

**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

MOTION RECORD

**(motion for an Order declaring that the amounts claimed in the Sunwing Claim are not
subject to a proprietary or trust interest)**

June 3, 2011

McCarthy Tétrault LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Jamey Gage LSUC#: 34676I
Tel: (416) 601-7539
E-mail: jgage@mccarthy.ca

Geoff R. Hall LSUC#: 34701O
Tel: 416 601-7856
E-mail: ghall@mccarthy.ca

Heather Meredith LSUC#: 48354R
Tel: (416) 601-8342
E-mail: hmeredith@mccarthy.ca

Fax: (416) 868-0673
Lawyers for FTI Consulting Canada Inc., in its
capacity as court-appointed receiver of
Skyservice Airlines Inc.

TO: **Blake, Cassels & Graydon LLP**
199 Bay St., Suite 2800, Commerce
Court West
Toronto ON M5L 1A9

Linc Rogers
Tel: 416-863-4168
E-mail: linc.rogers@blakes.com

Steven J. Weisz
Tel: 416-863-2616
E-mail: steven.weisz@blakes.com

Christopher Burr
Tel: 416-863-3301
E-mail: chris.burr@blakes.com

Cathy Beagan Flood
Tel: 416-863-2269
E-mail: cbe@blakes.com

Nathan Cheifetz
Tel: 416-863-2969
E-mail:
nathan.cheifetz@blakes.com

Lawyers for Sunwing Tours Inc.

AND
TO: **The Service List**

**ONTARIO
SUPERIOR COURT OF JUSTICE
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**IN THE MATTER OF THE RECEIVERSHIP OF
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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

NOTICE OF MOTION

(motion for an Order declaring that the amounts claimed in the Sunwing Claim are not subject to a proprietary or trust interest)

FTI Consulting Canada Inc. (“FTI”) in its capacity as court appointed receiver (the “Receiver”) of the property, assets and undertaking of Skyservice Airlines Inc. (“Skyservice”) will make a motion to a judge presiding over the Commercial List on a date to be fixed by the Commercial List office, at 330 University Avenue, Toronto.

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

THE MOTION IS FOR:

- (a) an order declaring that the amounts claimed in the Sunwing Claim (defined below) are not subject to a proprietary or trust interest as alleged by Sunwing;
- (b) an order that the Receiver is no longer required to keep segregated \$2,329,473 of the funds of Skyservice or to segregate any deposits recovered from suppliers or service providers; and
- (c) such further and other relief as this Honourable Court considers just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. Sunwing Tours Inc. (now Sunwing Vacations Inc.) (“Sunwing”) carries on business as an operator of package tours and charter flights and operates a retail travel business. Sunwing was one of the parties that chartered flights from Skyservice.
2. The price paid by Sunwing to Skyservice was determined on a “cost plus” basis and payments were made by Sunwing to Skyservice on a weekly basis.
3. Sunwing 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” (the “Sunwing Claim”).

4. In response to the allegations, the Receiver requested particulars without delay. None were provided at that time.

5. As a result, to ensure there was money available to fund the continuing activities in the receivership, the Receiver and Sunwing entered into a letter agreement dated April 8, 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.

6. Some time later, Sunwing provided some information to explain its claims, indicating that the Sunwing Claim was divided into the following four categories:

- (a) 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.
- (b) Third Party Invoice Amounts – 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." It appears

Sunwing is not pursuing this aspect of the claim separate and apart from its claim relating to third party deposits, described below.

- (c) 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 has clarified that this claim relates only to amounts from deposits that were not in fact remitted to the intended third party payee.
- (d) 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” in excess of \$4,900,000 (the “Damages Claim”). 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.

7. It now appears Sunwing is not pursuing the claim for third party invoice amounts separately from the third party deposit claim and is not alleging that the Damages Claim is subject to a trust. As a result, the following issues with respect to the Sunwing Claim remain to be resolved:

- (a) With respect to amounts paid by Sunwing to Skyservice in relation to general invoices, is \$2,329,473 subject to an “actual” trust in favour of Sunwing?

- (b) With respect to amounts paid by Sunwing to Skyservice in relation to general invoices, is \$3,513,450.08 (which includes and is duplicative of the amount claimed in the “actual” trust) subject to a constructive trust in favour of Sunwing?
- (c) Did Skyservice receive any amount from Sunwing specifically for the purpose of funding, which was in fact used to fund, deposits with third parties (or a tourist card inventory), but that were not used by such third parties and were returned to the Receiver or are still payable and, if so, are such amounts subject to a quistclose trust in favour of Sunwing?

The Receiver’s Review of the Sunwing Claim

8. The Receiver has conducted a review of the documentation and information provided by Sunwing in support of its claim and has conducted its 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.

9. With respect to amounts paid by Sunwing to Skyservice in relation to general invoices, the following observations are relevant:

- (a) The amounts paid by Sunwing in relation to the general invoices were not paid in advance for specific services. Rather, they were paid in response

to a calculation based on a formula using total costs budgeted for the season 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 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.
- (c) The Agreements are clear that there is no fiduciary relationship between Skyservice and Sunwing, which is inconsistent with a trust relationship.

10. The Receiver has found no evidence of an “actual” trust with respect to payments made by Sunwing. In anticipation of the receivership, an amount was transferred from the Skyservice general bank account to a second, less frequently-used Skyservice bank account, along with certain other amounts; however, 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 it may have been necessary to consider whether fraudulent conveyance and preference issues arose as a result;

11. The Receiver has found no evidence of the alleged unjust enrichment (enrichment, corresponding deprivation or lack of juristic reason) on which Sunwing bases its claim for a constructive trust. To the contrary:

- (a) Amounts paid by Sunwing in relation to the general invoices were not paid in advance for specific services, they were paid in accordance with a formula set out in the relevant agreements.
- (b) The agreements do not provide for monies to be held in trust for Sunwing but do provide an alternate method – a letter of credit – to protect pre-payments. The agreements, relevant regulations and existence of a letter of credit to secure advance payments, appear to provide a reason for Skyservice to have accepted and for the Receiver to now retain amounts paid pursuant to the invoices in question.
- (c) The receivership, the insolvency regime and competing rights of other creditors are also important considerations and may be reasons for the Receiver to retain amounts paid and to require Sunwing to claim pursuant to the insolvency regime.
- (d) The Receiver is not aware of any support for the suggestion by Sunwing that failure to refuse payments on invoices issued pursuant to a long-standing and ongoing contract, in circumstances in which there is knowledge of the possibility of the commencement of a receivership application by a third party, vitiates the juristic reasons permitting the payments to be received and retained.

12. With respect to the claim for third party deposits, the amounts paid by Sunwing in this category were co-mingled with other funds in the Skyservice general bank accounts and were used by Skyservice as general funds, without segregation. In addition, Skyservice did not have deposits with the third parties in relation to which the amounts were provided to Skyservice; rather, those parties were paid by Skyservice from the Skyservice general accounts either in advance or on 30 day credit terms. Finally, 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.

Relief sought

13. Accordingly, the Receiver requests an order declaring that the amounts claimed in the Sunwing Claim are not subject to a proprietary or trust interest as alleged by Sunwing and declaring that the Receiver is no longer required to keep segregated \$2,329,473 of the funds of Skyservice or to 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.

Rules and provisions relied upon

14. The Receiver relies upon:
 - (a) paragraph 24 of the receivership order of Justice Gans dated March 31, 2010 (authorizing the Receiver to seek advice and directions of the court);
 - (b) the *Bankruptcy and Insolvency Act*(Canada), including section 249;
 - (c) the *Rules of Civil Procedure*;
 - (d) the Regulations Respecting Air Transportation (SOR/88-58) (the “Regulations”) pursuant to the *Canadian Transportation Act*; and
 - (e) 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:

1. the Tenth Report of the Receiver; and

2. such further and other material as counsel may advise and this Honourable Court may permit.

June 3, 2011

McCarthy Tétrault LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Jamey Gage LSUC#: 34676I
Tel: (416) 601-7539
E-mail: jgage@mccarthy.ca

Geoff R. Hall LSUC#: 34701O
Tel: 416 601-7856
E-mail: ghall@mccarthy.ca

Heather Meredith LSUC#: 48354R
Tel: (416) 601-8342
E-mail: hmeredith@mccarthy.ca

Fax: (416) 868-0673

Lawyers for FTI Consulting Canada Inc., in its capacity as court-appointed receiver of Skyservice Airlines Inc.

TO: **BLAKE, CASSELS & GRAYDON LLP**
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9
Linc Rogers
Tel: 416-863-4168
E-mail: linc.rogers@blakes.com
Steven J. Weisz
Tel: 416-863-2616
E-mail: steven.weisz@blakes.com
Christopher Burr
Tel: 416-863-3301
E-mail: chris.burr@blakes.com
Cathy Beagan Flood
Tel: 416-863-2269
E-mail: cbe@blakes.com
Nathan Cheifetz
Tel: 416-863-2969
E-mail: nathan.cheifetz@blakes.com
Fax: 416-863-2653

Lawyers for Sunwing Tours Inc. and
Thomson Airways Limited

AND TO: The Service List

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

BETWEEN:

THOMAS COOK CANADA INC.

- and -

SKYSERVICE AIRLINES INC.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding Commenced at Toronto

NOTICE OF MOTION

McCarthy Tétrault LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Jamey Gage LSUC#: 346761
Tel: (416) 601-7539
E-mail: jgage@mccarthy.ca

Geoff R. Hall LSUC#: 347010
Tel: 416 601-7856
E-mail: ghall@mccarthy.ca

Heather Meredith LSUC#: 48354R
Tel: (416) 601-8342
E-mail: hmeredith@mccarthy.ca

Fax: (416) 868-0673

Lawyers for FTI Consulting Canada Inc.
#10392439

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 “I” 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
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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 co-mingled 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 A

FIRST REPORT OF THE RECEIVER, WITHOUT APPENDICES

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

Skyservice Airlines Inc.

FIRST REPORT OF THE RECEIVER

April 14, 2010

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

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

INTRODUCTION

1. On March 31, 2010 (the “**Date of Appointment**”), FTI Consulting Canada Inc. was appointed as receiver (the “**Receiver**”) of all of the assets, undertakings and properties (the “**Property**”) of Skyservice Airlines Inc. (“**Skyservice**” or the “**Company**”) pursuant to the order of the Honourable Mr. Justice Gans (the “**Receivership Order**”) granted upon the application of Thomas Cook Canada Inc. (“**TCCI**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act R.S.C. 1985 c. B-3 as amended* (the “**BIA**”) and section 101 of the *Courts of Justice Act R.S.O. 1990 c.43 as amended*.
2. The purpose of this, the Receiver’s First Report, is to inform the Court of the following:
 - (i) The activities of the Receiver since the Date of Appointment;

- 2 -

- (ii) Claims asserted by Sunwing Tours Inc. (“**Sunwing**”), including possible proprietary or trust claims, over funds held by the Receiver, and the arrangement negotiated by the Receiver with Sunwing to ensure that the Company’s monies continue to be available to fund the receivership;
- (iii) The seizure applications (the “**Seizure Applications**”) commenced by Greater Toronto Airports Authority, Ottawa Macdonald-Cartier Airports Authority, Winnipeg Airports Authority Inc. and NAV Canada (the “**Airport Authorities**”) pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5* (the “**ATMM Act**”) and other similar legislation in respect of aircraft operated by Skyservice, and the court orders made in those proceedings;
- (iv) The urgent requests made by the lessors of ten aircraft and the engines installed thereon leased by Skyservice and located in Canada on the Date of Appointment (as described in Appendix A hereto, the “**Lessors**” and the “**Aircraft**”, respectively) for the immediate return of the Aircraft;
- (v) The process undertaken by the Receiver to consider the urgent requests of the Lessors and to review the leases applicable to the Aircraft (the “**Leases**”),

and to request that an Order be granted by this Honourable Court (the “**Order**”), among other things:

- (vi) authorizing the Receiver and Skyservice to enter into:
 - (a) an aircraft return agreement, substantially in the form attached hereto as Appendix B (an “**Aircraft Return Agreement**”);

- (b) an aircraft return indemnity agreement, substantially in the form attached hereto as Appendix C (an “**Aircraft Return Indemnity Agreement**”); and
- (c) if applicable, a responsible person aircraft return and indemnity agreement, substantially in the form attached hereto as Appendix D (an “**Responsible Person Agreement**”),

with each Lessor and other parties, in respect of Responsible Person Agreements if applicable (such other parties being “**Responsible Persons**”); and

- (vii) grant certain related relief for the benefit of third parties, if any, including any owners of parts or equipment installed on the Aircraft.

3. The Lessors have requested that the Receiver bring its motion on an urgent basis and, as a result, the relief sought includes relief with respect to service.

TERMS OF REFERENCE

4. 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. Accordingly, the Receiver expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this report is based on assumptions regarding future events; actual results may vary from forecast and such variations may be material.

5. 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.
6. 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.

ACTIVITIES SINCE THE DATE OF APPOINTMENT

CONTROL OF ASSETS

7. On the Date of Appointment, the Receiver took steps to secure possession and control over the Property and all proceeds, receipts and disbursements arising out of or from the Property, other than the Aircraft (as discussed below).
8. The Receiver has changed the locks and security codes of all premises in the Greater Toronto Area (“**GTA**”). All of the property of Skyservice outside of the GTA is located on the secure side of Canadian airports and the Receiver therefore believes that such property is reasonably secure. The Receiver has engaged independent security personnel to assist in the protection of assets located in the GTA.
9. The Receiver has begun the task of taking physical inventories of all of the Company’s assets located around the world. The assets are spread out amongst approximately 20 locations. The vast majority are located in Toronto (with most of those assets located in the GTA), however there are minor amounts of assets elsewhere in Canada and in the United States, Cuba, Dominican Republic, France, United Kingdom, Germany and United Arab Emirates.

10. A review of the existing insurance coverage has been undertaken and it appears that adequate insurance and liability coverage is in place.
11. Pursuant to paragraph 3(c) of the Receivership Order and in compliance with the Status Quo Order (described below), the Receiver did not go into possession and control of the property consisting of airframes and aircraft engines (collectively "**Aircraft Objects**"). The Receiver has taken possession of the related accessories, parts, equipment, manuals, records and other property related to but not located or installed on the aircraft ("**Aircraft Parts**").
12. The Receiver has frozen all Skyservice bank accounts and the majority of funds have been remitted by the banks to the Receiver. Certain funds have been retained by the banks against possible charge-backs and fees. The Receiver continues to work with the banks to finalize matters with respect to the pre-receivership accounts.
13. The Company's head office is located at 31 Fasken Drive, Toronto, Ontario (the "**Head Office**"). These premises are owned by the Company. The Company's physical books and records are primarily located at its Head Office. The Company also owns premises at 2450 Derry Road, Mississauga, Ontario (the "**Hangar**") which is the primary location for the detailed records relating to the Aircraft and Aircraft Parts. The Company leases premises at 7611 Bath Road, Mississauga, Ontario which was used primarily as a training facility for employees.
14. The Receiver has made copies of Skyservice's electronic books and records, including imaging software and data contained on Skyservice's server, which supports all accounting and financial-related applications, Skyservice's payroll records, email servers and a number of lap-top computers.

15. The Receiver has communicated with various parties that it understands are holding deposits and inventory to ensure that such parties are aware of the Receiver's appointment and the Receiver is in the process of confirming amounts being held by such parties and requesting refunds, where appropriate.

EMPLOYEES

16. At the Date of Appointment, Skyservice employed 1,088 employees, on either a full-time or part-time basis. Since the Date of Appointment, the Receiver on behalf of the Company has issued 1,023 letters of termination. The Receiver has held periodic meetings with the retained staff located at the Company's premises in the GTA and has also held daily conference calls with the Company's retained employees around the world, in order that employees remain engaged in and informed of issues related to the receivership. To date the Receiver has received good co-operation from the employees.
17. The Receiver is in the process of completing the calculations necessary to complete the required filings under the Wage Earner Protection Program Act ("WEPPA") and will be making WEPPA filings and providing copies of the WEPPA submissions to former employees as soon as practical.
18. Groups of former employees are represented by four different unions: the Skyservice Cabin Crew Association ("SCCA"), the Skyservice Pilots' Association ("SkyPAC"), Canadian Airlines Dispatchers Association ("CALDA") and the Canadian Auto Workers ("CAW"). The Receiver has been in contact with representatives of each of the unions other than CALDA and is working to address any questions and concerns that have been raised. The Receiver has also reached out to CALDA, though has not connected with its representatives.

NOTICE TO CREDITORS

19. On April 8, 2010, in accordance with section 245 of the BIA, the Receiver caused to be sent to all of the Company's known creditors as identified in the Company's books and records, notice of the Receiver's appointment in the prescribed form, together with a copy of the Receiver's first report pursuant to Section 246 of the BIA.

WEBSITE AND RECEIVER CONTACTS

20. The Receiver has established a website at <http://cfcanada.fticonsulting.com/skyservice> at which the Receiver will post periodic updates on the progress of the receivership, together with copies of court orders, motion materials and reports filed in the receivership. In addition, the Receiver has created a dedicated email address, skyservice.receiver@fticonsulting.com, and a dedicated telephone number, 1-888-679-5969, which creditors, employees, interested parties and other stakeholders can use to contact the Receiver.

THE SUNWING CLAIMS

21. 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", over funds held by the Receiver (the "**Sunwing Claim**"). A copy of that letter is attached hereto as Appendix E.
22. By letter agreement dated April 8, 2010, executed by counsel to Sunwing on behalf of Sunwing on April 9, 2010, Sunwing and the Receiver agreed, *inter alia*, 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 obtains 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;
 - (ii) The Receiver would keep segregated CDN\$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.
23. A copy of the April 8, 2010, letter agreement is attached hereto as Appendix F.

THE SEIZURE APPLICATIONS

24. On the afternoon of the Date of the Appointment, the Greater Toronto Airports Authority ("GTAA") commenced a Seizure Application, without notice, pursuant to Section 9 of the ATMM Act for the seizure of certain of the Aircraft located at Toronto Pearson International Airport (the "GTAA Application"). Notwithstanding the absence of notice, representatives of certain Lessors and the Receiver were in attendance at the hearing and raised objections to the relief sought. After discussion, an Order was granted by the Honourable Mr. Justice Morawetz on March 31, 2010 (as amended by an Order granted April 6, 2010, the "Status Quo Order") that provides, among other things:
- (i) no person, including the Receiver, shall take or cause any steps to be taken to possess or repossess the Aircraft; and
 - (ii) the Receiver and/or any affected aircraft lessors may take any reasonable steps to inspect, protect and preserve the aircraft including performing and documenting any required maintenance procedures.

25. Also on March 31, 2010, the Winnipeg Airport Authority Inc. (“WAA”) commenced a Seizure Application pursuant to Section 9 of the ATMM Act for the seizure of two Aircraft located at the Winnipeg James Armstrong Richardson International Airport (the “Winnipeg Airport”). The application was commenced without notice and an Order was granted by Justice McKelvey (the “Winnipeg Seizure Order”) that provides, among other things:
- (i) that the WAA is authorized to seize the two Aircraft located at the Winnipeg Airport; and
 - (ii) the Receiver is permitted to appear before the court in Winnipeg to address the issue of the stay of proceedings resulting from the Receivership Order.
26. On receiving notice of the Winnipeg Seizure Order, the Receiver served a motion to set aside the Winnipeg Seizure Order on that basis that, among other reasons, it was obtained and made contrary to the stay of proceedings imposed by the Receivership Order. The Lessor of the Aircraft subject to the Winnipeg Seizure Order has filed a similar motion. Both motions have been adjourned, pending the outcome of the GTAA Application.
27. Similar Seizure Applications were brought by NAV Canada and Ottawa Macdonald-Cartier Airports Authority.
28. The Lessors and Airport Authorities, with cooperation and assistance from the Receiver, subsequently negotiated arrangements for the posting of cash security to stand in place of the Aircraft for the purposes of the Seizure Applications, which arrangements became the subject of the Order of the Honourable Mr. Justice Morawetz granted on consent of the parties on April 9, 2010 (the “Airports Security Order”). The Airports Security Order, a copy of which is attached hereto as Appendix G, provides, among other things:

- (i) upon payment by the Lessors of certain amounts to the Receiver to be held as security (the “**Airport Authority Security**”) for the claims of the Airport Authorities, the Aircraft shall, on notice to the Airport Authorities that the Airport Authority Security has been received, be released from the claims of the Airport Authorities (the “**Seizure Claims**”);
 - (ii) in effect, the Airport Authority Security is to be released by the Receiver to the Airport Authorities or returned to the Lessors, as applicable, depending on the final disposition of the Seizure Applications; and
 - (iii) no person shall commence or continue any proceedings against the Aircraft, except for proceedings taken in accordance with order and protocol contained therein.
29. The endorsement issued by Justice Morawetz on April 9, 2010 further stated that the operative paragraphs (2, 3, 4 and 5) of the Status Quo Order would cease to apply in respect of an Aircraft released from the Seizure Claims in accordance with the protocol approved in the Airports Security Order, and that the Seizure Applications (which are presently scheduled to be heard on June 1, 2010) are to be determined based on the facts and legal circumstances as they existed at 6:30 p.m. Toronto time on March 31, 2010.
30. The following table summarizes the amounts to be paid to and held by the Receiver pursuant to the Airports Security Order and the payments received to date:

Lessor	Contribution
Thomson Airways	\$1,055,870.90
Celestial Aviation	\$272,098.40
IAI V, Inc	\$97,071.60
MCAP Europe	\$321,254.87
ORIX Aviation	\$232,624.27
CIT Leasing	\$345,088.30
International Lease Finance Co	\$158,641.31
Total	\$2,482,649.65

31. The Receiver has received cheques in the following amounts that the respective provider of the cheques have asked to be held in escrow and not deposited pending further instruction following receipt of the Order and execution of the relevant Aircraft Return Agreement: \$1,055,870.90 (Thomson), \$272,098.40 (Celestial Aviation), \$321,254.87 (MCAP Europe – certified cheque), \$232,624.27 (Orix Aviation) and \$158,641.31 (International Lease Finance Co. – certified cheque).

RETURN OF AIRCRAFT

THE AIRCRAFT FLEET

32. Prior to the appointment of the Receiver, Skyservice operated a fleet of twenty aircraft. Ten of these aircraft were utilized for flight services provided primarily to TCCI. The other ten aircraft, being the Aircraft subject to the relief being sought by the Receiver in connection with this Report, were utilized for flight services provided primarily to Sunwing Tours Inc. One further aircraft is under sub-lease to an operator carrying out flight operations in Europe.
33. The Receiver understands that the ten aircraft used for TCCI flight services were leased from TCCI or its affiliates and that those aircraft were returned to the lessor(s) shortly before the receivership application.
34. The following table summarizes the ten Aircraft leased by Skyservice and located in Canada on the Date of Appointment:

Tail Mark	Type	Lessor	Lease Expiry	Location
C-GTBB	Boeing 757-28A	Celestial Aviation Trading	14-Jun-10	Mallard
C-GMYH	Boeing 757-236	CIT Leasing Corporation	1-May-10	Toronto
C-GTDP	Airbus A320-200	International Lease Finance	31-May-12	Toronto
C-GTSJ	Boeing 757-236	IAI V, Inc. (Jetscape Inc.)	28-Feb-11	Toronto
C-FRAA	Airbus A320-200	MCAP Europe Ltd.	31-Mar-11	Toronto
C-FLEU	Boeing 757-200	Thomson Airways Limited	14-Jun-10	Toronto
C-FLOX	Boeing 757-200	Thomson Airways Limited	16-Dec-10	Winnipeg
C-FOBH	Boeing 757-200	Thomson Airways Limited	8-Jun-10	Winnipeg
C-FTDG	Airbus A320-200	Thomson Airways Limited	10-May-10	Toronto
C-GTDH	Airbus A320-200	Thomson Airways Limited (by novation from ORIX)	1-May-10	Toronto

LESSOR REQUESTS FOR IMMEDIATE RETURN OF AIRCRAFT

35. Virtually immediately following its appointment, the Receiver started receiving demands for the immediate return of Aircraft from Lessors, with Lessors stating that significant costs may be incurred if the return of Aircraft was delayed especially as the Receiver did not; intend to take possession of the Aircraft (which is provided for in the Receivership Order). With a view to considering and responding to the urgent requests of the Lessors as quickly as possible, the Receiver on an expedited basis:

- (i) undertook a review of the Leases to determine whether there appeared to be any significant realizable value in respect of Skyservice's interest in any of the Aircraft under the Leases that could be realized by the Receiver, and
- (ii) gave consideration to other parties that may be impacted if the Receiver was to accede to the Lessors' requests for the immediate return of the Aircraft on short or no notice.

LEASE REVIEW

36. The Receiver is authorized to wind-down the business of Skyservice but is not authorized by the Receivership Order to operate the business of Skyservice. Therefore, in connection with the wind-down of Skyservice's business, the Receiver does not require the Aircraft and is generally looking to realize on Property, including Skyservice's interest in the Aircraft under the Leases, to the extent it has realizable value and otherwise to dispose of it.
37. At the request of the Receiver, Receiver's Counsel has reviewed each of the Leases provided to it by the Lessors. Among other things, none of the Leases transfers ownership of the Aircraft to Skyservice at the end of the Lease or contains an option to purchase.
38. The Receiver has also reviewed the terms of the Leases. Of the ten Leases, six expire within three months of the Date of Appointment. It is the Receiver's view that there would be no reasonable prospect of finding a party willing to take an assignment of any of these Leases or to sublease the Aircraft subject to these Leases. The Receiver has obtained independent market data on the current fair market lease rate of the Aircraft subject to the other four Leases. In three cases, the base rent payable under the Lease is higher than the current fair market lease rate. In the fourth case, the base rent is marginally below the current fair market lease rate. However, it is the Receiver's view, given the expiry of the fourth Lease in December 2010, that the time and costs that would be associated with endeavouring to either assign the Lease or sublease the Aircraft would far exceed the nominal notional value of the Lease.

39. For these reasons, the Receiver has concluded that none of the Leases has any significant realizable value for the receivership estate, and subject to the discussion below regarding other stakeholders, the Receiver believes that it is appropriate in the circumstances, subject to suitable arrangements, to cooperate with the Lessors in connection with their demand for the return of their Aircraft and to facilitate such return.

OTHER STAKEHOLDERS

40. In addition to considering whether Skyservice's interest in Aircraft under the Leases had any significant realizable value, the Receiver considered whether the return of the Aircraft to the Lessors may impact other parties that may have possible claims to the Aircraft and engines or parts mounted thereon. In particular, the Receiver considered parties with registrations made the *Personal Property Security Act* (Ontario) (the "PPSA") and parties identified by Skyservice personnel as possibly having an interest in parts on the Aircraft.
41. With respect to parties registered under the PPSA, the Receiver has been advised by Receiver's Counsel of the following, based on the PPSA and a search of PPSA registrations as of April 11, 2010, a summary of which is attached as Appendix H (the "PPSA Search"):
- (i) the PPSA, which governs security interests in personal property and their respective priority, applies to "leases with a term of more than one year"¹. As a result, lessors of personal property that are subject to leases with a term of more than one year must comply with certain aspects of the PPSA for their leases to be effective against others;

¹ See section 2 of the PPSA

- (ii) generally speaking, priority between two parties with security interests in the same property is determined by the order in which they registered notice of their security interest under the PPSA.² In other words, the one that properly registered first has priority;
- (iii) one exception to this general priority rule involves “purchase-money security interests” (“PMSIs”). In the case of equipment, if a party with a PMSI in the equipment registers notice of its PMSI before or within 10 days after the equipment subject to the PMSI is delivered to the debtor, generally speaking the PMSI-holder has priority over prior registered parties in respect of that equipment.³ Leases with a term of more than one year are considered PMSIs for the purposes of the PPSA;
- (iv) in the case of the Leases governing the Aircraft and the engines currently installed on the Aircraft, it appears from the PPSA Search that each is the subject of one or more PPSA registrations;
- (v) although Receiver’s Counsel has not issued an opinion in respect of the Leases and registrations or priorities, it has reviewed the Leases provided to it by the Lessors, the delivery certificates provided by the Lessors and the applicable PPSA registrations, and noted for the sole benefit of the Receiver in considering its course of action that, as of the date of the appointment of the Receiver:
 - (a) two of the Leases, although subject to registrations that appear to have been properly made, do not appear to have been made within the time required to enjoy PMSI priority so as to entitle them to priority over prior-registered security interests in the same property:

² See section 30(1) of the PPSA.

³ See section 30(3) of the PPSA.

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- (i) the Lease in respect of an Airbus 330-200 with Canadian registration mark C-GTDP, and related engines, leased from International Lease Finance Corporation (the “**ILFC Aircraft**”);
 - (ii) the Lease in respect of an Airbus 320-200 with Canadian registration mark C-FRAA, and related engines, leased from MCAP Europe Limited (the “**MCAP Aircraft**”);
- (b) two of the leases do not appear to have been subject to proper PPSA registrations:
- (i) the Lease in respect of a Boeing 757-236 with Canadian registration mark C-GMYH, and related engines, leased from CIT Leasing Corporation (the “**CIT Aircraft**”);
 - (ii) the Lease in respect of a Boeing 757-236 with Canadian registration mark C-GTSJ, and related engines, leased from IAI V, Inc. (the “**Jetscape Aircraft**”);
- (c) the remaining Leases appear to be subject to properly registered PMSI registrations. Accordingly, as far as potential PPSA claimants are concerned, it does not appear from the PPSA Search that anyone has a security interest with priority, based on registration, over the applicable Lessors in respect of these six Aircraft and related engines.

ILFC AIRCRAFT

42. The lease for the ILFC Aircraft was registered on June 25, 2002, although it may not have been registered properly at that time. An amending registration was made on January 23, 2003 to correct the possible deficiency. Therefore, it may be that the registration was not made within the time required to obtain PMSI priority (recognizing that, in 2002 and 2003, there was no PPSA requirement to register all leases with a term of more than one year, but only “financing leases” and the lease may not have been a “financing lease”).

43. Of the 83 families of registrations on the PPSA Search, only six that included equipment as a collateral classification were made prior to the amended ILFC registration. In the case of five of those six registrations, they include a description of the collateral subject to the registration, and in no such case does it appear that the collateral description relates to the ILFC Aircraft. Although the collateral description does not, as it once did under the PPSA until recent amendments, limit the effectiveness of a registration to the collateral described,⁴ it does suggest that the interest of the security party likely applies only to such collateral. In the case of the remaining registration that does not have a collateral description, the Receiver understands from Skyservice that the secured party – Associates Leasing (Canada) Ltd. – is or was a lessor of motor vehicles and does or did not have general security. In addition, several of the registrations, including the one by Associates Leasing (Canada) Ltd., may not have been properly made originally or may not have been properly maintained.

MCAP AIRCRAFT

44. The lease for the MCAP Aircraft was registered on October 10, 2002, although it does not appear that it was registered within the time required to obtain PMSI priority (recognizing that, in 2002, there was no PPSA requirement to register all leases with a term of more than one year, but only “financing leases” and the lease may not have been a “financing lease”).

⁴ See former section 46(3) of the PPSA.

45. Of the 83 families of registrations on the PPSA search, only five that included equipment as a collateral classification were made prior to the MCAP registration. In the case of four of those five registrations, they include a description of the collateral subject to the registration, and in no such case does it appear that the collateral description relates to the MCAP Aircraft. In the case of the remaining registration that does not have a collateral description, as noted earlier the Receiver understands from Skyservice that the secured party – Associates Leasing (Canada) Ltd – is or was a lessor of motor vehicles and does or did not have general security. In addition, several of the registrations may not have been properly made originally or may not have been properly maintained.

CIT AIRCRAFT

46. The Receiver's Counsel has informed the Receiver that the Lease for the CIT Aircraft was originally registered on March 22, 2002 and, based on the material provided by the Lessor, appears to have been initially properly registered within the time required to obtain PMSI priority. However, the registration apparently lapsed in March, 2008. A new registration was made by CIT on April 6, 2010 to re-register notice of the Lease, several days after the Date of Appointment. In this regard, Receiver's Counsel has noted the following:

- (i) Pursuant to the PPSA, an unperfected security interest (which would appear to include the Lease, at least during the time period after the original CIT registration lapsed and before it was re-registered) (the "**CIT Registration Gap**") is:
 - (a) not effective against the rights of "a person who represents the creditors of the debtor, including ... a trustee in bankruptcy", determined as at the time of such person's appointment;⁵ and

⁵ See section 20(1)(b) of the PPSA.

- (b) subordinate to the rights of certain parties, including parties with properly registered security interests.⁶
- (ii) Receiver's Counsel has advised the Receiver that, in Receiver's Counsel's view, the Receiver would not be considered to be a "person who represents the creditors of the debtor" for this purpose. As a result, the provision of the PPSA which causes unperfected security interests to be ineffective against a "person who represents the creditors of the debtor" does not appear to be of benefit to the Receiver. In this regard, it is noteworthy that the Receivership Order, which is based on the model receivership order used in receivership proceedings in Toronto, provides that the stay of proceedings contemplated by the Receivership Order does not prevent the filing of any registration to preserve or perfect a security interest;
- (iii) With respect to other parties with PPSA registrations, the following can be noted:
 - (a) Section 30(6) of the PPSA provides that, in effect, a registration that lapses but then is re-registered gains its original priority, except in respect of any person that "acquired rights" in the relevant property during the period between the lapse and re-registration;
 - (b) During the CIT Registration Gap, there were 40 new registrations made against Skyservice that included equipment as a collateral classification. In each case, with the exception of two registrations in favour of IOS Financial Services, those registrations included a description of the collateral subject to the registration, and in no case does it appear that the collateral description

⁶ See section 20(1)(a)(ii) of the PPSA.

relates to the CIT Aircraft. In the case of IOS Financial Services, the Receiver understands from Skyservice that it is a supplier of photocopiers and does not have general security;

- (c) Also of note, however, is that TCCI, the assignee of the security of Roynat Inc. which was registered prior to the original CIT registration, acquired the Roynat security and filed amending registrations to show it as the secured party during the CIT Registration Gap. The Receiver understands that TCCI takes the position that it may be a person who “acquired rights” in the CIT Aircraft for the purposes of section 30(6) of the PPSA;
- (d) In addition, the Receiver understands that TCCI claims that it may also be entitled to priority in respect of the CIT Aircraft on the basis that priorities between two competing secured creditors are determined at the time that their respective security interests come into conflict. In this regard, the Receiver understands TCCI’s argument to be that, because TCCI demanded payment of its debt and sought the appointment of the Receiver at a time when CIT was not properly registered, their respective interests came into conflict at that time and on that basis TCCI has priority;
- (e) The Receiver further understands that CIT disputes the position of TCCI for various reasons and asserts that its rights in respect of the CIT Aircraft are superior to all others, including TCCI.

47. The Receiver understands that CIT and TCCI, or their respective counsel, have been discussing the matter. If the potential issue between CIT and TCCI is not resolved prior to the hearing, the Receiver may seek further directions with respect to the CIT Aircraft and proposed return of it to CIT.

JETSCAPE AIRCRAFT

48. The Receiver has been informed by Receiver's Counsel that the lease for the Jetscape Aircraft was registered on August 5, 2009 and, based on the material provided by the Lessor, appears to have been properly registered within the time required to obtain PMSI priority except that the registration was made only against Skyservice's English name and not its French name. An amending registration was made by Jetscape on April 12, 2010 to correct this possible deficiency. In this regard, Receiver's Counsel has noted the following:
- (i) Pursuant to Minister's Order made under the PPSA,⁷ a registration in respect of a corporation that has both an English name and a French name must be made against both names.
 - (ii) The PPSA contains a curative provision,⁸ to the effect that a registration is neither invalid nor ineffective by reason only of an error or omission unless a reasonable person is likely to be misled materially by the error or omission.
 - (iii) The Receiver understands that TCCI took the position that the original Jetscape registration was invalid, that the registration is not "saved" by the curative position given the nature of the error, and that TCCI has a prior claim to the Jetscape Aircraft as a result of its registration being prior to Jetscape's amending registration.

⁷ See section 17 of the Minister's Order.

⁸ See section 46(4) of the PPSA.

- (iv) The Receiver understands that TCCI and Jetscape, or their respective counsel, have been discussing the matter. If the potential issue between Jetscape and TCCI is not resolved prior to the hearing, the Receiver may seek further directions with respect to the Jetscape Aircraft and proposed return of it to Jetscape.
 - (v) In addition to TCCI, there are 51 families of other registrations on the PPSA Search made prior to the Jetscape amending registration and which include equipment as a collateral classification. Of those, 43 include a description of the collateral, and in no case does it appear that the collateral description relates to the Jetscape Aircraft. Of the remaining 8 registrations, the secured parties (some with more than one registration) are Gibraltar, TCCI, IOS Financial Services, Associates Leasing (Canada) Ltd. and CBSC Capital. As noted below, Gibraltar has been repaid, TCCI is discussed above and the Receiver understands from Skyservice that the other three do not have security in the CIT Aircraft.
49. More generally, as it relates to potential PPSA priority matters as between parties with registrations, the Receiver understands from inquiries made with Skyservice that the only general security granted by Skyservice was in favour of Roynat (which security has been assigned to TCCI) and Gibraltar.
50. TCCI is aware of the registration issues that may affect its interest in the Aircraft and, as noted above, has been in discussions with the applicable Lessors. In the case of Gibraltar, the Receiver understands that it has been repaid in full.

Parts and Equipment Suppliers

51. As an additional step to attempt to bring the proposed return of Aircraft to the Lessors to the attention any person that may wish to assert a competing claim to, or other interest in the Aircraft, the Receiver sent a notice to certain parties indicating that the Lessors were seeking to have the Aircraft returned to them on an urgent basis and the Receiver expected Court approval of the return arrangements to be sought very soon. The notice, in the form attached as Appendix I, was sent by next day courier on Friday, April 9, or Monday, April 12, 2010 to parties with PPSA registrations and to parties identified by Skyservice as consignment providers of parts and equipment (with copies also delivered by fax or e-mail where possible), and by e-mail on April 9, 2010 to other parts suppliers that have contacted the Receiver.
52. Among other things, the notice invited recipients to inform the Receiver and Receiver's Counsel if they had an interest in appearing at the hearing for approval of the return of the Aircraft or wanted a copy of the court material. As of the time of preparing this Report, no person to whom the notice was sent has informed the Receiver that it wants to participate at the hearing and only two parts suppliers expressed an interest in being added to the service list in order to receive the court materials although at least one expressed that they did not expect to take a position on the motion.

**REQUEST FOR APPROVAL OF THE AIRPLANE RETURN AGREEMENT
AND AIRPLANE RETURN INDEMNITY AGREEMENT**

53. At the same time as the Receiver has been conducting its expedited review of Skyservice's interest in the Aircraft under the Leases, the Receiver has been in discussions with the Lessors with respect to arrangements to govern the potential return of the Aircraft. As noted above, the Receiver has now concluded that the estate has no economic interest in the Aircraft.

54. The Receiver and the Lessors have negotiated the terms of the Aircraft Return Agreement to govern the return of the Aircraft, including the services to be provided by Skyservice in connection therewith, and the terms of the Aircraft Return Agreement Indemnity to be provided to Skyservice, the Receiver and FTI Consulting Canada Inc. in its personal capacity, in connection with the Aircraft Return Agreement. It is contemplated that an Aircraft Return Agreement and an Aircraft Return Indemnity Agreement would be entered into for each of the Aircraft.
55. The key terms of the Aircraft Return Agreement are summarized as follows:
- (i) Skyservice will return the Aircraft to the applicable Lessor and, upon such return, the Lease will be terminated;
 - (ii) Skyservice will provide assistance to the applicable Lessor in connection with the return of the Aircraft, including, to the extent required, by providing certain maintenance services to prepare the Aircraft for its return and by ferrying the Aircraft to the agreed upon return destination; and
 - (iii) the Lessor is responsible for dealing with parts and equipment on or in the Aircraft that may be owned by or subject to interests of third parties (the “**Third Party Parts**”) and, in that regard, the Lessor agrees it will purchase or return the relevant Third Party Parts if the third party has a prior-ranking or otherwise superior claim.
56. The Receiver understands that it is not uncommon in the industry that aircraft may have parts or equipment on board that does not belong to the operator or lessor of the aircraft. For this reason, the Receiver sought the terms described in paragraph (iii) immediately above.

57. Pursuant to the Aircraft Return Indemnity Agreement, among other things, the Lessor agrees to indemnify the Receiver and Skyservice in respect of any claim it incurs or may be subject to as a result of or in connection with the Aircraft Return Agreement or any action or inaction pursuant thereto or contemplated thereby
58. In some cases, because the Lessor is a special purpose vehicle or the Receiver otherwise considers it appropriate, the Receiver has requested and the applicable Lessor has agreed to arrange for a parent or other party to provide a Responsible Party Agreement.
59. Pursuant to the Responsible Party Agreement, the applicable person agrees to perform the obligations of the Lessor if it fails to perform its obligations under the Aircraft Return Agreement and agrees to indemnify the Receiver and Skyservice on the same basis as the Lessor pursuant to the Aircraft Return Agreement Indemnity.
60. The expeditious return of the Aircraft is necessary to avoid potential claims that may arise from the Aircraft continuing to sit on the ground without maintenance and the Lessors have requested that the Receiver's motion be brought on an urgent basis. The Receiver is of the view that the Aircraft Return Agreement and the Aircraft Return Indemnity Agreement are reasonable and necessary in the circumstances. Accordingly, the Receiver respectfully requests the approval of this Honourable Court of the Aircraft Return Agreement and the Aircraft Return Indemnity Agreement and the authority to enter into an Aircraft Return Agreement and an Aircraft Return Indemnity Agreement with respect to each Aircraft.

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

Dated this 14th day of April, 2010.

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 Engen
Managing Director

Appendix B

**LETTER FROM SUNWING'S COUNSEL OF APRIL 2, 2010
(ASSERTING SUNWING'S CLAIM)**



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

April 2, 2010

McCarthy Tetrault LLP
Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto, ON M5K 1E6

Linc Rogers
Dir: 416-863-4168
linc.rogers@blakes.com

Reference: 76074/2

Re: Receivership of Skyservice Airlines Inc. ("Skyservice")

Attention: James Gage

As you are aware, we are counsel to Sunwing Tours Inc. ("**Sunwing**").

This letter is to advise you that the Receiver is holding funds, in its capacity as Receiver of Skyservice, over which Sunwing asserts an interest, including without limitation a proprietary interest.

Sunwing's business relationship with Skyservice historically involved Sunwing making certain prepayments and deposits to Skyservice for charter services, fuel costs, airport and landing fees and levies, Serviceair services and tourist card charges. The aggregate paid by Sunwing in this regard on account of services not provided by Skyservice is at least CDN\$7,200,000, subject to further confirmation by Sunwing.

Prepayments for services were received by Skyservice for the express purpose of funding the applicable flights and associated costs. The prepayment 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. Any interest in the prepayments and deposits that has passed to the Receiver is irrevocably impressed with Sunwing's interest.

As a result of Skyservice's receivership, the March 31 – April 9 flight services for which the prepayments were made cannot and will not be provided by Skyservice. Sunwing will seek the necessary relief to assert its interest and the return of these funds. We trust that you will not take any steps to disburse these funds without first obtaining a court order on at least seven days notice to Sunwing, so that we can seek appropriate direction from the Court. We are currently seeking instructions with respect to bringing a motion for the return of the funds, and will be in contact with additional information in furtherance of this claim.

Sunwing's claim to the funds set out herein is without prejudice to, and shall not limit, any other claims it may have to such funds.

Yours very truly

per Linc Rogers

cc: N. Meakin, FTI Consulting Canada Inc.
H. Merideth, McCarthy Tetrault
S. Weisz, Blakes
C. Cerqueira, Blakes

Appendix C

**LETTER FROM RECEIVER'S COUNSEL OF APRIL 5, 2010 IN
RESPONSE TO THE APRIL 2, 2010 LETTER**

Barristers & Solicitors
Patent & Trade-mark Agents

McCarthy Tétrault

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Telephone: 416 362-1812
Facsimile: 416 868-0673
mccarthy.ca

Jamey Gage
Direct Line: (416) 601-7539
Direct Fax: (416) 868-0673
E-Mail: jgage@mccarthy.ca

April 5, 2010

VIA EMAIL

Linc Rogers
Blake, Cassels & Graydon LLP
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9

Dear Mr. Rogers:

Re: Receivership of Skyservice Airlines Inc. ("Skyservice")

We are in receipt of your letter dated April 2, 2010 on behalf of Sunwing Tours Inc. ("Sunwing") in which Sunwing asserts an unspecified interest in unspecified funds of Skyservice.

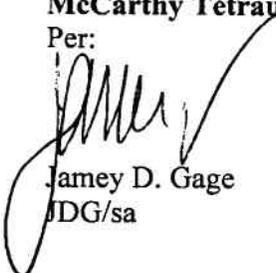
As you will appreciate, the vague nature of the assertions in your letter and absence of any detail or documentation makes it extremely difficult for the Receiver to consider or investigate Sunwing's claim, let alone determine Sunwing's "interest".

Given the seriousness of the alleged "interest" and its potential impact on the Receiver's activities, we request that Sunwing deliver to the Receiver, on an urgent and immediate basis, copies of all agreements and other documentation that identify the funds claimed by Sunwing and prove Sunwing's proprietary interest therein.

Yours very truly,

McCarthy Tétrault LLP

Per:



Jamey D. Gage
JDG/sa

Appendix D

**LETTER AGREEMENT BETWEEN THE RECEIVER AND
SUNWING DATED APRIL 8, 2010
("SUNWING LETTER AGREEMENT")**

Barristers & Solicitors
Patent & Trade-mark Agents

McCarthy Tétrault

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Telephone: 416 362-1812
Facsimile: 416 868-0673
mccarthy.ca

Jamey Gage
Direct Line: (416) 601-7539
Direct Fax: (416) 868-0673
E-Mail: jgage@mccarthy.ca

April 8, 2010

Blake, Cassels & Graydon LLP
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9
Attention: Steven J. Weisz
Linc Rogers

Dear Sirs/Madams:

Re: Receivership of Skyservice Airlines Inc. ("Skyservice") re: Sunwing Tours Inc. ("Sunwing")

Further to our discussion this morning, we write to confirm the arrangements between our clients with respect to the claim asserted by Sunwing in your letter dated April 2, 2010 (the "Sunwing Claim"). We understand that you are still seeking instructions with respect to certain of the arrangements. As you know, this matter is now urgent. Therefore, we look forward to receiving your confirmation of these arrangements, as set out below, as soon as possible but in any event prior to the case conference scheduled for 2:30 p.m. this afternoon.

to 9:30 am to morrow morning SW

The agreement is as follows:

1. FTI Consulting Canada Inc. in its capacity as receiver (the "Receiver") of the assets, undertakings and properties of Skyservice (the "Property") agrees to:
 - (a) keep segregated CDN\$2,329,473 of the funds of Skyservice, and
 - (b) 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

(collectively, the "Segregated Funds"), and agrees not to disburse the Segregated Funds without further order of the court, obtained on not less than 7 days notice to Sunwing.
2. Sunwing acknowledges and agrees that, notwithstanding the Sunwing Claim and any rights or interest Sunwing may have in any of the Property:

McCarthy Tétrault

April 8, 2010

- 2 -

Blake, Cassels & Graydon

- (a) the Receiver may deal with the Property (other than the Segregated Funds) and spend any Skyservice receivership funds now held or received in the future by the Receiver other than the Segregated Funds (the "Available Receivership Funds") free and clear of the Sunwing Claim, unless and until Sunwing obtains a final order of the Court (a "Sunwing Order"), on not less than 7 days notice to the Receiver, declaring Sunwing's ownership interest (whether by trust or otherwise) to all or any portion of the Available Receivership Funds (the "Sunwing Funds");
- (b) if Sunwing obtains a Sunwing Order, the Receiver will nevertheless be entitled to pay from the Sunwing Funds any fees, expenses or liabilities incurred by the Receiver up to the date of the Sunwing Order, to the extent other Available Receivership Funds (not subject to any other prior claims) are not available at such time to do so; and
- (c) Sunwing shall not hold the Receiver liable or otherwise responsible in any manner for the disbursement of Available Receivership Funds in accordance with paragraphs (a) and (b).
3. If there is a Sunwing Order but as a consequence of the Receiver's use of Available Receivership Funds pursuant to paragraphs 2(a) and (b), Available Receivership Funds to which Sunwing would have been entitled under the Sunwing Order are not available and Sunwing suffers a deficiency, Sunwing and the Receiver have agreed in principle that Sunwing ~~should~~ be able to claim for any deficiency from other Skyservice property or proceeds, including proceeds of fixed assets, to the same extent that the Receiver could do so to recover its fees, expenses and liabilities.
4. The Receiver agrees to provide, upon reasonable request from Sunwing from time to time (not more frequently than every 2 weeks), information regarding the Available Receivership Funds and an estimate of the then accrued fees, expenses and liabilities.
5. Sunwing agrees that under no circumstances will FTI Consulting Canada Inc. have any personal liability in respect of the foregoing matters.
6. The fact that Sunwing has entered into this agreement will not prejudice any arguments it wishes to make as to the characterization of any funds for the purpose of establishing whether Sunwing has a valid Sunwing Claim.

McCarthy Tétrault

April 8, 2010

- 3 -

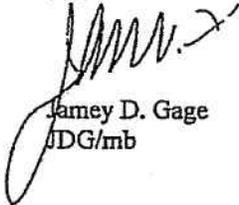
Blake, Cassels & Graydon

If Sunwing agrees to these terms, kindly sign below and return the signed letter to us as soon as possible.

Yours very truly,

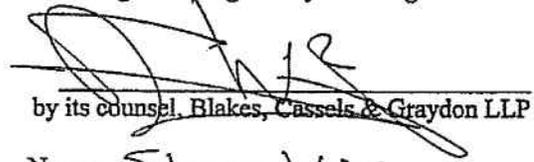
McCarthy Tétrault LLP

Per:



Jamey D. Gage
JDG/mb

Acknowledged and Agreed by Sunwing Tours Inc.



by its counsel, ~~Blakes, Cassels & Graydon LLP~~

Name: Steven Weisz

April 9, 2010

Appendix E

**AFFIDAVIT (SWORN APRIL 27, 2010) OF MARK WILLIAMS
PRESIDENT OF SUNWING AIRLINES INC.
("WILLIAMS AFFIDAVIT")**

Court File No.: CV-10-8647-00CL
Court File No.: CV-10-8651-00CL
Court File No.: CV-10-8657-00CL
Court File No.: CV-10-8658-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.,
Of the City of Toronto, in the Province of Ontario**

AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 (Application by the Greater Toronto Airports Authority)

AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 (Application by the Ottawa Macdonald-Cartier International Airport Authority)

AND IN THE MATTER OF AN APPLICATION pursuant to Section 56 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, Chapter 20, as amended (Application by NAV Canada)

AFFIDAVIT OF MARK WILLIAMS

Sworn April 27, 2010

I, Mark Williams, of the Town of Oakville, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of Sunwing Airlines Inc., a wholly owned subsidiary of Sunwing Travel Group Inc. ("Sunwing Group"), which is also the 100% shareholder of Sunwing Tours Inc. ("Sunwing") and, as such, have knowledge of the matters hereinafter deposed to, except where such knowledge is based on information and belief in which case I verily believe it to be true.

2. I have read the Affidavit of Thomas Chandler, filed in connection with these proceedings (the "**Chandler Affidavit**").

A. Sunwing Tours Inc.

3. Sunwing is a corporation organized under the laws of Ontario, carrying on business at 27 Fasken Drive, Etobicoke, Ontario.

4. TUI Canada Holdings Inc. ("**TUI Canada**") (an indirect wholly-owned subsidiary of TUI Travel PLC ("**TUI Travel**")) owns a 25% voting interest and 49% economic interest in Sunwing Group. Sunwing therefore shares an indirect common equity holder with Thomson Airways Limited ("**Thomson**"), which is also a wholly owned subsidiary of TUI Travel.

5. Sunwing was formed, effective February 5, 2010, as a result of an amalgamation of First Choice Canada Inc. ("**First Choice**") and Red Seal Tours Inc. Sunwing's divisions include "Signature Vacations" and "Sell Off Vacations," which were formerly divisions of First Choice.

6. At all material times, Sunwing carried on business as an operator of package tours and charter flights and a retail travel business in Canada, and was in that capacity a customer of Skyservice Airlines Inc. ("**Skyservice**"). Sunwing supplies package holidays (comprised of flights, accommodations and ground transportation, with the option to purchase other rated services) from 30 cities in Canada to over 42 destinations in Mexico, the Dominican Republic, Cuba, the Caribbean and Central America. Sunwing also provides various travel agency services for leisure and business travellers.

B. Sunwing's & Thomson's Relationship with Skyservice

7. Skyservice and Sunwing are party to a commercial agreement dated June 11, 2006, (as amended, including amendments dated November 21, 2008, November 25, 2008 and December 1, 2008, the "**Commercial Agreement**"), and First Choice Airways Limited and Skyservice are

party to an agreement dated August 28, 2006, (as amended and novated from time to time, the "FCA Commercial Agreement"). Pursuant to a novation agreement, dated September 30, 2008, between First Choice Airways limited and Thomson (formerly, Thomsonfly Limited) all rights and obligations of First Choice Airways Limited under the FCA Commercial Agreement were novated to Thomson.

8. The Commercial Agreement sets out the terms and conditions pursuant to which Sunwing and Skyservice enter into individual agreements (such agreements, the "Charter Agreements") for the charter of flight services during the term of the Commercial Agreement. The Commercial Agreement and the Charter Agreements are not attached to this Affidavit, however they will be made available to the Court and the other parties to these proceedings upon request, together with a request from Sunwing that such agreements be sealed and kept confidential

9. In November 2008, the parties agreed to an amendment to the Commercial Agreement, effective November 1, 2008, which extended the term of the Commercial Agreement until October 31, 2013.

10. Pursuant to the Charter Agreements, Sunwing agrees to charter a fleet of aircraft from Skyservice for a specified time period, and Skyservice agrees to operate the chartered aircraft.

11. Pursuant to the Commercial Agreement and the Charter Agreement, the charters are a cost-plus arrangement under which Sunwing pre-pays Skyservice a "Charter Fee" that includes "Overhead Charges", "Operating Costs" and "Profit Charges."

12. Clause 5.1.2 of the Commercial Agreement provides:

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 perseat 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 [reconciliation].

13. The "Operating Costs" that Sunwing prepays to Skyservice include:

(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;

(f) Flight and cabin crew salaries and expenses; and

(g) Irregular operations, welfare costs and sub-chartering of replacement aircraft (irregular operations and subservice)

Collectively, the "Operating Costs".

14. Both the Commercial Agreement (at section 15.1(e)) and the Charter Agreements (at section 5.1(e)) contain representations from Skyservice that for the term of the respective agreements, Skyservice will have the financial resources, management and technical expertise and the human resources to carry out and perform the services contemplated in the respective agreements.

B. Skyservices' "Cost-Plus" Funding Structure

(i) Ordinary Course Funding

15. In the ordinary course of business, Skyservice would submit invoices to Sunwing reflecting the aggregate overhead and Operating Costs, plus the profit charges, for scheduled charter flights. These invoices would typically cover flight services for a weekly period, and the amount charged would generally be in accordance with an annual budget negotiated between Skyservice and Sunwing.

16. Accordingly, before Skyservice incurs a cost to any of the Airport Authorities (as defined below), Sunwing has already paid Skyservice an amount to fund the liability.

(ii) Irregular Funding

17. Sunwing also provides Skyservice with funds for Operating Costs apart from the amounts regularly invoiced by Skyservice, such as for certain deposits required by fuel suppliers, airport authorities or other third party suppliers and service providers.

18. For example, on October 7, 2009, Percy Guyara, Controller of Skyservice, requested CDN\$678,000 for a deposit and prepayment of airport improvement fees, landing fees and general terminal charges incurred in connection with the operation of Skyservice aircraft to the Greater Toronto Airport Authority (the "GTAA"). The email request, sent to Jolanta Bialy, Sunwing Group's Vice President, Finance, attached a letter dated March 20, 2009, from the GTAA to Skyservice advising that the GTAA was "implementing new financial security requirements in respect of airport improvement fees ("AIF"), landing fees and general terminal charges ... to reduce the financial risk to the GTAA and to the air carriers operating at Toronto Pearson." The letter required that Skyservice provide a prepayment of an estimate of the fees, or a provision of a security deposit to the GTAA, and indicated that such prepayments were due

five business days before each successive 30 day period for AIF and 15 day period for landing fees and general terminal charges. A copy of the GTAA's letter and the email from Percy Guyara to Jolanta Bialy, together with proof of payment of the amount to Skyservice by wire transfer, are attached hereto as Exhibit A.

C. Prepayments made by Sunwing

(i) Prepayments on Account of "Claimed Unpaid Amounts"

19. As discussed in detail in the Chandler Affidavit, the GTAA, the Ottawa MacDonald-Cartier International Airport Authority, the Winnipeg Airports Authority and NAV Canada (collectively, the "Airport Authorities") have made claims against Skyservice for amounts charged in respect of certain leased aircraft, including aircraft leased by Skyservice from Thomson. These claims are referred to in the Thomson Affidavit as the "Claimed Unpaid Amounts", and I understand from the Chandler Affidavit that the Claimed Unpaid Amounts are with respect to Skyservice operations in February and March.

20. Sunwing has paid Skyservice CDN\$34,943,732.70 since January 22, 2010, on account of February and March charter flights. I do not have a breakdown of what proportion of this amount can be allocated to Skyservice liabilities incurred to the Airport Authorities, however by virtue of the Commercial Agreement and Charter Agreements, all Skyservice liabilities incurred to the Airport Authorities in relation to Sunwing-chartered flights were paid in advance by Sunwing. Accordingly, any Claimed Unpaid Amounts allocated to aircraft operated by Skyservice to provide Sunwing chartered flights have already been paid by Sunwing to Skyservice.

21. Sunwing did not receive any notice or information from Skyservice or the Airport Authorities that Skyservice had failed to pay any amount owing to the Airport Authorities. This is notwithstanding that Sunwing obtained a covenant from Skyservice at section 4.2 of the

Charter Agreements that Skyservice would “pay its debts in connection with the operation of the Aircraft, including applicable surcharges and departure taxes, on a timely basis.”

(ii) Prepayments for Services Not Provided

22. As set out in the Chandler Affidavit, on March 31, 2010, the Ontario Superior Court of Justice granted an Order (the “**Receivership Order**”) appointing FTI Consulting Canada Inc. as National Receiver (the “**Receiver**”) of Skyservice and all assets, undertakings and properties, and imposing a blanket stay of proceedings in respect of Skyservice. As a result of the Receivership Order, Skyservice ceased all operations as of March 31, 2010.

23. Sunwing did not receive any notice or information from Skyservice that Skyservice would not be operating after March 31, 2010, nor did it receive any notice or warning from Thomas Cook Canada Inc. (“**Thomas Cook**”), the company that brought the application for the Receivership Order.

24. Indeed, Skyservice invoiced Sunwing on March 17, 2010 for flights for the period of March 27 to April 2, 2010 (Invoice number REV-005130), and invoiced Sunwing on March 23, 2010 for flights for the period of April 3 to 9, 2010. The aggregate amount prepaid by Sunwing pursuant to the Commercial Agreement and Charter Agreements prior to Skyservice’s March 31, 2010 receivership for flights that Skyservice was chartered to provide after March 31, 2010 is approximately CDN\$3,500,000.

25. Invoice number REV-005130, dated March 17, 2010, is for the amount of CDN\$3,189,731.34, representing flights for the period of March 27, 2010 to April 2, 2010. CDN\$1,064,367.04 of this amount is on account of prepayment for flight services that Skyservice was required, but failed, to provide from March 31, 2010 to April 2, 2010, taking into

account a credit note issued by Skyservice for this period. A copy of Invoice REV-005130 and the Credit Note are attached hereto as Exhibit B.

26. Invoice REV-005130 was paid in full by wire transfer, and to the best of my knowledge, following my inquiry of Sunwing staff involved with accounts payable, at no time before or after payment was made did anyone from Skyservice advise that the flights pre-paid for would not be provided.

27. Invoice number REV-005146, dated March 23, 2010, is for the amount of CDN\$2,449,083.04, representing flights for the period of April 3, 2010 to April 9, 2010. Skyservice did not provide any of the services for which this invoice was issued. A copy of Invoice REV-005146 is attached hereto as Exhibit C.

28. Invoice REV-005146 was paid in full by wire transfer on March 26, 2010, and to the best of my knowledge, following my inquiry of Sunwing staff involved with accounts payable, at no time before or after payment was made did anyone from Skyservice advise that the flights pre-paid for would not be provided.

D. Negotiations between Skyservice and Sunwing, Thomson & TUI Travel

29. Since on or around at least January, 2010 and continuing until March 2010, Sunwing, Thomson, TUI Travel and Skyservice have been involved in negotiations and discussions in order to reach a mutually agreeable settlement of certain pending litigation initiated by Skyservice against Sunwing and others, and in order to come to terms and schedule of termination of the Commercial Agreement, the FCA Commercial Agreement and certain other agreements among the parties. I have been the primary representative of Sunwing, Thomson and TUI Travel in these negotiations.

30. I have met with representatives of Skyservice numerous times face to face, had numerous discussions over the telephone and exchanged a number of emails in connection with these negotiations.

31. Any terms of settlement would have confirmed the continuation of the Thomson Lease Agreements (as defined in the Chandler Affidavit) to their contractual termination dates, and provided for the termination of the Commercial Agreement and FCA Commercial Agreement according to a schedule that would have minimized the service disruption and financial harm to all parties involved. Managing the termination of the arrangements between Sunwing, Thomson and Skyservice requires the cooperation of all parties to effect an orderly, scheduled wind down, which was rendered impossible by Skyservice's abrupt receivership.

32. At no time during the ongoing negotiations did Skyservice indicate to me that it would be unable to do perform services or obligations consistent with continuing the Thomson Lease Agreements, the Commercial Agreement and Charter Agreements, and at no time was I given any indication that Skyservice was or was close to becoming insolvent or that it had been advised that Thomas Cook intended to appoint a receiver. Neither was I advised that Thomas Cook intended to return all of its aircraft previously leased to Skyservice to Europe on or before March 31, 2010 (as detailed in the Chandler Affidavit).

33. Indeed, given that Skyservice operates a "cost-plus" business in which all of its expenses are paid in advance by its customers (as discussed above), its insolvency was a complete surprise when I learned of it after Thomas Cook's receivership application.

34. As a result of the affidavit of Karim Nensi, Chief Financial Officer for Thomas Cook, sworn March 31, 2010 and filed together with Thomas Cook's receivership application (the "Nensi Affidavit"), I am now aware that the Amended and Restated Credit Agreement between

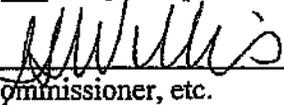
Skyservice and Thomas Cook dated February 12, 2010 (Exhibit C to the Nensi Affidavit),
provided:

... The Borrower [Skyservice] agrees that it will advise the Lender [Thomas Cook] of any action taken by or on behalf of the Borrower, directly or indirectly, to encourage, initiate or engage in discussions or negotiations with, or provide any information to Tui [which is defined as including Sunwing], or any affiliate of Tui, concerning the business or affairs of the Borrower other than in the ordinary course of business.

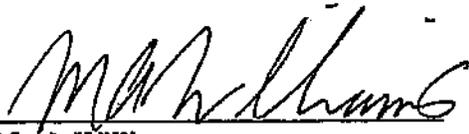
35. Prior to receiving the Nensi Affidavit, I was not aware that Skyservice had agreed with Thomas Cook to advise the latter of negotiations with them. Indeed, I understood that our negotiations with Skyservice were confidential, and I explicitly requested that our conversations not be recorded. I was also not aware that Skyservice had agreed with Thomas Cook not to provide to TUI Travel, Thomson or Sunwing any information concerning its business or affairs outside the ordinary course of business without first advising Thomas Cook.

36. Had Sunwing been notified of Skyservice's inability to perform the obligations contemplated in the settlement discussions, including an orderly, scheduled wind down of the arrangements between Sunwing and Skyservice, Sunwing would have taken steps to minimize its losses, both financially and operationally, including by way of limiting its outlay of the prepayments to Skyservice for charter flights that would not be provided.

SWORN BEFORE ME at the)
City of Etobicoke, in the Province of Ontario,)
this 27th day of April, 2010)


A Commissioner, etc.)

JENNIFER SHANNON WILLIS,
A COMMISSIONER, ETC.,
PROVINCE OF ONTARIO,
WHILE A STUDENT-AT-LAW.
EXPIRES APRIL 16, 2011.


Mark Williams)

This is Exhibit "A" referred to in
the Affidavit of
MARK WILLIAMS

sworn before me this 27th day of April, 2010



A Commissioner, etc.

Jolanta Bialy

From: Percy Gyara [Percy_Gyara@Skyservice.com]
Sent: Wednesday, October 7, 2009 3:23 PM
To: Jolanta Bialy
Cc: Barbara Syrek
Subject: RE: Skyservice Airlines - Air Carrier: Security Deposit Or Prepayment Requirement

Hi Jolanta

As per my email in Apr09, GTAA requires deposit and prepayment for AIF and landing fees \$ 678,000. We have to prepay 30 days of AIF and 15 days of landing fees. Please arrange to transfer this funds by 22nd October as I need to pay by 25th October.

Thanks in advance for all your help.

Percy Gyara , CGA, CPA
Controller



31 Fasken Drive
Toronto, Ontario M9W 1K6
Phone: (416) 679-5879
Fax: (416) 679-5913
E-mail: percy_gyara@skyservice.com

P Please consider the environment before printing this email

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From: Percy Gyara
Sent: April 2, 2009 5:04 PM
To: Jolanta Bialy
Cc: Barbara Syrek
Subject: FW: Skyservice Airlines - Air Carrier: Security Deposit Or Prepayment Requirement

Hello Jolanta

Attached please find a letter from GTAA which states that they will requiring a deposit for AIF and landing fees. As you don't have any operations in the summer, this will not affect you but I just wanted to inform you that we will need some kind of deposit from you in the winter season. Amount to be determined based on the schedule.

Please let me know if you have any questions or concerns.

Thanks

Percy Gyara , CGA, CPA
Controller





Greater Toronto Airports Authority

Finance

March 20, 2009

Percy Gyara
Skyservice Airlines Inc
31 Fasken Drive
Toronto ON M9W 1K6

Silena Betti, CGA
Manager, Accounting Operations
Tel: 416.776.7114
Fax: 416.776.5551

Dear Mr. Gyara:

Re: Toronto Pearson International Airport
Financial Security for Airport Improvement Fees and Aeronautical Fees

The Greater Toronto Airports Authority (GTAA) in consultation with the Air Carrier Consultative Committee (ACC) at Toronto Pearson International Airport ("Toronto Pearson") is implementing new financial security requirements in respect of airport improvement fees ("AIF"), landing fees and general terminal charges (all such fees and charges are collectively referred to as the "Fees") to reduce the financial risk to the GTAA and to the air carriers operating at Toronto Pearson. Attached for your information is an extract from the Minutes of the ACC meeting held on February 24, 2009 relating to this matter.

The financial security consists of the air carriers either prepaying an estimate of the Fees or providing a security deposit to the GTAA. Each air carrier operating at Toronto Pearson must either prepay an estimate of the Fees for each payment period or provide a security deposit. The attached Schedule "A" to this letter describes the prepayment and security deposit requirements in more detail. Air carriers providing security deposits may provide the required amount by a letter of credit or cash, or a combination of letter of credit and cash. The GTAA will pay interest on the cash portion of a security deposit as provided in the attached Schedule "A". We ask that you complete the attached Schedule "A" (indicate the option you have selected with a check mark) and return it to the GTAA by April 30, 2009.

Initially, after the GTAA receives the completed Schedule "A" from the air carrier, the GTAA will determine and advise the air carrier of the actual prepayment amount or security deposit, as applicable, based on its anticipated summer 2009 operational schedule. The GTAA may revise the applicable prepayment amount or security deposit from time to time depending on changes in the air carrier's operational schedule.



March 20, 2009
Page 2 of 3



It is important to note the following dates when the financial security requirements become effective:

A. Prepayment of Fees

For air carriers prepaying the Fees, the first prepayment is due on May 25, 2009. With respect to AIF, the first prepayment amount covers the period June 1 – June 30, 2009 and for landing fees and general terminal charges the first prepayment amount covers the period June 1 - June 15, 2009. Thereafter, the prepayments are due five (5) business days before each successive 30 day period for AIF and 15 day period for landing fees and general terminal charges.

B. Security Deposit

For air carriers paying security deposits (either letter of credit, cash, or combination), the GTAA must receive the applicable amount by May 29, 2009.

An air carrier may request to switch from prepayment to providing a security deposit, and vice versa, once per calendar year. If the GTAA approves such request it will inform the air carrier of the amount of the prepayment or security deposit, as applicable. However, at all times the air carrier must either be prepaying the Fees or have provided a security deposit to the GTAA.

Should you have any questions or require clarification please contact Teresa Fielding at teresa.fielding@gtaa.com.

Yours truly,

A handwritten signature in cursive script that reads "Silena Betti".

Silena Betti, CGA
Manager, Accounting Operations

c: Jackie Smalec – Skyservice
Larry Shack - Skyservice



Schedule "A"

Air Carrier _____

Aeronautical Revenue (Landing Fees and General Terminal Charges)

Option	Details*	Indicate Option Selected
1. Security Deposit (a) Cash Deposit **	45 days	
(b) Letter of Credit	45 days	
2. Prepayment***	15 days	

AIF Revenue

Option	Details	Indicate Option Selected
1. Security Deposit (a) Cash Deposit **	30 days	
(b) Letter of Credit	30 days	
2. Prepayment***	30 days	

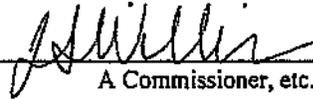
*Based on the average daily forecasted activity for each season: Winter (November 1 to March 31) and Summer (April 1 to October 31). The GTAA may revise the prepayment amount or security deposit if there are changes in the air carrier's forecasted operational activity.

** GTAA to pay interest as set by the 180 day CIBC Bank deposit rate

*** Carrier pays an estimate of the aeronautical activity 5 business days prior to the activity period and balance of invoice within 30 days of invoice date. The GTAA will periodically review and reconcile actual flight operations at Toronto Pearson with the prepayment amounts and security deposit and reserves the right to change the prepayment amounts and security deposit accordingly.

This is Exhibit "B" referred to in
the Affidavit of
MARK WILLIAMS

sworn before me this 27th day of April, 2010


A Commissioner, etc.



31 Fasken Drive
 Etobicoke Ontario M9W 1K6
 CANADA

INVOICE

Invoice Number REV-005130
 Date 3/17/2010
 Payment Terms NET0
 Customer ID SIGVAC1C

Signature Vacations - Revenue
 1685 Tech Ave
 Mississauga ON L4W 0A7

G.S.T. Registration: 13529 1458 RT0002
 H.S.T. Registration: 13529 1458 RT0002
 Q.S.T. Registration: 1012236286 TQ0001

Attention: Susana McCullough

Description	Quantity	Amount
Flights for the period of Mar 27 - Apr 2, 2010 This invoice includes meals for \$19,237.68	1	\$3,189,731.34
Subtotal		\$3,189,731.34
GST		\$0.00
TOTAL - CAD		\$3,189,731.34

Thank you for choosing Skyservice Airlines

Any questions or concerns, please call:

Shavir Mistry
 Phone: (416) 679 5893
 Email: shavir_mistry@skyservice.com

Please make cheques payable to Skyservice Airlines Inc.
 Wire transfer funds to: c/o HSBC Bank Canada
 885 West Georgia Street, Suite 200, Vancouver, BC V6C 3G1

Transit 10270 Account 217436-001



31 Fasken Drive
 Etobicoke Ontario M9W 1K6
 CANADA

CREDIT NOTE

Credit Note No. REVCRD-001472
 Date 3/23/2010
 Payment Terms
 Customer ID SIGVAC1C

Signature Vacations - Revenue

1685 Tech Ave
 Mississauga ON L4W 0A7

Attention: Susana McCullough

G.S.T. Registration: 13529 1458 RT0002
 H.S.T. Registration: 13529 1458 RT0002
 Q.S.T. Registration: 1012236286 TQ0001

Description	Quantity	Amount
Credit for YYZ-CUN-YYZ flights on Mar 28 & Apr 2, 2010	1.00	\$119,609.86
March 26	59,804.93	
Apr 2	54,804.93	
	<u>119,609.86</u>	

Thank you for choosing Skyservice Airlines

Subtotal	\$119,609.86
GST	\$0.00
TOTAL CAD	\$119,609.86

Any questions or concerns, please call:

Shavir Mistry
 Phone: (416) 679 5893
 Email: shavir_mistry@skyservice.com

Please make cheques payable to Skyservice Airlines Inc.
 Wire transfer funds to: c/o HSBC Bank Canada
 885 West Georgia Street, Suite 200, Vancouver, B.C., V6C 3G1

Transit: 10270 Account: 217430-001

This is Exhibit "C" referred to in
the Affidavit of
MARK WILLIAMS

sworn before me this __th day of April, 2010

A Commissioner, etc.



31 Fasken Drive
 Etobicoke Ontario M9W 1K6
 CANADA

INVOICE

Invoice Number REV-005146
 Date 3/23/2010
 Payment Terms NET0
 Customer ID SIGVAC1C

Signature Vacations - Revenue

1685 Tech Ave
 Mississauga ON L4W 0A7

Attention: Susana McCullough

G.S.T. Registration: 13529 1458 RT0002
 H.S.T. Registration: 13529 1458 RT0002
 Q.S.T. Registration: 1012236286 TQ0001

Description	Quantity	Amount
Flights for the period of Apr 3 -9, 2010 This invoice includes meals for \$14,770.73	1	\$2,449,083.04
Subtotal		\$2,449,083.04
GST		\$0.00
TOTAL CAD		\$2,449,083.04

Thank you for choosing Skyservice Airlines

Any questions or concerns, please call:

Shavir Mistry
 Phone: (416) 679 5893
 Email: shavir_mistry@skyservice.com

Please make cheques payable to Skyservice Airlines Inc.
 Wire transfer funds to: c/o HSBC Bank Canada
 885 West Georgia Street, Suite 200, Vancouver, BC V6C 3G1

Transit: 10270 - Account: 247480-901

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC., of the City of Toronto, in the Province of Ontario
AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (Application by the Greater Toronto Airports Authority)
AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (Application by the Ottawa Macdonald-Cartier International Airports Authority)
AND IN THE MATTER OF AN APPLICATION pursuant to Section 56 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, Chapter 20, as amended (Application by NAV Canada)

Court File No. CV-10-8647-00CL
Court File No. CV-10-8651 00CL
Court File No. CV-10-8657-00CL
Court File No. CV-10-8658-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at Toronto

AFFIDAVIT of MARK WILLIAMS

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
Box 25, Commerce Court West
199 Bay Street, Suite 2800
Toronto, Ontario M5L 1A9

Steven J. Weisz, LSUC #32102C
Tel: 416-863-2616

Catherine Beagan-Flood LSUC #43013U
Tel: 416-863-2269

Christopher Burr, LSUC #55172H
Tel: 416-863-3301
Fax: 416-863-2653

Lawyers for Sunwing Tours Inc.

Appendix F

**LETTER FROM SUNWING'S COUNSEL DATED MAY 12, 2010 TO
RECEIVER'S COUNSEL PROVIDING ADDITIONAL
INFORMATION**



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

May 12, 2010

McCarthy Tetrault LLP
Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto, ON M5K 1E6

Steven J. Weisz
Dir: 416-863-2616
steven.weisz@blakes.com

Reference: 76074/2

Re: Receivership of Skyservice Airlines Inc. ("Skyservice")
re: Claims to funds by Sunwing Tours Inc. ("Sunwing")

Attention: James Gage

As you are aware, we are counsel to Sunwing.

Further to our letter of April 2, 2010, this letter is to advise you of the particulars of Sunwing's claims to the funds held by FTI Consulting Canada Inc., in its capacity as receiver of Skyservice (the "Receiver").

As more particularly set out in the Affidavit of Mark Williams, sworn April 27, 2010 and filed in the receivership proceedings (the "Williams Affidavit"), Skyservice and Sunwing are party to a commercial agreement dated June 11, 2006, (as amended, including amendments dated November 21, 2008, November 25, 2008 and December 1, 2008, the "Commercial Agreement"). The Commercial Agreement sets out the terms and conditions pursuant to which Sunwing and Skyservice enter into individual agreements (such agreements, the "Charter Agreements") for the charter of flight services during the term of the Commercial Agreement.

Pursuant to the Commercial Agreement and the Charter Agreement, the charter flights are a cost-plus arrangement under which Sunwing pre-pays Skyservice a "Charter Fee" that includes overhead charges, operating costs and profit charges. In the ordinary course of business, Skyservice would submit invoices to Sunwing reflecting the aggregate overhead and operating costs, plus the profit charges, for scheduled charter flights in a subsequent weekly period. Sunwing also provides Skyservice with funds for operating costs apart from the amounts regularly invoiced by Skyservice, such as for certain deposits required by fuel suppliers, airport authorities or other third party suppliers and service providers.

Under the terms of the Commercial Agreement and Charter Agreement, Sunwing made a number of payments to Skyservice in which it retains, and hereby claims, a proprietary interest.

The March 26 Payment

On March 26, 2010, Sunwing paid to Skyservice by wire transfer the amount of CDN\$2,449,083.04, on account of Skyservice invoice number REV-005146, dated March 23, 2010 (the "March 26 Payment"). This invoice, and the payment made on account of it, represent the charter fee for flights for the period of April 3 to April 9, 2010. As a result of Skyservice's receivership, none of the charter flights pre-paid for were provided.

We understand that the Receiver holds the March 26 Payment in a segregated account, and that it was held separate and apart from other Skyservice funds between its receipt by Skyservice on March 26 and the appointment of the Receiver on March 31, 2010. The March 26 Payment was made to Skyservice for a



Page 2

specific purpose, being the charter flight services between April 3 and April 9, 2010 and was held in trust for Sunwing unless and until used for that purpose. Because such services were not provided, the March 26 Payment is held in trust by the Receiver for the benefit of Sunwing.

We hereby request that the Receiver return the March 26 Payment to Sunwing forthwith.

The March 19 Amount

On March 19, 2010, Sunwing paid to Skyservice by wire transfer the amount of CDN\$3,189,731.34, on account of Skyservice invoice number REV-005130, dated March 17, 2010. This invoice, and the payment made on account of it, represents the charter fee for flights for the period of March 27 to April 2, 2010. As set out in the Williams Affidavit, CDN\$1,064,367.04 of this amount is on account of prepayment for flight services that Skyservice was required, but failed, to provide from March 31, 2010 to April 2, 2010, taking into account a credit note issued by Skyservice for this period (the "**March 19 Amount**").

The March 19 Amount was paid to Skyservice for a specific purpose, being the charter flight services between March 27 and April 2, 2010 and was held in trust for Sunwing unless and until used for that purpose. Because such services were not provided, the March 19 Amount is held in trust by the receiver for the benefit of Sunwing.

We hereby request that the Receiver return the March 19 Amount to Sunwing forthwith.

The Wrongfully Withheld Payments

In addition to the amounts prepaid in the March 26 Payment and in addition to the March 19 Amount, the prior weekly payments made by Sunwing to Skyservice included amounts for operating costs incurred by Skyservice to third party goods and services providers, including the Airport Authorities (as defined in the Williams Affidavit), in connection with the operation of aircraft leased by Skyservice. Each of the Airport Authorities have brought actions seeking payment of amounts claimed from Skyservice, and there may be similar claims from other third party goods and services providers. To the extent that Skyservice failed to pay third parties, including the Airport Authorities, with monies that Sunwing had provided to Skyservice to make those payments (the "**Withheld Amounts**"), Sunwing seeks the return of such amounts.

The Withheld Amounts were paid by Sunwing to Skyservice for the sole and express purpose of those Withheld Amounts being used to fund payments to third parties, including the Airport Authorities, incurred in respect of flights chartered to Sunwing. To the extent that any of the Withheld Amounts were not paid to such third parties, including the Airport Authorities, such funds are the property of Sunwing and were received by the Receiver in trust, for the benefit of Sunwing.

We hereby request that the Receiver return to Sunwing any portion of the Withheld Amounts that are held by the Receiver forthwith.

The Deposits

In addition to the prepayments for Skyservice's operating costs and overhead, Sunwing has also paid substantial deposits to Skyservice as security for certain goods and services required by Skyservice from

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Page 3

third parties. In addition to the CDN\$678,000 paid on account of Greater Toronto Airport Authority fees (as described in the Williams Affidavit), Sunwing has also paid Skyservice CDN\$2,400,000 for an Imperial Oil fuel deposit and CDN\$390,000 for a Serviceair deposit, portions of which are related to flights that did not occur as a result of Skyservice's receivership. Further, Sunwing has paid to Skyservice CDN\$237,000 and US\$213,000 to enable Skyservice to purchase for Sunwing an inventory of tourist cards, which are required for Sunwing customers travelling on Skyservice charter flights to enter many vacation destinations (collectively, the amounts referred to in this paragraph are the "Deposits").

The Deposits were paid by Sunwing 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 as such the Deposits were never the property of Skyservice. To the extent that any of the Deposits were not used by Skyservice for their intended purpose, or are returned to the Receiver by the third party beneficiaries to which they were transferred, such funds are the property of Sunwing and are received by the Receiver in trust, for the benefit of Sunwing.

We hereby request that the Receiver return any portion of the Deposits that are held or have been received by the Receiver, and that the Receiver hold any portions of the Deposits that it should recover after the date hereof in trust for the benefit of Sunwing, and pay such funds over to Sunwing forthwith.

Damages

As a result of Skyservice's receivership and its consequent failure to provide the charter flight services for which Sunwing prepaid, Sunwing has incurred substantial costs and damages in addition to the amounts set out above. These costs and damages include, without limitation, costs of securing flight services from other carriers on very short notice, Skyservice inventory write offs, customer protection and compensation costs, loss of revenue and other costs. In addition to the losses occasioned by Sunwing as a direct or indirect result of Skyservice's failure to provide flight services, Sunwing has incurred significant costs in mitigating its losses to the extent possible, for which Skyservice is liable.

Sunwing has not yet completed a full assessment and accounting of its damages, however it is estimated that they will exceed CDN\$4,900,000, which is in addition to the March 26 Payment, the March 19 Amount, the Withheld Amounts and the Deposits. We hereby notify the Receiver of Sunwing's damage claim.

Please don't hesitate to contact me should you have any questions.

Yours very truly,



Steven J. Weisz

cc: N. Meakin, FTI Consulting Canada Inc.
H. Merideth, McCarthy Tetrault
M. Williams, Sunwing
C. Beagan-Flood, Blakes
C. Cerqueira, Blakes

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Appendix G

**LETTER FROM RECEIVER'S COUNSEL DATED DECEMBER 7,
2010 (THE "CLARIFYING LETTER")**



Heather L. Meredith
Direct Line: 416-601-8342
Direct Fax: 416-868-0673
Email: hmeredith@mccarthy.ca

December 7, 2010

Mr. Steven J. Weisz
Partner
Blake, Cassels & Graydon LLP
199 Bay Street
Suite 2800,
Commerce Court West
Toronto ON M5L 1A9

Dear Mr. Weisz:

Re: Receivership of Skyservice Airlines Inc. ("Skyservice") re: Sunwing Tours Inc. ("Sunwing")

As you know, FTI Consulting Canada Inc. in its capacity as receiver (the "**Receiver**") of all of the assets, undertakings and properties of Skyservice has been considering and investigating the claim asserted by Sunwing that it has a possible proprietary or trust interest in funds held by the Receiver (the "**Sunwing Claim**").

We received two letters from you, dated April 2, 2010 and May 12, 2010 (the "**Sunwing Letters**") outlining Sunwing's allegations with respect to the Sunwing Claim. Since that time, we have had some communications with you with respect to the Sunwing Claim but on a without prejudice basis only. As you know, the Receiver is preparing a report outlining the background to the Sunwing Claim, including Sunwing's allegations and the facts the Receiver has been able to identify in relation thereto. To do so accurately, we are writing to confirm our understanding of Sunwing's position with respect to certain allegations arising from our communications subsequent to the Sunwing Letters, particularly where that understanding may differ from or clarify the position outlined in the Sunwing Letters.

Separate Funds

We understand that Sunwing alleges that an "actual" trust was created in the amount of \$2,329,473 by what it describes as the identification and segregation of those funds in advance of the receivership. Sunwing alleges that there is: i) certainty of intention, which it says can be inferred from the acts of Skyservice in identifying and segregating funds (Sunwing says such actions supervene any provisions in written agreements between Skyservice and Sunwing, with Skyservice assuming greater duties to Sunwing than provided in the agreements); ii) certainty of object/beneficiary (Sunwing says it is the beneficiary by virtue of segregating the funds); and iii) certainty of object (Sunwing says the object of the trust is \$2,329,273, also by virtue of segregating those funds).

Invoices (March 27-April 9)

In the Sunwing Letters, Sunwing claims that \$3,513,450.08 (\$1,064,367.04 relating to invoice REV-005130 and \$2,449,083.04 relating to invoice REV-005146) was "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" and that such funds are held in trust for Sunwing "[b]ecause such services were not provided."

Sunwing has clarified its position with respect to this trust allegation. We now understand that Sunwing alleges that those funds are held in a constructive trust for the benefit of Sunwing (with \$2,329,273 of the \$3,513,450.08 also claimed in the "actual" trust category above). In particular, Sunwing alleges that the constructive trust is imposed to remedy the following alleged unjust enrichment: Skyservice was enriched by the \$3,513,450.08, Sunwing was correspondingly deprived of the same amount and, due to the appointment of the Receiver, there is no juristic reason for the enrichment.

In support of its position that there is no juristic reason for the enrichment, Sunwing alleges that Skyservice invoiced and accepted payment from Sunwing knowing it would not provide the flights covered by the two invoices and, as a result, acceptance of those payment is inequitable and vitiates any juristic reason for the enrichment that would have existed in the ordinary course by virtue of the agreements between Skyservice and Sunwing. Sunwing also states that the amounts of the invoices in question were determined based on complex formula involving an annual budget and that amounts received by Skyservice on account of such invoices were used to pay costs incurred, some of which are not divisible by flight. However, Sunwing alleges that this is not relevant to the question of whether or not the amounts paid are attributable to specific flights and that amounts paid with respect to flights scheduled can be identified and allocated.

Third Party "Deposits"

In the Sunwing Letters, Sunwing claimed certain amounts were paid by Sunwing to Skyservice for payment to third parties and/or for the purpose of funding Skyservice's deposits with third parties (or funding for a tourist card inventory). We now understand that these allegations are directed toward the following payments that were made by Sunwing to Skyservice for third party payments or "deposits" (please advise if Sunwing is now claiming any other amounts under the category of third party payments or third party deposits):

- (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.

We understand that Sunwing's position with respect to these amounts is that a Quistclose trust was created since, allegedly, the payments were made by Sunwing for a specified purpose and

the intention of the parties was for Skyservice to hold these funds and apply them only to the specified third party payee for the debt or obligation for which the funds were requested.

We also understand that the amount of this claim remains unquantified since it is Sunwing's position that the claim relates only to amounts that were not in fact remitted to the intended third party payee, which is information not available to Sunwing. To assist in that regard, the Receiver has reviewed the Skyservice records and has concluded that in each case the funds received from Sunwing were paid by Skyservice to the intended third party:

- (a) GTAA: Skyservice records show that C\$678,000 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).
- (b) Imperial Oil: Skyservice records show that US\$2,400,000 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

- (c) Servisair: Skyservice records show that C\$390,000 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).
- (d) US Tourist Cards: Skyservice records show that US\$213,000 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).
- (e) Canadian Tourist Cards: Skyservice records show that C\$237,000 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

On the basis of this information, and in light of Sunwing's previous advice that the claim relates only to amounts that were not in fact remitted to the intended third party payee, Sunwing may elect not to pursue this aspect of its claim. Kindly confirm to us if Sunwing will not be pursuing this aspect of its claim in light of the above information.

Damages

With respect to Sunwing's claim for miscellaneous damages and costs estimated to be C\$4,900,000 in the Sunwing Letters, Sunwing has clarified that it does not claim a trust exists with respect to those amounts except to the extent there is any overlap with the other trusts claims advanced by Sunwing (as described in the Sunwing Letters and clarified above).

Conclusion

If any of the above mis-states Sunwing's position in any way or if you object to its inclusion in the Receiver's report, please advise us as soon as possible. In addition, please advise if Sunwing intends to advance any other argument with respect to this matter.

Otherwise, the Receiver intends to complete its report with reference to Sunwing's updated/ clarified position and to proceed to seek court time for the hearing of a motion to determine the Sunwing Claim. In that regard, we will be in touch with respect to a proposed timetable shortly.

Yours very truly,

McCarthy Tétrault LLP

Per:



Heather L. Meredith

HLM/sa

Appendix H

LETTER FROM SUNWING'S COUNSEL OF DECEMBER 24, 2010 IN RESPONSE TO THE CLARIFYING LETTER



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

December 24, 2010

Via Email

McCarthy Tetrault LLP
Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto, ON M5K 1E6

Steven J. Weisz
Dir: 416-863-2616
steven.weisz@blakes.com

Reference: 76074/2

Dear Ms. Meredith:

Re: Receivership of Skyservice Airlines Inc. ("Skyservice")
Re: Claims to funds by Sunwing Tours Inc. ("Sunwing")

Further to our letter of May 12, 2010, and your letter of December 7, 2010, this letter is to advise you of the particulars of Sunwing's claims to the funds held by FTI Consulting Canada Inc., in its capacity as receiver of Skyservice (the "Receiver").

1. Background

As you know, Sunwing and Skyservice are party to a commercial agreement dated June 11, 2006 (as amended, the "**Commercial Agreement**"). The Commercial Agreement sets out the terms and conditions pursuant to which Sunwing and Skyservice enter into individual agreements (the "**Charter Agreements**") for the charter of flight services during the term of the Commercial Agreement.

As you also know, the charter flights are a cost-plus arrangement under which Sunwing pre-pays Skyservice a "Charter Fee". In the ordinary course of business, Skyservice would submit invoices to Sunwing reflecting charges for scheduled charter flights in a subsequent weekly period. In addition to the ordinary course scheduled prepayments for charter flights, at Skyservice's explicit request, Sunwing would provide Skyservice with funds for amounts owing to third parties including fuel suppliers, airport authorities and other third party suppliers and service providers.

When Skyservice ceased operations on March 31, 2010, without notice to Sunwing, Sunwing had made prepayments to Skyservice in respect of charter flights scheduled on and after March 31, 2010. Such flights were not provided by Skyservice, and Sunwing claims a proprietary interest in all such payments. Further, to the extent that the payments made by Sunwing to Skyservice on the basis that they would be forwarded to third parties were not actually forwarded to the appropriate third parties, or such payments were made to third parties and have been or will be refunded to Skyservice because they were not applied by such third parties as they were intended, such funds should rightfully be returned to Sunwing and Sunwing claims a proprietary interest in such unremitted or refunded amounts. As set out in detail below, Sunwing's proprietary interest in such payments is based on the existence of (a) an actual trust, (b) a constructive trust, and/or (c) a quistclose trust.



2. Actual Trust: March 29 Segregation Of Funds - \$2,329,473.00

Invoice REV-005146, dated March 23, 2010 (the "March 23 Invoice"), was issued by Skyservice to Sunwing in the amount of \$2,449,083.04, and on its face represents the charter fee for flights for the period of April 3 to April 9, 2010. Sunwing paid the March 23 Invoice on March 26, 2010. As a result of Skyservice's receivership, none of the charter flights pre-paid for under the March 23 Invoice were provided.

We understand from correspondence with the Receiver that on March 26, 2010, Skyservice applied \$2,329,473.00 in "partial" payment of the March 23 Invoice. As discussed in part 3 of this letter, Sunwing disputes that only "partial" payment was made on account of the March 23 Invoice, however for the purposes of this Part 2, it appears clear that Sunwing and Skyservice are in agreement that payment of at least \$2,329,473.00 was made.

We further understand from correspondence with the Receiver that on March 29, 2010, in anticipation of the receivership, Skyservice identified payments that had been made to it that related entirely to future flying that Skyservice was contracted to perform but that its management knew it would not provide. We understand that this review identified four amounts, totalling \$2,731,802.76, made up of: (a) \$2,329,473.00 in respect of the payment Sunwing made on March 26, 2010 on account of the March 23 Invoice (the "Trust Monies"); and (ii) three other amounts paid to Skyservice by third parties. We understand that Skyservice then transferred all of these amounts to a separate bank account known internally as the "In Flight Collections Account".

We have not been provided with details of the other amounts, in addition to the amounts paid by Sunwing, that were identified by Skyservice management and segregated in the In Flight Connections Account. Further information about these amounts is material to Sunwing's claim, and accordingly we hereby request (a) an accounting of all amounts deposited into the In Flight Collections Account, and (b) to the extent any funds were paid out of the In Flight Collections Account to third parties, details of the quantum and recipient of such payments, together with an explanation for the distribution(s).

The identification and segregation of the Trust Monies by Skyservice on March 29, 2010, in anticipation of the receivership, evidences the intention of Skyservice to establish a trust for the benefit of Sunwing. Case law is clear that certainty of intention to establish a trust need not be evidenced by a trust document or oral communication; the intention of the settlor to create a trust can be inferred from conduct and surrounding circumstances.¹ The actions of Skyservice in identifying and segregating the Trust Monies demonstrate that from March 29, 2010 forward, Skyservice's intention was to not use those funds for its own purposes, but to hold them in trust for Sunwing. Moreover, such manifest intention to hold the Trust Monies in trust supervenes any provisions of the Commercial Agreement or Charter Agreements to the contrary. Skyservice's act of segregating the Trust Monies created greater duties on Skyservice to Sunwing than those provided for in the agreements.

Further, with respect to the "three certainties" necessary to found a trust, the beneficiary or object of the trust, being Sunwing, and the quantity of the Trust Monies or subject of the trust, being \$2,329,473.00, were manifest by Skyservice by virtue of its segregation of the Trust Monies on March 29, 2010.

¹ D.W.M. Waters, *Law of Trusts in Canada*, 3rd ed., (Toronto: Carswell, 2005) at 133; *Arkay Casino Management & Equipment (1985) v. Alberta (Attorney General)*, 1998 CarswellAlta 771 (Alta. Q.B.) at para. 43; *McEachren v. Royal Bank*, [1991] 2 W.W.R. 702 (Alta. Q.B.) at para. 104; *Randall v. Nicklin*, 1984 CarswellNB 216 (N.B. C.A.) at paras. 23-24.



The requisite elements of a trust, being certainty of intention, object and subject, are therefore evident with respect to the Trust Monies. A trust exists, and we hereby request that the Receiver pay over \$2,329,473.00 to Sunwing forthwith.

3. Constructive Trust: Payments For Flights That Were Not Provided - \$3,513,450.08

As outlined above, in accordance with the Commercial Agreement and the Charter Agreements, Skyservice invoiced Sunwing in relation to each one-week period in which Sunwing flights were to take place. Such invoices were delivered to Sunwing and payment was due from Sunwing the week before the corresponding flights took place.

On March 17, 2010, invoice REV-005130 was issued to Sunwing in the amount of \$3,189,731.34 (the "March 17 Invoice") and was explicitly for flights in respect of the period March 27 to April 2, 2010. \$1,064,367.04 of the amount charged was for flights on March 31 to April 2, as accounted for below. The March 17 Invoice was paid in full by Sunwing on March 19, 2010. The March 23 Invoice was issued to Sunwing on March 23, 2010 in the amount of \$2,449,083.04 for flights in respect of the period April 3 to April 9, 2010. The March 23 Invoice was paid in full by Sunwing on March 26, 2010.

As a result of Skyservice's receivership, none of the charter flights scheduled on and after March 31, 2010, were provided. Sunwing therefore claims the aggregate amount of \$3,513,450.08, being the total amount paid by Sunwing for flights that were not provided, on the grounds that such amount is impressed with a constructive trust for Sunwing's benefit as a result of Skyservice being unjustly enriched in the same amount.

Unjust Enrichment

As a result of Skyservice's acceptance of Sunwing's payments under the March 17 Invoice and March 23 Invoice, Skyservice was clearly enriched by \$3,513,450.08. Skyservice, having paid the money and received nothing in return, was correspondingly deprived of the same amount. In the ordinary course Sunwing would not be deprived for having made payment to Skyservice because Sunwing would receive the flights that it paid for.

Due to the March 31 appointment of the Receiver and, more specifically, the resulting failure of Skyservice to provide the flights pre-paid for, however, Skyservice's enrichment and Sunwing's corresponding deprivation lack all juristic reason or justification. It is Sunwing's position that Skyservice invoiced Sunwing and accepted payment from Sunwing knowing that it would not provide the flights for which the two invoices were rendered. Indeed, based on the Affidavit of Karim Nensi filed by Thomas Cook Canada, Ltd. ("Thomas Cook") with the receivership application, Skyservice's officers and directors had informed Skyservice's counsel of their intention to resign on March 29, 2010 (at the latest). That is just six days after the issuance of the March 23 Invoice and three days after receipt of payment for the March 23 Invoice. Sunwing's position is that Skyservice was not caught unaware by Thomas Cook's action, and that it had knowledge of the impending receivership well in advance of March 31, 2010, including on March 17, March 19, March 23 and March 26, 2010, when the March 17 Invoice was issued and paid and the March 23 Invoice was issued and paid, respectively. Moreover, by knowingly invoicing and accepting payment for flights that Skyservice knew it would not be able to provide, Skyservice cannot rely on the adjustment mechanism that would



rectify, in the normal course, Skyservice's enrichment and Sunwing's corresponding deprivation; Skyservice cannot point to remedial contractual provisions that it knew would be of no effect to avoid liability for its unjust enrichment.

Issuance of invoices and acceptance of "pre-payments" with the undisclosed certainty that the flights for which the invoices and pre-payments relate would not be provided is inequitable and vitiates any juristic reason for an enrichment that would in the ordinary course exist by virtue of the Commercial Agreement and Charter Agreements.

The case law is clear that a remedy for unjust enrichment is restitution via the imposition of a constructive trust.²

Quantification of Constructive Trust Claim

The amounts paid by Sunwing pursuant to the March 17 Invoice and the March 23 Invoice are clearly attributable to certain, specific flights and indeed, in the case of the amounts claimed herein by Sunwing, to the flights that were not provided. Pursuant to the relationship between Sunwing and Skyservice, the amounts of invoices were determined based on a complex formula involving an annual budget, and in all likelihood the amounts received by Skyservice on account of such invoices were used by Skyservice for costs incurred, some of which are not divisible by flight by Skyservice after their receipt (such as general overhead costs). However, how the charges for flights were calculated and how Skyservice handled the funds after receipt are matters of internal management and are irrelevant to the determination of whether or not the amounts paid are attributable to specific flights.³ Whether Skyservice used money received from Sunwing to operate the specific flights for which it was paid, or applied some or all of such amounts to general costs, such as the overhead costs of Skyservice's office, has no bearing on whether or not the money was *paid* in respect of specific flights – in this case, the specific flights that were not provided.

The March 17 Invoice and the March 23 Invoice are explicitly, on their face, for flights scheduled March 27 to April 2 and April 3 to April 9, respectively. In the ordinary course, where flights actually provided in a given week did not match the scheduled number of flights, adjustments were made to subsequent invoices: this would only be possible to the extent that actual amounts are allocable to certain, specific flights. Furthermore, it appears that Skyservice was able to and did attribute charges to particular flights: we understand from previous correspondence, for example, that Skyservice records show that the invoiced amount relating to the period from March 31 to April 2, 2010, is \$944,949.94. Therefore, it is Sunwing's position that the amounts paid with respect to the flights scheduled for March 31 to April 9, 2010 can be easily identified and allocated to the flights not provided.

We understand that there may be some dispute as to the amount that Sunwing paid for the flights not provided. It is Sunwing's position that the amount relating to flights that were not provided for the period March 31 to April 2, 2010 is \$1,064,367.04. The attached spreadsheet illustrates how Sunwing's allocation is determined.

² *Becker v. Pettkus*, (1980), 117 D.L.R. (3d) 257 (S.C.C.).

³ For example, see *R. v. Lowden*, (1981) 15 Alta. L.R. (2d) 250, aff'd [1982] S.C.R. 60, where a travel agent received funds from a client for purchasing an airline ticket but used such funds for other purposes.



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Regarding payment for the March 23 Invoice, we understand that Skyservice received a single payment from Sunwing on March 26, 2010 in the amount of \$2,685,435.58 (the "**March 26 Payment**").

The March 26 Payment related to two invoices; the March 23 Invoice and invoice SALES000000817 dated March 26, 2010 for passenger taxes between March 8 and March 14, 2010 in the amount of \$255,969.25 (the "**Passenger Tax Invoice**"). We understand that Skyservice applied the March 26 Payment as full payment of the Passenger Tax Invoice and the remainder of \$2,329,466.33 as partial payment of the March 23 Invoice. However, we understand that a credit note, REVCRD-001472, in the amount of \$119,609.86 (the "**Credit Note**") was applied in payment of the difference between the amount of the March 26 Payment and the total amount due under the March 23 Invoice and the Passenger Tax Invoice.

The Credit Note was issued to Sunwing from Skyservice to account for previous overpayments made by Sunwing to Skyservice. The Credit Note represented a cash amount of \$119,609.86, to be applied by Sunwing against any amount owing to Skyservice, and was in fact applied against amounts owing under the March 23 Invoice. For the purposes of establishing a constructive trust, Sunwing's payment of \$2,685,435.58 in addition to Sunwing's application of the Credit Note is no different than if Sunwing had paid \$2,805,045.44 in cash.

Therefore, it is Sunwing's position that the March 26 Invoice was paid in full, in the amount of \$2,449,083.04.

Requested Remedy

We hereby request that the Receiver pay over \$3,513,450.08 to Sunwing forthwith. This amount reflects the payments made by Sunwing on account of flights that were not provided, specifically: (i) the portion of the payment made on account of the March 17 Invoice that is attributable to flights scheduled March 31 to April 2, 2010, being \$1,064,367.04; and (ii) the payment made on account of the March 23 Invoice, attributable to flights scheduled April 3 to April 9, 2010, being \$2,449,083.04.

We note that this \$3,513,450.08 requested is duplicative of the \$2,329,473.00 (being the Trust Monies) requested in Part 2 of this letter, which are subject to both an actual trust, as discussed in Part 2 of this letter, and to a constructive trust, as discussed in this Part 3.



4. Quistclose Trust: Third Party Payments – Unknown Quantum

In addition to the prepayments made under the Commercial Agreement and the Charter Agreements in respect of flights to be provided by Skyservice, Sunwing also provided substantial payments to Skyservice, at Skyservice's explicit request, to be paid over by Skyservice to specific third parties. In this regard, the following payments (the "Sunwing Third Party Payments") were made by Sunwing to Skyservice on the following specified dates:

Intended Third Party Payee	Amount of Payment	Date Paid
GTAA	\$678,000	October 22, 2009
Imperial Oil	\$2,400,000	November 25, 2009
Servisair deposit	\$390,000	December 23, 2009
Tourist Cards (CAN)	\$237,000	October 9, 2009
Tourist Cards (US)	US\$213,000	October 9, 2009

As demonstrated by the attached correspondence between Skyservice and Sunwing, each of the above payments were made by Sunwing for a specific purpose, which purpose was explicitly set out in the request from Skyservice. Skyservice therefore had notice of such purpose, and the purpose was abundantly clear: the money was to be paid over to the specified third party. It can furthermore be gathered from the attached correspondence that the intention of the parties was for Skyservice to hold the Sunwing Third Party Payments and apply them only to the specified third party debts or obligations for which they were requested. Purpose of payment, knowledge of such purpose by the recipient and an intention that the money be used only for such purpose are the three requirements for a quistclose trust, and the Sunwing Third Party Payments were therefore subject to a quistclose trust immediately upon their delivery to Skyservice.⁴

We understand from your letter of December 7, 2010, that Skyservice made payment to the Intended Third Party Payees listed above in amounts in excess of the amount of the Sunwing Third Party Payments within a reasonable time after such amounts were received by Skyservice from Sunwing.

In addition to the Sunwing Third Party Payments, we assume that Skyservice received funds for the purpose of making payments to the Intended Third Party Payees listed above from parties other than Sunwing, including from Thomas Cook (the "Other Third Party Payments"). To the extent that Skyservice failed to pay the sum of such Other Third Party Payments and the Sunwing Third Party Payments to the third parties for whom they were intended, some or all of the unpaid amounts are held by Skyservice in trust, and Sunwing's portion thereof is hereby requested by Sunwing. Sunwing is not able to quantify this claim at this time because the amount of the claim is dependant upon records of Skyservice revealing the amount of the Third Party Payments received by Skyservice. Such information is not available to Sunwing; however, we trust it is available to the Receiver and hereby request the details thereof.

⁴ See, for example, *Cliffs Over Maple Bay Investments Ltd., Re*, 2010 CarswellBC 726 (B.C.S.C.), which reviews the Canadian jurisprudence on quistclose trusts generally.



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In addition, to the extent that Skyservice has received or is owed a refund from the Intended Third Party Payees on account of the Sunwing Third Party Payments made by Sunwing to Skyservice and thereafter paid by Skyservice to the Intended Third Party Payee, the portion of such Sunwing Third Party Payments refunded is held by Skyservice in trust, and is hereby requested by Sunwing. Sunwing is not able to quantify this claim at this time because the amount of the claim is dependent upon records of Skyservice revealing the amount of the refunds, if any. Such information is not available to Sunwing; however, we trust it is available to the Receiver and hereby request the details thereof

5. Damages Claim

In our letters to you dated May 12, 2010 and April 2, 2010 wherein we assert certain financial and trust claims on behalf of Sunwing, claims for costs and damages, including costs of replacing flight services, inventory write-offs, customer protection and compensation and loss of revenues were included. Our May 12, 2010 letter estimated these claims to be CDN\$4,900,000, and they have since been determined to substantially exceed that amount as set out in the proof of claim filed with the Receiver on behalf of Sunwing on August 27, 2010 (the "Proof of Claim").

Without limiting the claims made in this letter, and without prejudice to anything in the Proof of Claim, we wish to clarify Sunwing does not claim a trust with respect to these miscellaneous damages and costs, except to the extent there is any overlap between the damages and the trust claims set out in this letter, in which case Sunwing asserts its trust claim in full over any overlapping amount.

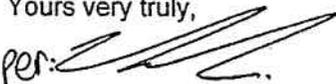
6. Determination of Trust Claim

We understand that the Receiver may seek the assistance of the Superior Court of Justice in determining Sunwing's trust claim. Sunwing does not object to the inclusion of this letter and its attachments and in any materials filed by the Receiver with the Court for that purpose, and reserves the right to include this letter and its attachments in any responding materials filed by Sunwing.

The facts underlying Sunwing's claim do not appear to be materially in dispute. We trust that in the event the Receiver seeks the Court's assistance to determine Sunwing's claim, we will be given an opportunity to develop an agreed statement of facts to expedite and focus any issue that may remain following your consideration of this letter.

Please do not hesitate to contact me should you have any questions.

Yours very truly,

per: 
Steven J. Weisz

12434733.2

Jolanta Bialy

From: Percy Gyara [Percy_Gyara@Skyservice.com]
Sent: Wednesday, October 7, 2009 3:23 PM
To: Jolanta Bialy
Cc: Barbara Syrek
Subject: RE: Skyservice Airlines - Air Carrier: Security Deposit Or Prepayment Requirement

Hi Jolanta

As per my email in Apr09, GTAA requires deposit and prepayment for AIF and landing fees \$ 678,000. We have to prepay 30 days of AIF and 15 days of landing fees. Please arrange to transfer this funds by 22nd October as I need to pay by 25th October.

Thanks in advance for all your help.

Percy Gyara , CGA, CPA
Controller



31 Fasken Drive
Toronto, Ontario M9W 1K6
Phone: (416) 679-5879
Fax: (416) 679-5913
E-mail: percy_gyara@skyservice.com

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From: Percy Gyara
Sent: April 2, 2009 5:04 PM
To: Jolanta Bialy
Cc: Barbara Syrek
Subject: FW: Skyservice Airlines - Air Carrier: Security Deposit Or Prepayment Requirement

Hello Jolanta

Attached please find a letter from GTAA which states that they will requiring a deposit for AIF and landing fees. As you don't have any operations in the summer, this will not affect you but I just wanted to inform you that we will need some kind of deposit from you in the winter season. Amount to be determined based on the schedule.

Please let me know if you have any questions or concerns.

Thanks

Percy Gyara , CGA, CPA
Controller





Greater Toronto Airports Authority

Finance

March 20, 2009

Percy Gyara
Skyservice Airlines Inc
31 Fasken Drive
Toronto ON M9W 1K6

Silena Betti, CGA
Manager, Accounting Operations
Tel: 416.776.7114
Fax: 416.776.5551

Dear Mr. Gyara:

Re: Toronto Pearson International Airport
Financial Security for Airport Improvement Fees and Aeronautical Fees

The Greater Toronto Airports Authority (GTAA) in consultation with the Air Carrier Consultative Committee (ACC) at Toronto Pearson International Airport ("Toronto Pearson") is implementing new financial security requirements in respect of airport improvement fees ("AIF"), landing fees and general terminal charges (all such fees and charges are collectively referred to as the "Fees") to reduce the financial risk to the GTAA and to the air carriers operating at Toronto Pearson. Attached for your information is an extract from the Minutes of the ACC meeting held on February 24, 2009 relating to this matter.

The financial security consists of the air carriers either prepaying an estimate of the Fees or providing a security deposit to the GTAA. Each air carrier operating at Toronto Pearson must either prepay an estimate of the Fees for each payment period or provide a security deposit. The attached Schedule "A" to this letter describes the prepayment and security deposit requirements in more detail. Air carriers providing security deposits may provide the required amount by a letter of credit or cash, or a combination of letter of credit and cash. The GTAA will pay interest on the cash portion of a security deposit as provided in the attached Schedule "A". We ask that you complete the attached Schedule "A" (indicate the option you have selected with a check mark) and return it to the GTAA by April 30, 2009.

Initially, after the GTAA receives the completed Schedule "A" from the air carrier, the GTAA will determine and advise the air carrier of the actual prepayment amount or security deposit, as applicable, based on its anticipated summer 2009 operational schedule. The GTAA may revise the applicable prepayment amount or security deposit from time to time depending on changes in the air carrier's operational schedule.

Greater Toronto Airports Authority
Toronto Pearson International Airport

P.O. Box 6031, 3111 Convoir Drive
Toronto AMF, Ontario, Canada L5P 1B2

P (416) 776-3000
F (416) 776-7748
www.GTAA.com



March 20, 2009
Page 2 of 3



It is important to note the following dates when the financial security requirements become effective:

A. Prepayment of Fees

For air carriers prepaying the Fees, the first prepayment is due on May 25, 2009. With respect to AIF, the first prepayment amount covers the period June 1 – June 30, 2009 and for landing fees and general terminal charges the first prepayment amount covers the period June 1 - June 15, 2009. Thereafter, the prepayments are due five (5) business days before each successive 30 day period for AIF and 15 day period for landing fees and general terminal charges.

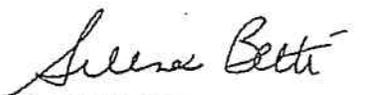
B. Security Deposit

For air carriers paying security deposits (either letter of credit, cash, or combination), the GTAA must receive the applicable amount by May 29, 2009.

An air carrier may request to switch from prepayment to providing a security deposit, and vice versa, once per calendar year. If the GTAA approves such request it will inform the air carrier of the amount of the prepayment or security deposit, as applicable. However, at all times the air carrier must either be prepaying the Fees or have provided a security deposit to the GTAA.

Should you have any questions or require clarification please contact Teresa Fielding at teresa.fielding@gtaa.com.

Yours truly,


Silena Betti, CGA
Manager, Accounting Operations

c: Jackie Smalec – Skyservice
Larry Shack - Skyservice



Schedule "A"

Air Carrier _____

Aeronautical Revenue (Landing Fees and General Terminal Charges)

Option	Details*	Indicate Option Selected
1. Security Deposit (a) Cash Deposit **	45 days	
(b) Letter of Credit	45 days	
2. Prepayment***	15 days	

AIF Revenue

Option	Details	Indicate Option Selected
1. Security Deposit (a) Cash Deposit **	30 days	
(b) Letter of Credit	30 days	
2. Prepayment***	30 days	

*Based on the average daily forecasted activity for each season: Winter (November 1 to March 31) and Summer (April 1 to October 31). The GTAA may revise the prepayment amount or security deposit if there are changes in the air carrier's forecasted operational activity.

** GTAA to pay interest as set by the 180 day CIBC Bank deposit rate

*** Carrier pays an estimate of the aeronautical activity 5 business days prior to the activity period and balance of invoice within 30 days of invoice date. The GTAA will periodically review and reconcile actual flight operations at Toronto Pearson with the prepayment amounts and security deposit and reserves the right to change the prepayment amounts and security deposit accordingly.

Jolanta Bialy

From: Jolanta Bialy
Sent: Monday, November 23, 2009 2:50 PM
To: Percy Gyara
Cc: Abdul Khan; Deborah D'Souza; Giulia Geraci
Subject: RE: Imperial Oil deposit

Hello Percy,

Please note that we will provide you with \$2.4m Cad funds to cover Imperial Oil Deposit for W09/10 season on Nov 25.
Thanks. Jolanta

From: Percy Gyara [mailto:Percy_Gyara@Skyservice.com]
Sent: Thursday, November 12, 2009 2:33 PM
To: Jolanta Bialy
Subject: Imperial Oil deposit

Hi Jolanta

I have to provide this deposit on or before 30th Nov. Can you please transfer US\$ 2.2M being your portion of the deposit by 26th Nov so that I have enough turnaround time.

Thanks

Percy Gyara , CGA, CPA
Controller



31 Fasken Drive
Toronto, Ontario M9W 1K6
Phone: (416) 679-5879
Fax: (416) 679-5913
E-mail: percy_gyara@skyservice.com

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