

CANADA

SUPERIOR COURT

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Commercial Division
(Sitting as a court designated pursuant to the
Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36)

No: 500-11-042345-120

IN THE MATTER OF THE PROPOSED PLAN OF
COMPROMISE AND ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.

Insolvent Debtors/Petitioners

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.

Insolvent Debtor/Plaintiff

vs

CANADIAN NORTH INC., a duly constituted
corporation pursuant to the *Canada Business
Corporations Act*, having a registered office at
4902 - 49 Street, PO Box 939, in the city of
Yellowknife, in the Northwest Territories,
X1A 2N7

Respondent

and

FTI CONSULTING CANADA INC.

Mis en Cause/Monitor

MOTION TO RECOVER AMOUNTS DUE FOR GOODS SUPPLIED AND SERVICES RENDERED AND
FOR OTHER ORDERS

(Sections 9 and 11 of the *Companies' Creditors Arrangement Act* R.C.S. 1985 c. C-36)

TO THE HONOURABLE JUSTICE MARK SCHRAGER OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE PETITIONER RESPECTFULLY SUBMITS THE FOLLOWING:

1. On December 19, 2008, the Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc. ("**Aveos**"), entered into a seven-year *General Terms Agreement for B737 Technical Services* effective January 1, 2009 (the "**B737 Agreement**"), Exhibit P-1, with the Defendant, Canadian North Inc. ("**Canadian North**");
2. Sections 23.1 and 23.2 of the B737 Agreement provide that said agreement is subject to the laws applicable in and jurisdiction of the courts of the Province of Québec;
3. In the context of the application of the *Companies' Creditors Arrangement Act* (the "**CCA**") to Aveos, as more fully explained in paragraph 11 of the present Motion, Aveos respectfully submits this matter to the jurisdiction of this honourable Court;
4. Under the B737 Agreement, Aveos provided parts and materials and serviced aircraft and equipment for aircraft operated by Canadian North. Namely, Aveos performed Heavy Airframe Maintenance Services, Engine and Auxiliary Power Unit (APU) Maintenance Services, Component Maintenance Services, Line Maintenance Services and Fleet Management Services;
5. Except for heavy maintenance work known as "C" checks which was to be performed at specified rates, the remuneration under the B737 Agreement was based on a "Power By The Hour" ("**PBH**") approach where the customer pays a fixed fee for each hour the asset is operated, which covers agreed upon criteria (including, but not limited to maintenance, repairs, components, engineering, etc.);
6. Under the B737 Agreement, Canadian North was to pay Aveos a fixed fee per hour of flight operation. The payment of this PBH rate was not linked to the performance of a specific volume of maintenance by Aveos;
7. In return, and separate and apart from Canadian North's obligations under the contract, Aveos agreed that it would perform maintenance as specified in the scope of the B737 Agreement, as it was required by the operations of Canadian North. This maintenance was to take place regardless of whether it was forecasted at that time or not. Despite the quality of a maintenance forecast, there can be a large variance between the forecasted requirement and the actual requirement in any given time period;
8. The benefits and main reasons that airlines enter into PBH contracts with suppliers, and the benefits and main reasons that Canadian North entered into the B737 Agreement with Aveos, include:

- a) PBH contracts act as a cash management tool, providing predictable cash flow and transferring the risk of unpredictability from the customer to the vendor;
 - b) Maintenance is done as needed, without disruption to the customer. This comes at a cost to the vendor, as it must always be able to accommodate the customer; and
 - c) The contract effectively acts as an insurance policy for the customer;
9. Under this type of arrangement, the obligations of the parties are not interdependent. In other words, a monthly payment by the customer is not a function of the amount of services actually rendered during a given period, as the market value of the services may either exceed or not be as high as the amount of payment;
 10. On November 5, 2010, Aveos and Canadian North entered into a five-year *License and Support Services Agreement* (the "**License Agreement**"), **Exhibit P-2**, pursuant to which Aveos granted Canadian North the right to use Aveos' aircraft maintenance planning and management software known as SMART, and has also provided training and support services to facilitate the use of said software;
 11. On March 19, 2012, this Honourable Court issued an Initial Order (as amended on March 30, 2012, April 5, 2012 and May 4, 2012, the "**Initial Order**"), pursuant to the CCAA in respect of Aveos;
 12. Pursuant to the Initial Order, a monitor was appointed to Aveos and a stay of proceedings until April 5, 2012 was ordered. Pursuant to an Order made on April 5, 2012 in response to Aveos' First Motion for an Order to Extend the Stay Period, the stay of proceedings was extended until May 4, 2012. Finally, pursuant to the Amended and Restated Initial Order made on May 4, 2012 in response to Aveos' Second Motion for an Order to Extend the Stay Period, the stay of proceedings was extended until July 20, 2012, as appears from the Court record;
 13. On Sunday March 18, 2012, the day before the issuance of the Initial Order and not a business day, Canadian North e-mailed Aveos a Notice of Termination of Agreement regarding the B737 Agreement (the "**Termination Notice**"), **Exhibits P-3 en liasse**;
 14. Canadian North purported to terminate the B737 Agreement for no other reason than the alleged insolvency of Aveos. Yet, on the Termination Notice date, Aveos had duly performed and was duly performing all of its obligations under the B737 Agreement without any complaints whatsoever from Canadian North with regard to the services provided;
 15. Concurrent with the issuance of the Initial Order, Aveos ceased its regular operations;
 16. Following the sending of the Termination Notice P-3, representatives of Aveos and Canadian North had discussions and agreed that the sum owed by Canadian North to Aveos as of May 2012 pursuant to the B737 Agreement and as of March 2012 pursuant

to the License Agreement would be reduced and settled at \$1,109,746.19 (the "Debt"), as appears from the statement of account dated May 3, 2012, **Exhibit P-4**;

17. Aveos compromised on the amount originally owed by Canadian North under both Agreements only because of the Canadian North commitment to pay the Debt immediately after its final amount was agreed upon;
18. However, once the amount of the Debt had been established and settled, Canadian North refused to pay it, acting therefore in bad faith with regard to the agreement reached by the parties;
19. On June 1, 2012, Aveos served Canadian North with a demand letter, **Exhibit P-5**, requiring payment of the Debt as well as the additional amounts owed for the use after the issuance of the Initial Order, by Canadian North, of Aveos inventory in possession of Canadian North after the issuance of the Initial Order. As appears from the inventory statement, **Exhibit P-6**, fair market value of Aveos for such inventory is \$69,050;
20. In the demand letter, P-5, Aveos also informed Canadian North that it would terminate the License Agreement P-2 within fifteen (15) days;
21. On the same date, Canadian North responded to the demand letter admitting owing the Debt and acknowledging its obligation to compensate Aveos for the use of its inventory, as appears from Canadian North's letter dated June 1, 2012, **Exhibit P-7**;
22. On June 11, 2012, a representative of Canadian North e-mailed Aveos the Canadian North bid for the Aveos 737-200 and 737-300 parts and tooling, **Exhibit P-8 en liasse**, in which Canadian North offers to unconditionally release from its counsel trust account and pay in favour of Aveos the amount of the Debt, thereby admitting once more that it owed this sum;
23. Since the Initial Order and until June 26, 2012, Aveos continued to provide Canadian North with full access to SMART software in spite of non-payment by Canadian North of License Agreement fees;
24. On or about June 26, 2012, Aveos effectively terminated Canadian North's access to write new information to the SMART software under the License Agreement in view of the continuing defaults of Canadian North. However, Aveos has allowed, up to the date of the present Motion, without any obligation on the part of Aveos, Canadian North to continue to access and read maintenance information entered prior to June 26, 2012 from the SMART software;
25. To date, Canadian North has neglected, omitted or refused to pay the Debt, and the outstanding sum of \$23,625, owed to Aveos under the License Agreement for April, May and June 2012, despite Canadian North having no valid claim against Aveos regarding any liquid and exigible debt as of the date of the Initial Order;

26. Aveos is therefore entitled to claim from Canadian North the global amount of \$1,133,371.19, plus interest at the legal rate, as well as the additional indemnity provided for by Article 1619 of the *Civil Code of Quebec* from June 1st, 2012;
27. Aveos also prays this honourable Court to declare that the Termination Notice is null and void according to the Initial Order which forbids parties to terminate agreements entered into with Aveos by reason of insolvency;
28. In fact, pursuant to Section 15 of the B737 Agreement, the effective date of termination of the agreement for insolvency of a party is the date of receipt of notice by the insolvent party;
29. Pursuant to Section 29 of the B737 Agreement, the closest effective date of a notice, if transmitted by fax, is the business day following its communication. It should be noted that email, used by Canadian North to send the Termination Notice, is not mentioned in the B737 Agreement as a valid means of communication;
30. Thus, the Termination Notice sent by e-mail on March 18, 2012 is deemed to have been received, and was therefore only effective, on March 19, 2012 at the earliest, after the Effective Time of the Initial Order, i.e. 12.01 a.m. Consequently, the Termination Notice is null and void;
31. Also, Aveos prays this honourable Court to order that inventory listed in the inventory statement, P-6, currently in the possession of and being used by Canadian North, be returned to Aveos within 10 days of the judgement to be rendered on the present Motion, together with all pertaining records, including traceability records and non-incident statement for each item within 10 days of the Order to be rendered herein;
32. Finally, Canadian North and Aveos exchanged engines under Section 3.3 of Annex B-2 of the B737 Agreement, P-1, but Canadian North failed to deliver to Aveos the documents required by transport regulations including maintenance documents, back-to-birth records for life limited parts and non-incident statements for the period operated by Canadian North for the five following engines: ESN 674234, ESN 696751, ESN 709511, ESN 709491 and ESN 688588;
33. Thus, Aveos prays this honourable Court to order Canadian North to deliver to Aveos the documents required by transport regulations including maintenance documents, back-to-birth records for life limited parts and non-incident statements for the period operated by Canadian North for the five following engines: ESN 674234, ESN 696751, ESN 709511, ESN 709491 and ESN 688588;
34. The present Motion is well-founded both in fact and in law.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Motion;

CONDEMN Defendant, Canadian North Inc., to pay to Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc., the sum of \$1,133,371.19, plus the interest at the legal rate, as well as the additional indemnity provided for by Article 1619 of the *Civil Code of Quebec* since June 1st, 2012;

DECLARE that the Termination Notice, Exhibit P-3, of the *General Terms Agreement for B737 Technical Services* is null and void in accordance with the Initial Order;

ORDER Defendant, Canadian North Inc., to deliver to Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc., the inventory listed in the inventory statement, Exhibit P-6, together with all pertaining records, including traceability records and non-incident statement for each item within 10 days of the Order to be rendered herein;

ORDER Defendant, Canadian North Inc., to deliver to Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc. the documents required by transport regulations including maintenance documents, back-to-birth records for life limited parts and non-incident statements for the period operated by Canadian North for the five following engines: ESN 674234, ESN 696751, ESN 709511, ESN 709491 and ESN 688588;

THE WHOLE with costs.

Montréal, July 16, 2012



FRASER MILNER CASGRAIN LLP

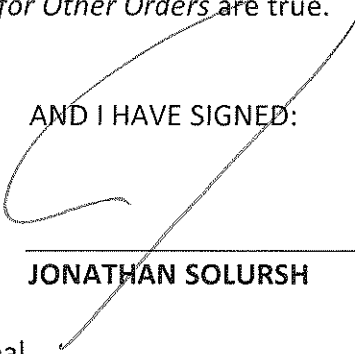
Attorneys for the Petitioners

AFFIDAVIT

I, the undersigned, **JONATHAN SOLURSH**, Chief Restructuring Officer of the Petitioners in the present matter, domiciled, for the purposes hereof, at BAN3, 2311 Alfred Nobel Boulevard, in the City and district of Montreal, Province of Quebec, do solemnly declare:

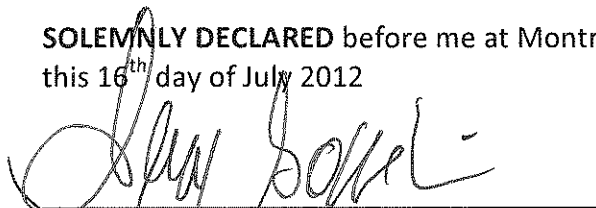
1. I am the Chief Restructuring Officer of the Petitioners in the present matter;
2. All of the facts alleged in the present *Motion to Recover Amounts Due for Goods Supplied and Services Rendered and for Other Orders* are true.

AND I HAVE SIGNED:



JONATHAN SOLURSH

SOLEMNLY DECLARED before me at Montreal,
this 16th day of July 2012



**COMMISSIONER OF OATHS FOR THE
PROVINCE OF QUÉBEC**



SCHEDULE 1
(Article 119 CCP)

NOTICE TO DEFENDANT:

TAKE NOTICE that Plaintiff has filed this action against you in the office of the Superior Court of the judicial district of Montréal.

To respond to this action, you must first file an appearance, in writing, personally or through an attorney, at the Court House of Montréal, situated at 1 Notre-Dame Street East, within **10 days** from the date of service of the present action.

BE ADVISED that if you fail to file an appearance within the time limit mentioned above, a judgment by default may be rendered against you at the expiration of the delay without further notice or extension.

If you file an appearance, the action will be presented before the Superior Court of the District of Montréal on **July 26, 2012, at 2:15 p.m., in room 2.13** of the Court House unless a written agreement is made by the parties, before that date, to determine a timetable for the orderly progress of the proceeding. Such agreement must be filed at the office of the Court. On the date of presentation, the Court may then exercise such powers as are necessary to ensure the orderly progress of the proceeding.

In support of the action, Plaintiff discloses the following exhibits:

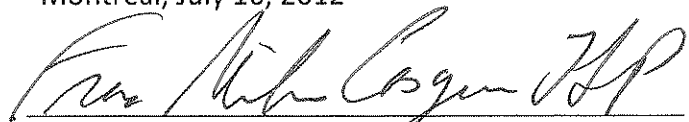
- P-1 **General Terms Agreement for B737 Technical Services;**
- P-2 **License and Support Services Agreement;**
- P-3 **Email dated March 18, 2012 with attached Notice of Termination of Agreement;**
- P-4 **Statement of account dated May 3, 2012;**
- P-5 **Demand letter dated June 1st, 2012;**
- P-6 **Inventory statement;**
- P-7 **Letter from Canadian North Inc. dated June 1st, 2012;**
- P-8 **Email dated June 11, 2012 with attached Bid from Canadian North Inc. for the Aveos 737-200 and 737-300 parts and tooling.**

These exhibits are available upon request.

If the amount claimed is inferior to \$7,000, and if, as a Plaintiff, you could have been admissible as such in Small Claims Court, you may make a request to the clerk for the action to be disposed pursuant to the rules of Book VIII of the *Code of Civil Procedure* (R.S.Q. c. C-25), and **BE ADVISED** that if you fail to make such a request, you could be liable for higher costs according to the rules applicable under the other Books of this *Code*.

DO GOVERN YOURSELF ACCORDINGLY.

Montréal, July 16, 2012



FRASER MILNER CASGRAIN LLP

Attorneys for Petitioners

No. 500-11-042345-120

**SUPERIOR COURT (Commercial Division)
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VS

CANADIAN NORTH INC., a duly constituted corporation pursuant
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Respondent

and

FTI CONSULTING CANADA INC.

Mis en Cause/Monitor

Me Oleksandra Synytsyna

☞ #548732-1

**MOTION TO RECOVER AMOUNTS DUE FOR GOODS SUPPLIED
AND SERVICES RENDERED AND FOR OTHER ORDERS**

(Sections 9 and 11 of the *Companies' Creditors*

Arrangement Act R.C.S. 1985 c. C-36).

ORIGINAL



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