

FILED / PRODUIT

Date: October 24, 2012

CT- 2012-001

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

PUBLIC VERSION

OTTAWA, ONT.

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COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/2008-141;

AND IN THE MATTER OF the proposed transborder joint venture between Air Canada and United Continental Holdings, Inc.;

AND IN THE MATTER OF the “Marketing Cooperation Agreement” between Air Canada and United Air Lines, Inc.;

AND IN THE MATTER OF the “Alliance Expansion Agreement” between Air Canada and United Air Lines, Inc.;

AND IN THE MATTER OF the “Air Canada/Continental Alliance Agreement” between Air Canada and Continental Airlines Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more Orders pursuant to sections 90.1 and 92 of the *Competition Act*;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

– and –

**AIR CANADA,
UNITED CONTINENTAL HOLDINGS, INC.,
UNITED AIR LINES, INC., and
CONTINENTAL AIRLINES INC.**

Respondents

CONSENT AGREEMENT

RECITALS:

A. Respondents are currently party to Alliance Agreements that provide for pricing, inventory and yield management coordination, pooling of revenues, and route and schedule planning for passenger airline services on Transborder Routes;

B. Respondents propose to enter into a transborder joint venture agreement that would further their coordination on Transborder Routes (the “**Transborder Joint Venture Agreement**”);

C. The Commissioner has concluded that the Alliance Agreements and the Transborder Joint Venture Agreement are likely to result in a substantial lessening and/or prevention of competition in the supply of Local Passenger airline services on the Carve-Out Routes, and that the implementation of this Agreement is necessary to ensure that a substantial lessening and/or prevention of competition will not result from the Alliance Agreements and/or Transborder Joint Venture Agreement; and

D. Respondents do not admit, but will not for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner’s present conclusions that (i) each of the Alliance Agreements and the Transborder Joint Venture Agreement are likely to result in a substantial lessening and/or prevention of competition in the supply of Local Passenger airline services on the Carve-Out Routes; and (ii) the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Alliance Agreements and the Transborder Joint Venture Agreement; but Respondents do not accept the Commissioner’s allegations and nothing in this Agreement will be taken as an admission or acceptance by Respondents of any facts, liability, wrongdoing, submissions, legal argument or conclusions for any other purpose.

THEREFORE Respondents and the Commissioner agree as follows:

I. DEFINITIONS

[1] Whenever used in this Agreement, the following words and terms have the meanings set out below:

- (a) “**Act**” means the *Competition Act*, R.S.C., 1985, c. C-34, as amended;
- (b) “**Affiliate**” means an affiliated corporation, partnership or sole proprietorship within the meaning of section 2(2) of the Act;
- (c) “**Agreement**” means this Consent Agreement, including the schedules hereto, and references to an “Article”, “Section”, “Part”, “Paragraph”, “Schedule”, or “Subparagraph” are, unless otherwise indicated, references to a section, part, paragraph or schedule of or to this Agreement;

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- (d) **“Air Canada”** means Air Canada, its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by Air Canada, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (e) **“Air Canada Carve-Out Route Personnel”** means persons, functions or positions of or within Air Canada that have access to and responsibility for Air Canada Commercially Sensitive Carve-Out Route Information; “Air Canada Carve-Out Route Personnel” as of the date of this Agreement shall include, but not be limited to, the names, functions or positions described in Schedule “B” and all people who report (directly or indirectly) to such names, functions or positions and have access to and responsibility for Air Canada Commercially Sensitive Carve-Out Route Information;
- (f) **“Air Canada Commercially Sensitive Carve-Out Route Information”** means any Confidential Information in the power, possession, or control of Air Canada concerning current or prospective fares or seat availability of any Air Canada air passenger service on any Carve-Out Route, except any Carve-Out Route on which the application of Section [2] is suspended;
- (g) **“Alliance Agreements”** means the Marketing Cooperation Agreement dated May 30, 1995 between Air Canada and United Air Lines, Inc., as amended, the Alliance Expansion Agreement dated May 31, 1996 between Air Canada and United Air Lines, Inc., and the Air Canada/Continental Alliance Agreement dated October 25, 2009 between Air Canada and Continental Airlines Inc.;
- (h) **“Application Period”** shall have the meaning set out in Confidential Schedule “A”;
- (i) **“Business Day”** means a day on which the Competition Bureau’s Gatineau, Quebec office is open for business;
- (j) **“Carve-Out Route”** means any route that is a Long Haul Carve-Out Route or Short Haul Carve-Out Route;
- (k) **“Commercially Sensitive Carve-Out Route Information”** means Air Canada Commercially Sensitive Carve-Out Route Information and United Continental Commercially Sensitive Carve-Out Route Information;
- (l) **“Commissioner”** means the Commissioner of Competition appointed under the Act;
- (m) **“Competitor”** means any air carrier providing scheduled air passenger service, other than Respondents or a carrier acting on behalf of Respondents;

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- (n) **“Confidential Information”** means competitively sensitive, proprietary and all other information that is not in the public domain, and that is owned by or pertains to a Person or a Person’s business, and includes, but is not limited to, manufacturing, operations and financial information, customer lists, price lists, contracts, cost and revenue information, marketing methods, patents, technologies, processes, or other trade secrets; for greater certainty, Confidential Information does not include information relating to current or prospective fares or seat availability that an airline makes available to other airlines or travel agents generally;
- (o) **“Exit Period”** shall have the meaning set out in Confidential Schedule “A”;
- (p) **“Exited Routes”** shall have the meaning set out in Section [29];
- (q) **“Expert”** means the Person appointed pursuant to Part V (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Expert;
- (r) **“Expert Agreement”** means the agreement described in Section [13];
- (s) **“Interpretation Act”** means the *Interpretation Act*, R.S.C. c. I-21, as amended;
- (t) **“Local Passenger”** means a passenger whose point of departure is one end of a Carve-Out Route and whose final destination is the other end of a Carve-Out Route. For greater certainty, Local Passenger does not include any passenger who flies on a Carve-Out Route as part of a connecting itinerary;
- (u) **“Long Haul Threshold”** means the threshold as set out in Confidential Schedule “A”;
- (v) **“Long Haul Carve-Out Route”** means any non-stop flight between the following cities:
 - (i) Calgary (YYC) – Houston (HOU or IAH);
 - (ii) Montreal (YUL) – Houston (HOU or IAH);
 - (iii) Toronto (YTZ or YYZ) – Denver (DEN);
 - (iv) Toronto (YTZ or YYZ) – Houston (HOU or IAH);
 - (v) Toronto (YTZ or YYZ) – San Francisco (OAK or SFO); and
 - (vi) Calgary (YYC) – Chicago (MDW or ORD);
- (w) **“Monitor”** means the Person appointed in accordance with Part VI (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor;
- (x) **“Monitor Agreement”** means the agreement described in Section [16];

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- (y) **“Parties”** means the Commissioner and Respondents collectively, and **“Party”** means any one of them;
- (z) **“Person”** means any individual, sole proprietorship, partnership, joint venture, firm, corporation, unincorporated organization, trust, or other business or government entity, and any subsidiaries, divisions, groups or Affiliates thereof;
- (aa) **“Prohibited Activities”** means any of the following activities:
 - (i) joint pricing;
 - (ii) inventory or yield management coordination;
 - (iii) pooling of revenues or costs;
 - (iv) provision by Air Canada, directly or indirectly, to United Continental of Air Canada Commercially Sensitive Carve-Out Route Information; and
 - (v) provision by United Continental, directly or indirectly, to Air Canada of United Continental Commercially Sensitive Carve-Out Route Information;
- (bb) **“Records”** means records within the meaning of section 2(1) of the Act;
- (cc) **“Respondents”** means Air Canada and United Continental collectively, and **“Respondent”** means any one of them;
- (dd) **“Review Event”** shall have the meaning set out in Section [18];
- (ee) **“Short Haul Threshold”** means the threshold as set out in Confidential Schedule “A”;
- (ff) **“Short Haul Carve-Out Route”** means any non-stop flight between the following cities:
 - (i) Montreal (YUL) – Chicago (MDW or ORD);
 - (ii) Montreal (YUL) – Washington (DCA, IAD or BWI);
 - (iii) Toronto (YTZ or YYZ) – Cleveland (CLE);
 - (iv) Vancouver (YVR) – San Francisco (OAK or SFO);
 - (v) Ottawa (YOW) – New York (EWR, JFK, or LGA);
 - (vi) Ottawa (YOW) – Washington (DCA, IAD or BWI);
 - (vii) Toronto (YTZ or YYZ) – Washington (DCA, IAD or BWI); and
 - (viii) Calgary (YYC) – San Francisco (OAK or SFO);
- (gg) **“Threshold”** means the Long Haul Threshold and Short Haul Threshold, or either one of them;
- (hh) **“Threshold Application”** shall have the meaning set out in Section [47];

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- (ii) **“Threshold Calculation”** shall have the meaning set out in Section [12];
- (jj) **“Total Seat Capacity”** shall have the meaning set out in Confidential Schedule “A”;
- (kk) **“Transborder Joint Venture Agreement”** means the agreement described in the second recital to this Agreement;
- (ll) **“Transborder Route”** means a city pair with one end in Canada and the other end in the United States of America;
- (mm) **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.);
- (nn) **“United Continental”** means United Continental Holdings, Inc., United Air Lines, Inc. and Continental Airlines Inc., their directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by United Continental Holdings, Inc., United Air Lines, Inc. and Continental Airlines Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (oo) **“United Continental Carve-Out Route Personnel”** means persons, functions or positions of or within United Continental that have access to and responsibility for United Continental Commercially Sensitive Carve-Out Route Information; “United Continental Carve-Out Route Personnel” as of the date of this Agreement shall include, but not be limited to, the names, functions or positions described in Schedule “B” and all people who report (directly or indirectly) to such names, functions or positions and have access to and responsibility for United Continental Commercially Sensitive Carve-Out Route Information; and
- (pp) **“United Continental Commercially Sensitive Carve-Out Route Information”** means any Confidential Information in the power, possession, or control of United Continental concerning current or prospective fares or seat availability of any United Continental air passenger service on any Carve-Out Route, except any Carve-Out Route on which the application of Section [2] has been suspended.

II. PROHIBITED ACTIVITIES ON CARVE-OUT ROUTES

- [2] Subject to Sections [3] and [5], Respondents shall not engage in any Prohibited Activity in respect of any Local Passenger on any Carve-Out Route for so long as this Agreement remains in force.
- [3] The Prohibited Activities in Section [2] shall not apply in respect of any sale or discount of passenger airline services pursuant to corporate or group contracts on the Carve-Out Routes where it is made known to the Person calling for or requesting the bid or tender, at or before the time when any bid or tender is submitted or withdrawn, that Respondents intend to offer a joint bid or tender, or that the Person has explicitly consented to Respondents offering a joint bid or tender.

III. SUSPENSION AND REINSTATEMENT OF PROHIBITED ACTIVITIES ON CARVE-OUT ROUTES

- [4] The application of Section [2] to a Carve-Out Route may only be suspended or reinstated with the prior approval of the Commissioner, in his discretion, in accordance with this Part and the criteria set out in Confidential Schedule "A".
- [5] The application of Section [2] to a Carve-Out Route shall be suspended, subject to Section [7], where Respondents have demonstrated to the Commissioner and he is satisfied that:
- (a) on a Short Haul Carve-Out Route, Respondents' aggregate share of Local Passengers or Total Seat Capacity on that route, which shall be determined using the criteria set out in Confidential Schedule "A", did not exceed the Short Haul Threshold for the most recently completed Application Period covered by Respondents' notice under Paragraph [7](a);
 - (b) on a Long Haul Carve-Out Route, Respondents' aggregate share of Local Passengers or Total Seat Capacity on that route, which shall be determined using the criteria set out in Confidential Schedule "A", did not exceed the Long Haul Threshold for the most recently completed Application Period covered by Respondents' notice under Paragraph [7](a); and
 - (c) each Competitor on that route has made inventory available for purchase throughout the next Exit Period as of the date covered by Respondents' notice under Paragraph [7](a) such that Respondents would not be likely to exceed the applicable Threshold.
- [6] Respondents' aggregate share of Local Passengers or Total Seat Capacity on a Carve-Out Route shall include any air carrier providing service on that route that:
- (a) is directly or indirectly controlled by Respondents, or in which Respondents have a direct or indirect interest which, for greater certainty,

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shall exclude any direct or indirect interests held by directors, officers, employees, agents, and representatives of Respondents; and

- (b) is not fully independent of or does not operate at arm's length from Respondents.
- [7] If Respondents, in their discretion, seek to obtain the approval of the Commissioner regarding the suspension of the application of Section [2] to a Carve-Out Route, the following process shall apply:
- (a) Respondents will provide written notice to the Commissioner and the Expert of circumstances that may lead to the suspension of the application of Section [2] to a Carve-Out Route and shall supply supporting information, including data in accordance with Confidential Schedule "A", to establish how the circumstances satisfy the terms of this Agreement.
 - (b) Within 7 Business Days following receipt of the information described in Paragraph [7](a), the Commissioner may request additional information concerning the circumstances on the applicable Carve-Out Route from any or all of Respondents and the Expert. Respondents and the Expert shall each provide any additional information requested from them within 7 Business Days. When Respondents have provided a complete response to the Commissioner's request, an officer or other duly authorized representative of each Respondent shall certify that he or she has examined any additional information provided by that Respondent to the Commissioner and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects.
 - (c) The Commissioner shall notify Respondents of the approval of, or the objection to, the proposed suspension of the application of Section [2] to the applicable Carve-Out Route as soon as possible, and in any event within 10 Business Days after the later date on which the Commissioner receives the information described in Paragraphs [7](a) and [7](b).
 - (d) The Commissioner's determination as to whether to approve the suspension of the application of Section [2] to a Carve-Out Route shall be in writing.
- [8] Where the Commissioner has approved the suspension of the application of Section [2] to a Carve-Out Route,
- (a) Respondents shall:
 - (i) promptly inform the Commissioner and the Expert of circumstances that may lead to the reinstatement of the application of Section [2] to a Carve-Out Route;

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- (ii) 6 months following the suspension of the application of Section [2] to a Carve-Out Route and every 6 months thereafter as long as the suspension remains in place, provide to the Commissioner and the Expert a written report setting out Respondents' aggregate share of Total Seat Capacity or Local Passengers on that Carve-Out Route together with all supporting information, including data, in accordance with Confidential Schedule "A".
- (b) Within 7 Business Days following receipt of the written report described in Paragraph [8](a)(ii), the Commissioner may request additional information reasonably required by the Commissioner concerning the circumstances on the applicable Carve-Out Route from any or all of Respondents and the Expert. Respondents and the Expert shall each provide any additional information requested from them within 7 Business Days. When Respondents have provided a complete response to the Commissioner's request, an officer or other duly authorized representative of each Respondent shall certify that he or she has examined any additional information provided by that Respondent to the Commissioner and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects.
- (c) Where the Commissioner determines that Respondents have subsequently exceeded the Threshold applicable to that Carve-Out Route for the Exit Period, the Commissioner shall promptly approve the reinstatement of the application of Section [2] to that route. The Commissioner's determination as to whether to approve the reinstatement of the application of Section [2] to a Carve-Out Route shall be in writing.

IV. COMMERCIALLY SENSITIVE CARVE-OUT ROUTE INFORMATION

- [9] Each Respondent shall develop and implement procedures with respect to Commercially Sensitive Carve-Out Route Information to comply with this Agreement:
- (a) Such procedures shall ensure that Commercially Sensitive Carve-Out Route Information is maintained confidentially and that no employee of a Respondent shall have access to the other Respondent's Commercially Sensitive Carve-Out Route Information;
 - (b) Such procedures shall include, without limitation:
 - (i) monitoring compliance;
 - (ii) enforcing compliance with appropriate remedial action in the event of non-compliant use or disclosure;

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- (iii) distributing information regarding procedures annually to Air Canada Carve-Out Route Personnel and United Continental Carve-Out Route Personnel; and
 - (iv) requiring that Air Canada Carve-Out Route Personnel and United Continental Carve-Out Route Personnel comply with the requirements of this Agreement.
- [10]** Each Person identified in Schedule “B” must submit to the Commissioner an executed non-disclosure agreement, in the form set out in Schedule “C”. Such materials shall be submitted:
 - (a) for each person specifically identified in Schedule “B”, no later than 20 Business Days after the date of registration of this Agreement with the Tribunal; and
 - (b) for each person who replaces any of the people specifically identified in Schedule “B, or is appointed to any of those positions or functions specifically identified in Schedule “B”, no later than 10 Business Days after assuming those responsibilities.
- [11]** Respondents shall change Air Canada Carve-Out Route Personnel and United Continental Carve-Out Route Personnel only pursuant to the following procedures:
 - (a) replacement or addition of individuals who report (directly or indirectly) to the people, functions or positions specifically identified in Schedule “B” shall be in accordance with the usual and customary business practices of the applicable Respondent; and
 - (b) replacing any of the people specifically identified in Schedule “B”, or appointing people to or reorganizing positions or functions specifically identified in Schedule “B”, or adding new positions or functions that are not specifically identified in Schedule “B”, shall be in accordance with usual and customary business practices of the applicable Respondent and shall require the provision of notice to the Monitor and the Commissioner within 3 Business Days following such replacement, appointment, reorganization, or addition.

V. CARVE-OUT ROUTE EXPERT

- [12]** The Commissioner may appoint an Expert following registration of this Agreement, selected in the Commissioner’s discretion, to determine whether the calculation of Respondents’ aggregate share of Local Passengers or Total Seat Capacity on a Carve-Out Route as set out in any notice or written report provided by Respondents pursuant to Paragraphs [7](a) and [8](a)(ii) has been determined in accordance with Part III and the criteria set out in Confidential Schedule “A”

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(the “**Threshold Calculation**”). Prior to the appointment, the Commissioner shall notify Respondents of his intention to make the appointment and Respondents may provide the Commissioner with input on the identity of the Expert.

- [13] Not later than 14 Business Days after the appointment of the Expert, Respondents shall propose an agreement that, subject to the prior approval of the Commissioner, confers upon the Expert all the rights and powers necessary to permit the Expert to perform his duties under this Agreement. Respondents shall execute the Expert Agreement promptly after receiving the Commissioner’s approval.
- [14] Respondents consent to and shall include the following terms and conditions in the Expert Agreement:
- (a) The Expert shall evaluate the Threshold Calculation in any notice or written report provided by Respondents pursuant to Paragraphs [7](a) and [8](a)(ii) in a manner consistent with the purposes of this Agreement and in consultation with the Commissioner;
 - (b) The Expert shall act for the sole benefit of the Commissioner, maintain all confidences and avoid any conflict of interest;
 - (c) The Expert shall have no duties of a fiduciary nature to Respondents;
 - (d) Within 5 Business Days following receipt of the information described in Paragraph [7](a) or of any additional information referenced in Paragraph [7](b), the Expert shall identify in writing to the Commissioner any additional information or further additional information required from Respondents to evaluate the Threshold Calculation. Within 5 Business Days following receipt of the information described in Paragraph [7](a) or if the Commissioner requests any additional information under Paragraph [7](b), within 5 Business Days following the receipt of the later of that information, the Expert shall provide a written report to the Commissioner evaluating whether Threshold Calculation has been determined in accordance with Part III and the criteria set out in Confidential Schedule “A”;
 - (e) Within 5 Business Days following receipt of the written report described in Paragraph [8](b)(ii), the Expert shall identify in writing to the Commissioner any additional information required from Respondents to evaluate the Threshold Calculations. Within 5 Business Days following the later of the receipt of the written report described in Paragraph [8](b)(ii), or the additional information under Paragraph [8](b), the Expert shall provide a written report to the Commissioner evaluating whether the Threshold Calculation has been determined in accordance with Part III and the criteria set out in Confidential Schedule “A”; and

- (f) The Expert shall fully and promptly respond to all requests from the Commissioner and shall provide all information the Commissioner may request.

VI. MONITOR

- [15] The Commissioner may appoint a Monitor following registration of this Agreement, selected in the Commissioner's discretion, responsible for monitoring compliance by Respondents with Part IV. Prior to the appointment of a Monitor, the Commissioner shall notify Respondents of his intention to make the appointment and Respondents may provide the Commissioner with input on the identity of the Monitor.
- [16] Not later than 14 Business Days after the appointment of the Monitor, Respondents shall propose an agreement that, subject to the prior approval of the Commissioner, confers upon the Monitor all the rights and powers necessary to permit the Monitor to perform his duties under this Agreement. Respondents shall execute the Monitor Agreement promptly after receiving the Commissioner's approval.
- [17] Respondents consent to the following terms and conditions and shall include such terms in the Monitor Agreement:
 - (a) The Monitor shall have the power and authority to monitor Respondents' compliance with Part IV as provided herein, and shall exercise such power and authority in a manner consistent with the purposes of this Agreement and in consultation with the Commissioner;
 - (b) The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, legal counsel and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
 - (c) The Monitor shall act for the sole benefit of the Commissioner, maintain all confidences and avoid any conflict of interest; and
 - (d) The Monitor shall have no duties of a fiduciary nature to Respondents.
- [18] In performing the Monitor's duty to monitor Respondents' compliance with Part IV, the Monitor shall:
 - (a) provide to the Commissioner a written report regarding Respondents' compliance with Part IV within 60 days following:
 - (i) registration of this Agreement;
 - (ii) execution of the Transborder Joint Venture Agreement; and

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- (iii) receipt of an affidavit or certificate pursuant to Section [35].
 - (b) within 7 Business Days, respond to any request by the Commissioner for additional information regarding Respondents' compliance with Part IV;
 - (c) where the Commissioner has reasonable grounds to believe that Respondents may not be in compliance with their obligations under Part IV, perform such investigations and take such steps as are reasonably necessary to verify that Respondents are complying with Part IV ("**Review Event**"); and
 - (d) where there is a Review Event, provide to the Commissioner a report within 60 days.
- [19] Subject to any legally recognized privilege, Respondents shall:
- (a) fully and promptly respond to all reasonable requests from the Monitor and, to the extent available, shall provide all information the Monitor may thereby request; and
 - (b) provide to the Monitor full and complete access to all personnel, Records, information (including Confidential Information) and facilities as the Monitor may reasonably request to verify Respondents' compliance with Part IV.
- [20] Each Respondent shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Monitor on behalf of that Respondent.
- [21] The Monitor appointed pursuant to this Part may be the same Person appointed as the Expert pursuant to Section [12].

VII. PROVISIONS APPLYING TO BOTH CARVE-OUT ROUTE EXPERT AND MONITOR

- [22] Respondents shall take no action that interferes with or impedes, directly or indirectly, the Expert's efforts to evaluate whether the Respondents' Threshold Calculations have been determined in accordance with Part III and the criteria set out in Confidential Schedule "A" and the Monitor's efforts to monitor Respondents' compliance with Part IV. In performing their duties under this Agreement, the Expert and the Monitor shall not unreasonably interfere with the normal operations and the usual conduct of the business of Respondents.
- [23] Respondents may require the Expert, Monitor, and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner and Respondents; provided, however, that such agreement shall

not restrict the Expert or Monitor from providing any information to the Commissioner.

- [24] The Commissioner may require the Expert, Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Expert or Monitor may receive from the Commissioner in connection with the performance of the Expert's or Monitor's duties.
- [25] Subject to Confidential Schedule "E", Respondents shall be responsible for all reasonable fees and expenses properly charged or incurred by the Expert and Monitor in the course of carrying out their duties under this Agreement. The Expert and Monitor shall serve without bond or security, and shall account for all fees and expenses incurred. In the event of any dispute, such accounts shall be subject to the approval of the Commissioner.
- [26] Respondents shall indemnify the Expert and Monitor and hold the Expert and Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Expert's or Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Expert or Monitor.
- [27] If the Commissioner determines that the Expert or Monitor has ceased to act or has failed to act diligently or reasonably, the Commissioner may remove the Expert or Monitor and appoint a substitute Expert or Monitor, selected in the Commissioner's discretion in accordance with Sections [12] and [15]. The provisions of this Agreement respecting the Expert or Monitor shall apply in the same manner to any substitute Expert or Monitor.
- [28] The Expert and Monitor shall serve, at the discretion of the Commissioner, for so long as this Agreement remains in force.

VIII. EXITED ROUTES

- [29] With respect to the Calgary-Chicago, Calgary-San Francisco, and Montreal-Houston Carve-Out Routes (collectively, "**Exited Routes**"), if Air Canada is able to demonstrate to the Commissioner's satisfaction, in his discretion, that Air Canada's decision to cease operations on these routes was not related in any way to its cooperation with United Continental under the Alliance Agreements or the Transborder Joint Venture Agreement (other than the existence of a code sharing relationship with United Continental on the Exited Routes), these routes will cease to be Carve-Out Routes. Prior to any such exercise of discretion by the Commissioner, Respondents will provide:

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- (a) all Records prepared or received by Air Canada between July 1, 2008 and the date of registration of this Agreement with the Tribunal related to the decision to increase or reduce capacity on the Exited Routes;
- (b) all Records prepared or received by Respondents between July 1, 2008 and the date of registration of this Agreement with the Tribunal related to plans with respect to flights, routes, schedules and capacity on the Exited Routes; and
- (c) the Commissioner with an opportunity to interview representatives of each of Respondents, as selected by the Commissioner, with respect to Air Canada's decision to increase or reduce capacity on the Exited Routes.

[30] Records produced in response to Paragraphs [29](a) and [29](b) shall be certified under oath or solemn affirmation by an officer or other person duly authorized by the board of directors or other governing body of the applicable Respondent as having been examined by that person and as being, to the best of his or her knowledge and belief, correct and complete in all material respects.

IX. COMPLIANCE

[31] Within 5 Business Days of execution of the final Transborder Joint Venture Agreement, Respondents shall provide to the Commissioner a copy of the final Transborder Joint Venture Agreement.

[32] Respondents shall provide a copy of this Agreement to each of its own and its Affiliates' directors, officers, employees and agents having managerial responsibility for any obligations under this Agreement within 3 Business Days after the date of registration of this Agreement. Respondents shall ensure that their respective directors, officers, employees and agents with responsibility for any obligations under this Agreement receive sufficient training respecting Respondents' responsibilities and duties under this Agreement, and the steps that such individuals must take in order to comply with this Agreement.

[33] Respondents shall not, without the prior written approval of the Commissioner in his discretion, enter into or execute any amendment, supplement or modification to the Transborder Joint Venture Agreement or the Alliance Agreements relating to any Prohibited Activity on any Transborder Route. The Commissioner shall notify Respondents of the approval of, or objection to, the proposed amendment, supplement, or modification as soon as possible, and in any event within 60 days after the date on which the Commissioner receives Respondents' request.

[34] For a period of 5 years after the date of registration of this Agreement with the Tribunal, Respondents shall provide 30 days' advance written notice to the Commissioner of any proposed merger as that term is defined in section 91 of the Act or any agreement or arrangement between Respondents relating to any Prohibited Activity on any Transborder Route. If any such merger, agreement or

arrangement is one for which notice is not required under section 114 of the Act, the relevant Respondent shall supply to the Commissioner the information described in section 16 of the *Notifiable Transactions Regulations* at least 30 days before completing such transaction. The Respondent shall certify such information in the same manner as would be required if section 118 of the Act applied. The Commissioner may, within 30 days after receiving the information described in section 16 of the *Notifiable Transactions Regulations*, request that the Respondent supply additional information that is relevant to the Commissioner's assessment of the transaction. In the event that the Commissioner issues such a request for additional information, the Respondent shall supply information to the Commissioner in the form specified by the Commissioner and shall not complete such transaction until at least 30 days after the Respondent has supplied all such requested information in the form specified by the Commissioner.

- [35] Six months after the date of registration of this Agreement and annually on the anniversary of that date for as long as this Agreement remains in force, and at such other times as the Commissioner in his discretion may require, each Respondent shall file an affidavit or certificate, substantially in the form of Schedule "D", certifying its compliance with Parts II, III, IV and IX and setting out the following information in detail:
- (a) the steps taken to ensure compliance;
 - (b) the controls in place to verify compliance; and
 - (c) the names and titles of employees who have oversight of compliance.
- [36] If any of Respondents or the Monitor becomes aware that there has been a breach or has reasonable grounds to believe there may have been a breach of any of the terms of this Agreement, such Person shall, within 5 Business Days after becoming aware of the circumstances described above, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual and anticipated) of the circumstances described above. Each Respondent shall provide confirmation of its compliance with this provision in all affidavits and certificates of compliance filed with the Commissioner pursuant to Section [35].
- [37] Respondents shall notify the Commissioner at least 10 days prior to:
- (a) any proposed dissolution of any Respondent; and
 - (b) any other change in Respondents including, but not limited to, a reorganization, material acquisition, disposition or transfer of assets, or any fundamental change for purposes of Respondent's incorporating statute, if such change may reasonably be expected to affect compliance obligations arising out of this Agreement.

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- [38] For the period commencing when this Agreement is registered and for as long as this Agreement remains in force, for purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, Respondents shall, upon written request given at least 5 Business Days in advance to Respondents, permit any authorized representative(s) of the Commissioner, without restraint or interference:
- (a) to access, during regular office hours of Respondents on any Business Day(s), all facilities and to inspect and copy all Records in the possession or control of Respondents related to compliance with this Agreement, which copying services shall be provided by Respondents at its expense; and
 - (b) to interview such officers, directors or employees of Respondents as the Commissioner requests regarding such matters.

X. DURATION

- [39] Unless otherwise agreed to in writing by the Parties, this Agreement shall become effective on the date when it is registered, and shall remain in effect for as long as:
- (a) the Transborder Joint Venture Agreement is in force, or
 - (b) any provision of the Alliance Agreements relating to any Prohibited Activity on any Transborder Route is in force,

except that Section [45] shall survive the expiry of this Agreement, and Sections [26] and [36] shall survive the expiry of this Agreement with respect to obligations arising prior to the expiry of this Agreement.

XI. NOTICES

- [40] For a notice, report, consent, approval, written confirmation or other communication required or permitted to be given under this Agreement to be valid,
- (a) it must be in writing and the sending party must use one of the following methods of delivery: (1) personal delivery; (2) registered mail; (3) courier service; (4) facsimile; or (5) electronic mail; and
 - (b) it must be addressed to the receiving party at the address(es) listed below, or to any other address designated by the receiving party in accordance with this Section.

if to the Commissioner:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Commissioner of Competition c/o Merger Notification Unit
Fax: (819) 953-6169
Email address: MergerNotification@cb-bc.gc.ca

with copies to:

Deputy Executive Director
Competition Bureau Legal Services
Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Fax: (819) 997-9210
Email address: Rhona.Einbinder-Miller@cb-bc.gc.ca

if to Air Canada:

if by mail or courier:

Air Canada Centre
7373 Côte-Vertu Blvd. West
Gate 11
Saint-Laurent, Quebec H4S 1Z3

Attention: David Shapiro, Vice President and General Counsel
And to: Daniel Magny, Senior Counsel, Regulatory and International

or if by registered mail:

Air Canada Legal Department
P.O. Box 7000
Airport Station
Dorval, Quebec
H4Y 1J2

Attention: David Shapiro, Vice President and General Counsel
And to: Daniel Magny, Senior Counsel, Regulatory and International

Facsimile: (514) 422-4147

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Email: David.Shapiro@aircanada.ca
Email: Daniel.Magny@aircanada.ca

With copies to:

Katherine Kay
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

Facsimile: (416) 947-0866
Email: kkay@stikeman.com

if to United Continental Holdings, Inc.:

United Air Lines, Inc.
77 W. Wacker Drive
HDQLD – 9th Floor
Chicago, Illinois 60601
Attention: Brett Hart, EVP, General Counsel & Secretary
Facsimile: (872) 825-0046
Email: Brett.Hart@united.com

And to:

United Air Lines, Inc.
1225 New York Avenue, NW
Suite 1100
Washington, D.C. 20005
Attention: Karine Faden, Managing Director and Senior Counsel
Facsimile: (202) 688-4120
Email: Karine.Faden@united.com

With copies to:

Jason Gudofsky
Blake, Cassels & Graydon LLP
4000 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1A9

Facsimile: (416) 863-2653
Email: jason.gudofsky@blakes.com

Paul Yde
Freshfields Bruckhaus Deringer US LLP

701 Pennsylvania Avenue, NW, Suite 600
Washington, D.C. 20004

Facsimile: (202) 507-5930
Email: paul.yde@freshfields.com

- [41] A notice, consent or approval under this Agreement is effective on the day that it is received by the receiving Party. A notice, consent or approval is deemed to have been received as follows:
- (a) if it is delivered in person, by registered mail or by courier, upon receipt as indicated by the date on the signed receipt;
 - (b) if it is delivered by facsimile, upon receipt as indicated by the time and date on the facsimile confirmation slip;
 - (c) if it is delivered by electronic mail, when the recipient, by an email sent to the email address for the sender stated in this Section or by a notice delivered by another method in accordance with this Section, acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email for purposes of this Section.

If a notice is received after 5:00 p.m. local time, or on a day that is not a Business Day, then the notice shall be deemed to have been received on the next Business Day.

- [42] Notwithstanding Sections [40] and [41], a notice, report, consent, approval, written confirmation or other communication that is not communicated in accordance with Sections [40] and [41] is valid if a representative of the Party to this Agreement that is the recipient of such communication confirms the receipt and sufficiency of such communication.

XII. GENERAL

- [43] In this Agreement:
- (a) **Number and Gender** – Unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.
 - (b) **Time Periods** – Computation of time periods shall be in accordance with the Interpretation Act, and the definition of “holiday” in the Interpretation Act shall include Saturday.
- [44] The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. Respondents hereby consent to such registration.

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- [45] Information in Confidential Schedule “A” and Confidential Schedule “E” shall remain confidential at all times and shall survive the termination of this Agreement; provided, however, the Commissioner may communicate or allow to be communicated such information for the purposes of the administration or enforcement of the Act.
- [46] The Commissioner may, in his discretion and after informing Respondents, extend any of the time periods contemplated by this Agreement, other than those time periods applicable to the Commissioner, the Expert, or the Monitor, which cannot be extended without Respondents’ prior written consent, not to be unreasonably withheld. If any time period is extended, the Commissioner shall promptly notify Respondents of the revised time period.
- [47] Nothing in this Agreement precludes Respondents or the Commissioner from bringing an application under section 106 of the Act. Respondents will not, for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner’s present conclusions that: (i) each of the Alliance Agreements and the Transborder Joint Venture Agreement are likely to result in a substantial lessening and/or prevention of competition in the supply of Local Passenger airline services on the Carve-Out Routes; (ii) if Respondents operate at levels above the Thresholds, there is no effective constraint on Respondents’ ability to exercise market power; (iii) the implementation of this Agreement, including the Thresholds and the criteria for the application of Section [2] (the “**Threshold Application**”), is necessary and sufficient to ensure that any substantial lessening and/or prevention of competition would not result from the Alliance Agreements, the Transborder Joint Venture Agreement, or any similar agreement between Respondents in respect of the Prohibited Activities on Carve-Out Routes. Respondents agree that with respect to the Threshold Application on any Carve-Out Route there will be no recourse to the Tribunal on a basis of ‘changed circumstances’ under section 106 of the Act.
- [48] Respondents attorn to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement.
- [49] This Agreement, together with the Expert Agreement and Monitor Agreement, constitutes the entire agreement between the Commissioner and Respondents, and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
- [50] This Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein, without applying any otherwise applicable conflict of law rules.
- [51] In the event of a dispute regarding the interpretation, implementation or application of this Agreement, including any decision by the Commissioner

PUBLIC VERSION

- pursuant to this Agreement or any breach of this Agreement by a Respondent, any of the Commissioner or Respondents may apply to the Tribunal for directions or an order.
- [52] In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail.
- [53] This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

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The undersigned hereby agree to the filing of this Agreement with the Tribunal for registration.

DATED this day of October 23, 2012

COMMISSIONER OF COMPETITION

[ORIGINAL SIGNED BY "John Pecman"]

Name: John Pecman

Title: Interim Commissioner of
Competition

AIR CANADA

[ORIGINAL SIGNED BY "Benjamin Smith"]

I/We have authority to bind the
corporation

Name:

Title: Executive Vice-President & Chief
Commercial Officer

**UNITED CONTINENTAL HOLDINGS, INC., UNITED AIR LINES, INC., and
CONTINENTAL AIRLINES INC.**

[ORIGINAL SIGNED BY "Brett Hart"]

I/We have authority to bind the
corporation

Name: Brett Hart

Title: Executive Vice-President, General
Counsel & Secretary

PUBLIC VERSION

CONFIDENTIAL SCHEDULE "A"

[CONFIDENTIAL]

SCHEDULE “B”

Air Canada Carve-Out Route Personnel

Vice President, Revenue Management
Director, Revenue Management, Transborder
Director, Alliances
Member(s) of Transborder Joint Venture Revenue Management Board
Member(s) of Transborder Joint Venture Pricing Organization
Member(s) of Transborder Joint Venture Network Planning Board
Member(s) of Transborder Joint Venture Steering Board
Transborder Joint Venture Revenue Management Lead(s)

United Continental Carve-Out Route Personnel

Managing Director, Americas Pricing & Revenue Management
Managing Director, Latin Pricing & Revenue Management
Senior Manager, Revenue Management, Canada
Managing Director, Alliances
Member(s) of Transborder Joint Venture Revenue Management Board
Member(s) of Transborder Joint Venture Pricing Organization
Member(s) of Transborder Joint Venture Network Planning Board
Member(s) of Transborder Joint Venture Steering Board
Transborder Joint Venture Revenue Management Lead(s)

SCHEDULE “C”

NON-DISCLOSURE AGREEMENT

WHEREAS Air Canada; United Continental Holdings, Inc., United Air Lines, Inc., and Continental Airlines Inc. (together, “**United Continental**”); and the Commissioner of Competition (“**Commissioner**”) have entered into a Consent Agreement to resolve the Commissioner’s competition concerns arising from certain Alliance Agreements and the proposed Transborder Joint Venture Agreement (“**TBJV**”) between Air Canada and United Continental;

AND WHEREAS as a condition of the Consent Agreement, certain prescribed personnel of United Continental must enter into a non-disclosure agreement to confirm that United Continental Commercially Sensitive Carve-Out Route Information, as that term is defined by the Consent Agreement, is maintained confidentially and that no employee of Air Canada (“**Air Canada Personnel**”) shall have access to the United Continental Commercially Sensitive Carve-Out Route Information;

AND WHEREAS as a condition of the Consent Agreement, certain prescribed personnel of Air Canada must enter into a non-disclosure agreement to confirm that Air Canada Commercially Sensitive Carve-Out Route Information, as that term is defined by the Consent Agreement, is maintained confidentially and that no employee of United Continental (“**United Continental Personnel**”) shall have access to the Air Canada Commercially Sensitive Carve-Out Route Information;

THE UNDERSIGNED hereby undertakes, acknowledges and agrees as follows:

1. I have received a copy of the Consent Agreement and have read and understood its terms as they apply to me.
2. I am an employee of [**United Continental**] / [**Air Canada**] and I have the job title of _____.
3. I acknowledge that I am required to comply with the terms of the Consent Agreement, and as such, I will not share, communicate, divulge, discuss or transmit any [**United Continental Commercially Sensitive Carve-Out Route Information**], as that term is defined by the Consent Agreement, to **Air Canada Personnel**] / [**Air Canada Commercially Sensitive Carve-Out Route Information**], as that term is defined by the Consent Agreement, to **United Continental Personnel**].
4. I acknowledge that I am required to take reasonable steps to ensure that persons who report to me comply with the prohibitions set out in the Consent Agreement, including against the sharing, communication, disclosure, discussion or transmission of [**United Continental Commercially Sensitive Carve-Out Route Information to Air Canada Personnel**] / [**Air Canada Commercially Sensitive Carve-Out Route Information to United Continental Personnel**].

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5. I will participate in mandatory compliance training sessions as regards the obligations under the Consent Agreement.
6. If I become aware that any **[United Continental Commercially Sensitive Carve-Out Route Information]** / **[Air Canada Commercially Sensitive Carve-Out Route Information]** may have been shared, communicated, divulged, discussed or transmitted to or with any **[Air Canada Personnel]** / **[United Continental Personnel]**, I shall promptly notify the **[United Continental]** / **[Air Canada]** Legal Department. I shall cooperate with the **[United Continental]** / **[Air Canada]** Legal Department to verify whether **[United Continental Commercially Sensitive Carve-Out Route Information]** / **[Air Canada Commercially Sensitive Carve-Out Route Information]** was indeed shared, divulged, discussed or transmitted and assist with any steps necessary to recover this information.
7. I will cooperate with any investigations conducted pursuant to the terms of the Consent Agreement.
8. I shall promptly inform the **[United Continental]** / **[Air Canada]** Legal Department or any person assigned to oversee compliance with the Consent Agreement in the event that my job title or function change.
9. I acknowledge that failure to abide by these commitments could result in disciplinary action.

(Witness)

(Print Name)

(Witness Signature)

(Title)

(Print Date)

(Signature)

(Print Date)

SCHEDULE “D”

FORM OF COMPLIANCE AFFIDAVIT

I, [name], of [place], hereby [make oath and say/solemnly declare] in accordance with the terms of the Consent Agreement dated October [22], 2012 between Air Canada, United Continental Holdings, Inc., United Air Lines, Inc., and Continental Airlines Inc. (together the “Respondents”) and the Commissioner of Competition (the “Consent Agreement”), that:

1. I am the [title] of [Respondent], and have personal knowledge of the matters deposed to herein, unless such matters are stated to be on information and belief, in which cases I state the source of such information and believe it to be true.
2. Any term not defined herein shall have the meaning set forth in the Consent Agreement.
3. Pursuant to Section [35] of the Consent Agreement, at the Commissioner’s discretion, [Respondent] is required to file, six months after the date of registration of the Consent Agreement and annually on the anniversary of that date for so long as the Consent Agreement remains in force, a report certifying its compliance with Parts II, III, IV and IX of the Consent Agreement.

Oversight of Compliance

4. [Names/titles] have primary responsibility for overseeing compliance with the Consent Agreement.

Steps Taken to Ensure Compliance

5. [Describe steps taken by [Respondent] to ensure compliance with the Consent Agreement.]

Controls in Place to Verify Compliance

6. [Describe controls in place to verify compliance with the Consent Agreement]
7. [Respondent] is in compliance with Parts II, III, IV and IX of the Consent Agreement.

DATED ●.

Commissioner of Oaths
[Commissioner for Taking Affidavits]

Name and Title of Certifying Officer

PUBLIC VERSION

CONFIDENTIAL SCHEDULE “E”

[CONFIDENTIAL]