aveos;

13. It admits paragraphs 18 and 19 of the Motion;

14. It denies paragraph 20 of the Motion, as Aveos operations have only been interrupted on an interim basis. There is no evidence at this stage that all or a portion of the business of Aveos will not be able to resume operations once one or more transactions to be identified by the *Divestiture Process* have been completed;

15. It denies paragraph 21 of the Motion;

16. With regards to paragraph 22 of the Motion, it refers to the GTA, (Exhibit P-1) and denies everything which is not in strict conformity therewith. It further alleges that this purported right of termination is stayed and suspended by the effect of the Initial Order and that this alleged breach may be cured by an assignment to one or more buyers to be identified through the *Divestiture Process*;

17. It denies paragraph 23 of the Motion adding that, as of now, there has been no *de facto* repudiation of the GTA or of the Exclusive Agreements, the work being temporary suspended until a potential buyer for the activities of Aveos is identified through the *Divestiture Process*;

18. It denies paragraph 24 of the Motion;

19. With regards to paragraph 25 of the Motion, it refers to the GTA (Exhibit P-1) and denies everything which is not in strict conformity therewith while adding that there has been no notice of material breaches sent to Aveos as of now;

20. With regards to paragraph 26 of the Motion, it denies it while further stating that there is no *de facto* repudiation of the obligation of Aveos pursuant to the Non-Exclusive Agreements;

21. It denies paragraph 27 of the Motion and further states that, as noted above, Aveos may cure any alleged breach by an assignment of one or more of the Non-Exclusive Agreements to one or more buyers identified through the Divestiture Process;

22. With regards to paragraphs 28 and 29 of the Motion, it denies that Air Canada is entitled to issue a notice to terminate and/or a notice to cure at this point in time;

23. It denies paragraphs 30 and 31 of the Motion;

24. It denies paragraph 32 of the Motion;

25. It denies paragraph 33 of the Motion, refers to the GTA (Exhibit P-1) and denies everything which is not in strict conformity therewith;

26. It denies paragraphs 34 of the Motion;

27. It denies paragraph 35 of the Motion, adding that Air Canada is not entitled to send a notice to Aveos to terminate the GTA;

28. It denies paragraph 36 of the Motion;

29. It ignores paragraph 37 of the Motion;

30. It denies paragraph 38 of the Motion and adds that, from Air Canada's own admission, prior to Aveos filing for protection under the CCAA, it had instituted a contingency plan that permitted to it to avoid and/or mitigate its alleged damages to an insignificant level, Air Canada has admitted that no flights were cancelled as a result of the shut-down, and no maintenance has been missed. Further, Air Canada's allegations in this paragraph do not make sense in light of Air Canada's agreement, prior to approval of the Divestiture Process, to participate in and cooperate with such process and the timeframe set forth therein;

31. With respect to paragraph 39 of the Motion, it prays act of the admissions made to the effect that a contingency plan had been established by Air Canada and further adds that, Air Canada had manifestly started to implement this contingency plan prior to Aveos filing for protection under the CCAA;

32. It ignores paragraph 40 of the Motion;

33. It denies paragraph 41 of the Motion and further adds that the *Divestiture Process* is scheduled to be completed by mid-June. Air Canada has admitted that (a) it had sought requests for proposals pursuant to a RFP process prior to Aveos' CCAA filing in respect of Service Agreements scheduled to expire in 2013; and (b) it had added additional Service Agreements to that process subsequent to the Aveos filing. Any urgency alleged by Air Canada with respect to this process is contradicted by its admission that Air Canada is "nowhere close to any agreement" [Examination by the attorney for Aveos, q.164-165]. The most efficient means for Air Canada to achieve the stable long-term access to maintenance services that it requires would be to permit the assignment of the various existing service agreements to one or to several potential buyers through the *Divestiture Process*. It is submitted that the only reason Air Canada wishes to terminate these Service Agreements now is because it no longer wishes to be bound by the terms of these Service Agreements;

34. It denies paragraph 42 of the Motion, and further states that there is no delay in securing suitable long-term arrangements in maintaining the stay of proceedings at this point in time, as Air Canada has admitted that it is nowhere near having replacement long-term arrangements negotiated;

35. It denies paragraph 43 of the Motion;

36. It denies paragraph 44 of the Motion while further adding that there has been no *de facto* repudiation. The purported hardship suffered by Air Canada is insignificant in comparison to the prejudice that will be suffered by all stakeholders in the Aveos restructuring in the event that the *Divestiture Process* is effectively disrupted due to Air Canada's tactics;

37. With regards to paragraph 45 of the Motion, it prays act of Air Canada's admission of its will to cooperate with the *Divestiture Process* while further adding that if this is truly Air Canada's intention, it is inconsistent with this Motion seeking the termination of the GTA and the Service Agreements, which are potential assets forming part of the business enterprise to be purchased by one or more buyers participating in the Divestiture Process;

38. It denies paragraph 46 of the Motion and states that termination of the GTA and the Service Agreements will have a significant impact on the *Divestiture Process*, by depriving stakeholders and potential buyers of a significant component of the business enterprise being marketed;

39. It denies paragraph 47 of the Motion. The GTA provides at paragraph 25 that the Service Agreements may be assigned with the consent of Air Canada, which consent may not be withheld unreasonably. There is an exception to this consent requirement where an assignment is to be made under certain conditions without the consent of Air Canada, One of these conditions is that the assignee shall agree to be bound by and perform all of the obligations under the GTA and all Service Agreements. However, there is no provision of the GTA or of the Service Agreements that states that the Service Agreements must be assigned as a whole, other than in the context of that exception. Section 11.3 of the CCAA contemplates that the Court may override the consent right of a counter-party, and there is no need for Aveos to rely upon the exception contained in this provision of the GTA. Furthermore, notwithstanding the numerous assertions to the contrary by Air Canada, the GTA provides at paragraph 1.1 that each Service Agreement constitutes a separate agreement. Consistent with this provision, the GTA permits the severance of the various Service Agreements. Indeed paragraphs 25.1 and 25.3 of the GTA contemplates the termination of individual Service Agreement explicitly without the termination of the remaining Service Agreements. There is no provision for the adjustment of these other Service Agreements in the event that one of them is terminated. It should also be noted that each Service Agreement has a different expiry date, with the result that they will naturally sever themselves over time. This belies any assertion by Air Canada that the agreements are "all-inclusive" and that "you cannot isolate and take things out, without adjusting all of the other agreements"[Examination by attorney for Credit Suisse, q. 32, 34], and that as a result, they cannot be assigned other than as a whole;

40. With regards to paragraph 48 of the Motion, it refers to Schedule F of the *Divestiture Process* while adding that the excerpt quoted by Air Canada is not an admission of any irreparable breach of the GTA or the Service Agreements, or of any right on the part of Air Canada to terminate the GTA or the Services Agreements;

41. It denies paragraph 49 of the Motion, submits that Air Canada has submitted no evidence of the allegations contained therein, and refers to and relies on the

terms of the GTA and the Services Agreements, denying whatever is not in strict conformity therewith;

42. It denies paragraph 50 of the Motion and states that, in fact, the relief requested in the Motion is extremely detrimental to the Debtor and its stakeholders because termination of the GTA and Services Agreements may substantially, negatively impact the value to be derived from one or more transactions completed as part of the *Divestiture Process*;

43. It admits paragraph 51 of the Motion;

44. It denies paragraph 52 of the Motion;

AND FOR FURTHER THE INTERVENING PARTY, CRÉDIT SUISSE, ADDS:

45. A stay of proceedings in the context of the CCAA is a basic component of the maintenance of the *status quo* for a debtor company and its stakeholders. Given the remedial purpose of the CCAA, the restructuring process and the general interest of all stakeholders should always be preferred over the particular interests of any individual stakeholder;

46. The lifting of the stay in CCAA is a discretionary decision of the Court that necessarily involves the balancing of interests. There must be sound reasons for doing so, consistent with the objects of the CCAA. A party seeking to lift the stay of proceedings faces a very heavy onus;

47. In determining whether to lift the stay in a CCAA proceeding, in the exercise of its discretion, the court should consider: (i) the balance of convenience; (ii) the relative prejudice to the parties; and (iii) where relevant, the merits of the proposed proceeding. The due diligence and good faith of the debtor company are also relevant to this analysis;

48. As noted by Justice Schrager in his reasons for decision in this matter dated May 8, 2012,

> "A sales process has been approved by this Court and initiated by Aveos under the guidance of the CRO and the Monitor. Hopefully this will result in a sale to one or more persons of all or part of the assets and business enterprise of Aveos in the best interests of all stakeholders. The rationale behind maintaining the CCAA legal framework after the shutdown on March 20 and allowing Aveos to avoid a bankruptcy liquidation was the speed and flexibility of realization under the CCAA while maintaining the critical mass and enterprise value of Aveos so as to maximize the value of the assets and hopefully retain, in some measure, the business enterprise, again for the benefit of all stakeholders, including particularly employees. Although Aveos will no longer carry on the business, hopefully somebody else will do so."

49. The decision of the Court as to whether to lift the stay of proceedings is to be made in this context.

I. – THE APPLICABLE CRITERIA TO LIFT THE STAY ARE NOT MET

1.1 Balance of convenience

50. Air Canada has been unable to demonstrate that the prejudice that it would sustain if the stay remains in force would be greater than the prejudice that would be sustained by all the stakeholders as a result of the impact on the *Divestiture Process*.

51. Air Canada has suffered no significant prejudice as a result of the interruption of the business of Aveos. No flights have been cancelled. No maintenance has been missed. [Examination by attorney for Aveos, q. 75, 84] Work is being completed on those airframes still with Aveos at the time of the filing.

52. Indeed, Air Canada has inducted 35 airframes since March 19, 2012, double the rate of inductions undertaken with Aveos between January, 2011 and the date of the filing. [Examination by attorney for Aveos, q. 128] Approximately 5-10 engines have been inducted since March 19, 2012. [Examination by attorney for Aveos, q. 137] As disclosed in its press releases to the public and as confirmed in examinations, Air Canada had started to implement a contingency plan before Aveos filed for relief. Any prejudice that it has suffered is only short-term in nature.

53. As stated in paragraph 39 of the Motion, the main source of the incremental cost for Air Canada services and supply is the fact that it has had to negotiate contracts on a short-term basis. But Air Canada has admitted that it is nowhere near the point of any agreement with a new service provider that would put an end to these short-term contracts, and as such maintaining the stay of proceedings will not cause Air Canada any delay or prejudice. It is the fact of the current shut-down of operations that has necessitated short-term arrangements, not the ongoing maintenance of the stay or the conduct of the *Divestiture Process*.

54. As there are currently no long-term arrangements ready to be executed in replacement of the existing Service Agreements, a termination of the Service Agreements now will make no difference to these circumstances. Indeed, the most efficient means for Air Canada to maintain long-term arrangements is for it to fulfill its professed intention to cooperate in the *Divestiture Process* by working with Aveos to consider the buyers that may be identified through the *Divestiture Process*.

1.2 Relative prejudice to parties

55. By contrast, the prejudice to the Debtor and its stakeholders that would result from Air Canada's termination of the Service Agreements at this time would be significant. The termination of these agreements would deprive Aveos and its stakeholders of the potential value that could be attained through the assignment

of these Service Agreements in connection with the sale of Aveos's business lines. At its core, the Motion constitutes an attempt by Air Canada to avoid this result in order to obtain more competitive pricing in the marketplace.

56. The *Divestiture Process* was authorized by the Court, without objection from Air Canada, who made no representation at the time regarding its desired termination of the GTA or the Service Agreements, but only sought to reserve its rights regarding section 11.3 of the CCAA with respect to the Debtor's ability to assign such contracts. The Debtor intentionally structured the *Divestiture Process* to provide Air Canada with the ability to negotiate long-term service agreements with potential purchasers, and Air Canada seemingly agreed to cooperate with such process. By its Motion, Air Canada is communicating that it is not willing to negotiate with potential buyers and also seeks to pre-empt the ability of Aveos to ask the Court to order the assignment of the agreements under section 11.3 of the CCAA. This is a significant prejudice to Aveos and to all the stakeholders involved in the restructuring that cannot be justified in the circumstances.

57. All that is asked of Air Canada is to maintain its short-term arrangements for a few short weeks pending the outcome of the *Divestiture Process*, in circumstances where it currently has no other alternative to its short-term arrangements.

58. Air Canada has clearly admitted that it has no long-term service provider lined up at present to replace any of the work provided by Aveos. As such, there is no evidence that Air Canada would be in any different position regarding its short-term arrangements at the end of the *Divestiture Process*, than it is now.

59. There is also no evidence that anything has changed for Air Canada since it received notice of and appeared on the motion in respect of the *Divestiture Process* that would cause it now to bring forward this Motion. Air Canada permitted the *Divestiture Process* to continue unabated for more than two weeks with no indication of any urgent need to terminate the existing Service Agreements.

60. In any event, with respect to the Non-Exclusive Agreements, since Air Canada was already entitled to use the services of third parties for any services provided pursuant to these agreements, Air Canada cannot suffer any prejudice if said agreements are not terminated.

61. In addition, paragraph 1.5.2 of the GTA grants Air Canada an exemption from exclusivity where Aveos is unable to perform those services provided for by the Exclusive Agreements.

62. The GTA provides that the Service Agreements may be assigned with the consent of Air Canada, which consent may not be unreasonably withheld. Air Canada refused to answer when asked whether it would consent to the

assignment of its Service Agreements in the context of the *Divestiture Process*, on the grounds that it was hypothetical, and (in the words of its attorney) Air Canada was "not going to express an opinion as to [an] assignment to somebody we don't know, something we don't know, somebody we don't know" [Examination by the attorney for Credit Suisse, q.90].

63. Air Canada's Motion is predicated on the contention that no party will emerge from the *Divestiture Process* who will obtain Air Canada's consent to an assignment, largely because Air Canada has decided that it will not consent to anyone who does not agree to take on the whole of the contracts (even though it is not a condition for their consent under the GTA). But by Air Canada's very admission, it is not possible to pre-judge the outcome of the *Divestiture Process*.

64. Essentially, all that Air Canada professes to seek now is clarity and certainty. The best opportunity for obtaining this is to participate in and await the outcome of the *Divestiture Process*. The prejudice to Air Canada in waiting a few weeks, in circumstances where it will continue to be subject to short-term arrangements for which it has no alternative at the moment, is far outweighed by the prejudice to the entire body of stakeholders who are interested in maximizing the value of the Service Agreements.

1.3 Merits of the request made to this Court to terminate the Service Agreements

65. This Motion has been filed by Air Canada in order to obtain the termination of the Service Agreements so that it may pre-empt the assignment of the Service Agreements to one or more purchasers.

66. As noted above, the said assignments are governed by Section 25 of the GTA (Exhibit P-1), which states that assignments are permissible inasmuch as the written consent of Air Canada is obtained, said consent having however not to be unreasonably withheld.

67. On that point, while being asked if Air Canada would have, at this point in time, any reason whatsoever to object to a potential assignment of the Service Agreements, as noted above, the affiant for Air Canada was silenced by an objection made by Air Canada's attorney, on the grounds that the question was hypothetical. This objection that should be debated in order to determine the reason, if any, that would justify Air Canada's refusal to consent to the assignment of one or more of the Service Agreements.

68. Indeed, with regards to reasons that may justify a refusal by Air Canada to consent to the assignment of the Service Agreements, the only response available to Air Canada is that it is not able to take a position at this time, pending the outcome of the *Divestiture Process*.

69. This being the case, Air Canada's Motion is premature.

70. Moreover, the argument that the Service Agreements can only be assigned as a whole is ill-founded. As noted above, there is no provision of the GTA nor of any of the Service Agreements providing for this requirement. To the contrary, (a) the GTA explicitly designates each Service Agreement as a separate agreement; (b) the GTA contemplates the severability of the individual Service Agreements in its termination provisions; and (c) each Service Agreement is subject to separate expiry dates.

71. To this end, prior to the Aveos filing, Air Canada had commenced an RFP process for individual contracts for which expiry dates were pending, and this process continues. This process is in direct contradiction to the allegation at paragraph 49(ii) of the Motion that the course of conduct of the parties demonstrates that all of the Service Agreements form an integrated whole that cannot be assigned on an individual basis. This allegation is also not consistent with Air Canada's professed support for the *Divestiture Process*, which clearly contemplates the potential assignment of Service Agreements on an individual basis.

72. In any event, the issue of assignability is a matter that is clearly contested by the parties and is a matter that should not be determined prior to the completion of the *Divestiture Process*, but should be reserved for consideration on a potential motion for relief under section 11.3 of the CCAA.

73. There is no evidence that any current breaches of the contracts cannot be cured by a purchaser who restarts the business of Aveos, and it is only once such a purchaser is identified by the *Divestiture Process* that this issue can be considered.

II. – CONCLUSION

74. To allow Air Canada to obtain a lift of the stay of said proceedings to permit it to terminate some of the most significant contracts of Aveos, accounting for by far the largest proportion of its business (as disclosed in Aveos' initial petition), would be in total contradiction with the most fundamental objective of the CCAA, namely to allow a debtor to reorganize its business in the best interest of all the stakeholders, in circumstances where:

a) only a few short weeks remain until the outcome of the *Divestiture Process* is known, and the clarity and certainty that Air Canada seeks will be available;

b) Air Canada's short-term arrangements will not change in the meantime, as it has no service provider ready to take up the provision of services in replacement of the Service Agreements, if it were able to terminate the GTA and the Service Agreements, and therefore the prejudice of costs

that it has identified will not be alleviated by the present termination of the Service Agreements;

c) Air Canada is unable or unwilling to state now whether it would consent to the assignment of the Service Agreements to a purchaser who will restart the business of Aveos, on the grounds that it is hypothetical, which leads to the conclusion that this motion is premature;

d) the effect of the termination of the Service Agreements would be to pre-empt the Court's consideration of the potential application of section 11.3 of the CCAA, and to deprive stakeholders of the opportunity of realizing the value of the Aveos business enterprise; and

e) there is nothing in the GTA requiring the assignment of all Service Agreements as a whole in the circumstances of this case, and as such, there is no contractual basis for asserting that individual assignments cannot be undertaken in the context of the *Divestiture Process*. The only conclusion that can be drawn is that Air Canada is seeking now to divest itself of contractual obligations that it no longer wishes to honour.

75. This contestation is well founded in fact and in law.

WHEREFORE, THE INTERVENING PARTY, CRÉDIT SUISSE, RESPECTFULLY PRAYS THIS HONOURABLE COURT TO :

GRANT the Contestation of the intervening party, Crédit Suisse,

DISMISS the Motion for an order lifting the stay of proceedings to confirm the termination of certain contracts;

ON A SUBSIDIARY BASIS,

TAKE under advice said Motion, once that the hearing will have been completed, in order to allow this Court to benefit from the outcome of the *Divestiture Process* to better assess Air Canada's demand;

THE WHOLE with costs.

Montréal, May 16, 2012

Blake, Cassels & Graydon

BLAKE, CASSELS & GRAYDON LLP
Attorneys for the Intervening Party
CRÉDIT SUISSE

8332346.7

NO. : 500-11-042345-120

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CONTESTATION

ORIGINAL

BB-8098

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