

**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

CROSS-MOTION RECORD

(Motion regarding the Sunwing Trust Claim, returnable February 13, 2012)

January 27, 2012

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**ONTARIO
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**IN THE MATTER OF THE RECEIVERSHIP OF
SKYSERVICE AIRLINES INC.**

BETWEEN:

THOMAS COOK CANADA INC.

Applicant

-and-

SKYSERVICE AIRLINES INC.

Respondent

CROSS-MOTION RECORD

(Motion regarding the Sunwing Trust Claim, returnable February 13, 2012)

I N D E X

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TAB 1

**ONTARIO
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**IN THE MATTER OF THE RECEIVERSHIP OF
SKYSERVICE AIRLINES INC.**

BETWEEN:

THOMAS COOK CANADA INC.

Applicant

-and-

SKYSERVICE AIRLINES INC.

Respondent

NOTICE OF CROSS-MOTION

(Motion for an Order declaring that the amounts claimed in the Sunwing Claim are subject to a trust interest)

Sunwing Tours Inc. (now Sunwing Vacations Inc.) ("**Sunwing**") will make a motion on February 13, 2012 at 10:00 a.m. or as soon thereafter as the Court can accommodate, at 330 University Ave., Toronto, Ontario, to the judge presiding over the motion that has been brought by FTI Consulting Canada Inc., in its capacity as court-appointed receiver (the "**Receiver**") of the property, assets and undertaking of Skyservice Airlines Inc. ("**Skyservice**") by notice of motion dated June 3, 2011.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

- a) an order:
 - i) declaring that funds in the amount of \$2,329,473.00, held by the Receiver in a segregated account, are subject to a trust in favour of Sunwing, do not form part of the Skyservice estate and are not subject to any other court ordered charges or security interests; and
 - ii) directing the Receiver to pay \$2,329,473.00 to Sunwing forthwith;
- b) in addition to (a) above, an order
 - i) imposing a constructive trust over funds in the amount of \$1,183,977.08, held by the Receiver in connection with the within receivership proceedings, in favour of Sunwing, declaring that such funds do not form part of the Skyservice estate and are not subject to any other court ordered charges or security interests; and
 - ii) directing the Receiver to pay \$1,183,977.08 to Sunwing forthwith;
- c) in the alternative to (a) and (b) above, an order:
 - i) imposing a constructive trust over funds in the amount of \$3,513,450.08, held by the Receiver in connection with the within receivership proceedings, in favour of Sunwing, declaring that such funds do not form part of the Skyservice estate and are not subject to any other court ordered charges or security interests; and
 - ii) directing the Receiver to pay \$3,513,450.08 to Sunwing forthwith;
- d) costs of this cross-motion on a partial indemnity basis; and
- e) such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:**Background**

1. Skyservice was a provider of charter flight services to two main customers, Thomas Cook Canada Inc. (“**Thomas Cook**”) and Sunwing. Sunwing, an operator of package tours and charter flights in Canada, purchased charter flight services from Skyservice.
2. On March 31, 2010, Thomas Cook, in its capacity as a secured creditor of Skyservice, and with the foreknowledge and co-operation of Skyservice, brought an application for the appointment of a receiver over the assets of Skyservice. No advance notice of such application was given to Sunwing.
3. As a result of that application, the Receiver was appointed and Skyservice abruptly ceased all operations on March 31, 2010.
4. The insolvency of Skyservice and this abrupt shutdown were complete surprises to Sunwing.
5. As required by legislation, Sunwing paid for charter flights at least seven days in advance of when such flights were scheduled to be provided by Skyservice.
6. Just days before the receivership and abrupt halt in services, Skyservice sent two invoices to Sunwing, requesting payment for flights scheduled on and after March 31, 2010. Sunwing paid these invoices in full and as a result, paid over \$3.5 million on the eve of insolvency for flights that would never be provided.
7. Skyservice requested and accepted these payments when it knew that such flights would never be provided.
8. Two days before the appointment of the Receiver, Skyservice identified and segregated payments it received entirely for future flights that would never be provided, including \$2,329,473.00 paid by Sunwing. Skyservice segregated and held these funds, evidencing its intention to create a trust with respect thereto.

Express or Implied Trust

9. In segregating the \$2,329,473.00 received from Sunwing on account of future flights, Skyservice effectively created a trust over these assets for the benefit of Sunwing.
10. All three certainties required for the creation of a trust are present in respect of these assets. There is no uncertainty as to the subject matter of such trust (the \$2,329,473.00 which was identified and segregated) or the object of such trust (Sunwing).
11. Certainty of intention can and should be inferred from the circumstances and conduct of Skyservice. Skyservice's actions in identifying and segregating these funds, on the eve of its impending receivership, can only be explained as evidencing Skyservice's intention to hold these funds for the benefit of Sunwing. The explanations given by Skyservice's management are consistent with and further demonstrate this intention.
12. A trust therefore exists with respect to the segregated \$2,329,473.00 and such funds must be paid over to Sunwing.

Constructive Trust

13. Whether or not the Court finds an express or implied trust in respect of the segregated \$2,329,473.00, the Skyservice estate would be unjustly enriched if it were permitted to retain the \$3,513,450.08 it collected from Sunwing in respect of flights that Skyservice did not intend to provide and did not in fact provide.
14. There is no juristic reason for Skyservice to retain the monies it received from Sunwing in these circumstances. Skyservice sought and received the monies in question under the pretext that flights would be provided between March 31 and April 9, when it was apparent to Skyservice that this would not be the case.
15. Sunwing had no choice but to pre-pay Skyservice for flights, as payment at least seven days in advance was mandated by federal legislation. In this context, Sunwing was not voluntarily a creditor of Skyservice.

16. Skyservice's enrichment was not authorized by contract, statute, or any other common law or equitable obligation. An examination of the conduct of the parties and their legitimate expectations favour the imposition of a constructive trust.
17. Absent the imposition of a constructive trust, Sunwing will have no effective remedy for its unjust enrichment claim and other creditors of Skyservice will reap a windfall at Sunwing's expense.

Rules and provisions relied upon

18. Sunwing relies upon:

- a) The provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;
- b) The *Air Transportation Regulations*, S.O.R./88-58 made pursuant to the *Canada Transportation Act*, S.C. 1996, c.10, as amended;
- c) The provisions of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and
- d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) A compendium of documents as follows:
 - i) The Affidavit of Mark Williams, sworn April 27, 2010 and the Exhibits attached thereto, filed;
 - ii) The Supplemental Affidavit of Mark Williams, sworn October 11, 2011 and the Exhibits attached thereto, filed;

- iii) The Pre-Appointment Report to the Court submitted by FTI Consulting Canada Inc., in its capacity as Proposed Receiver dated March 31, 2010, filed;
 - iv) The Second Report of the Receiver dated June 10, 2010 (without appendices), filed;
 - v) The Tenth Report of the Receiver dated June 2, 2011 (without appendices other than Appendix "I"), filed;
 - vi) The Answers to Written Questions for the Receiver, received December 22, 2011, filed;
 - vii) The Affidavit of Karim Nensi sworn March 31, 2010 and the Exhibits attached thereto, filed; and
 - viii) The Affidavit of Steven Golick, sworn September 15, 2011 and the Exhibits attached thereto, filed;
- b) A compendium of the Reports of the Receiver filed in these proceedings to date;
 - c) The pleadings and proceedings herein; and
 - d) Such further and other materials as counsel may advise and this Honourable Court may permit.

January 27, 2012

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IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

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

BETWEEN:

THOMAS COOK CANADA INC. -and- SKYSERVICE AIRLINES INC.

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Proceeding commenced at Toronto

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