File No. CT-2011-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c.C-34, as amended;
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.
BETWEEN:
THE COMMISSIONER OF COMPETITION, Applicant
- and -
AIR CANADA, UNITED CONTINENTAL HOLDINGS, INC.,
UNITED AIR LINES, INC., and CONTINENTAL AIRLINES INC., Respondents

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REQUEST OF HUBERT HORAN FOR LEAVE TO INTERVENE

I request leave of the Competition Tribunal pursuant to section 9(3) of the Competition Tribunal Act, RSC 1985, c.19, as amended, to intervene in this proceeding. In requesting this leave I am also requesting the Tribunal waive its original 29 August for petitions for leave to intervene due to the specific nature of the request. This petition for Leave to Intervene is solely based on my desire to provide the Tribunal with substantive evidence about consumer benefit claims that only introduced to the case record on 15 August. Thus my request for a waiver of the original deadline is fully consistent with the Tribunal's desire for timely filings, is fully consistent with the Tribunal's need for substantive evidence about the central issue of consumer benefits, and granting this position will not in any way disadvantage any of the parties to this case.

I. INTRODUCTION AND BACKGROUND

1. My name is Hubert Horan. During my 30 year aviation career I have done consulting work with over 30 airlines and held airline management positions with Northwest, America West, Swissair and Sabena. I am a US citizen based in Phoenix, Arizona. My business address and address for service is:

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2. I have substantial experience in international airline competition and the actual operation and economics of airline alliances. While at Northwest I was personally responsible for the original development of the KLM-Northwest Alliance network and introduced the intense hub-to-hub operations that became the template for all subsequent international alliances based on antitrust immunity (ATI). I also managed strategic network and alliance issues at Swissair-Sabena, and thus have been involved in immunized alliance management on both sides of the Atlantic. I have not only helped build successful airline alliances, but I have worked to shut down alliances that did not generate meaningful benefits, such as the Continental-America West and the intra-European Qualiflyer alliance. I have also worked directly on the business case and implementation requirements of nearly a dozen airline mergers, and thus have a strong understanding of the financial and competitive impacts of all categories of airline combinations. I have significant experience with the management and airpolitical challenges of cross-border airline cooperation, and am one of the few people who has worked at the strategic management level of an actual cross-border airline merger (Swissair-Sabena).

3. My professional career has always been focused on transportation competition, deregulation and industry structure and I strongly believe that liberal competition has been hugely beneficial for both consumers and long-run industry efficiency. In the original development of the Northwest-KLM, one of my jobs was to determine exactly how the emerging alliance network created value for consumers that we could turn into returns for shareholders. Thus we developed a detailed understanding of exactly what aspects of our service drove major changes in consumer behavior, and which type of competitive situations our new services were likely to have the greatest competitive impact. Based on this knowledge we focused network expansion on markets and competitors where it would be most successful, and carefully avoided markets where we had no competitive advantage, and this allowed Northwest to become the most profitable US carrier on the North Atlantic in the 1990s. I have published a number of articles explaining the economics and competitive impacts of international alliances and examining airpolitical issues related to alliances and international competition.

4. Given this experience, I became increasingly concerned when in recent years, the same immunized alliances that generated significant consumer and industry benefits in the 1990s became the vehicle for consolidation efforts that harmed long-range industry efficiency and created artificial, anti-competitive pricing power. I also became concerned as airline regulators in the US and the EU not only abandoned their longstanding commitment to liberal, market-based competition but abandoned their legal obligations to evaluate merger and ATI proposals on the basis of objective, verifiable evidence of efficiency gains that would create significant consumer benefits. I have conducted detailed analysis outlining the economic issues in terms of the actual operations and competitive dynamics of the large network carriers that have

been pursuing this artificial consolidation. This has been presented in detailed testimony in antitrust immunity cases before the US Department of Transportation (DOT) including the Oneworld and US-Japan cases. I also testified before the US Congress on the consumer and competitive impacts of the Delta-Northwest and United-Continental mergers. I recently published a law review article summarizing these ATIdecisions and the recent industry consolidation efforts, "Double Marginalization and the Counter Revolution Against Liberal Airline Competition"

5. These articles can be downloaded, and a full list of publications and biographical information can be found at my website, horanaviation.com. I would state for the record that I have no financial or personal ties to any of the parties to this case, and have no personal financial stake in the Tribunal's final decisions.

II. THIS MOTION FOR LEAVE TO INTERVENE IS JUSTIFIED BY THE CRITICAL IMPORTANCE OF CONSUMER BENEFITS CLAIMS TO THE TRIBUNAL'S EVALUATION OF THIS CASE, AND BECAUSE MY INTERVENTION WILL PROVIDE SUBSTANTIVE, UNIQUE AND DISTINCT INPUT ON THESE ISSUES NOT AVAILABLE FROM OTHER PARTIES TO THIS CASE

6. In any airline merger/antitrust immunity case, the direct reduction of competition must be weighed against the potential that the combination generates significant new benefits for consumers that could not be generated in the absence of the combination. Thus the likelihood and magnitude of consumer benefits is perhaps the most important evidentiary question before the Tribunal in this case. In airline cases, consumer benefits would either take the form of meaningful, aggregate reductions in average prices across the defined relevant markets, a material increase in the level of aggregate flight capacity available to consumers across the relevant markets, and/or a material improvement in the quality of service offered across those flights. Any merger/antitrust immunity evaluation must identify the underlying drivers of claimed consumer benefits (usually in the form of major product innovations or operating efficiency improvements), must demonstrate that consumers in the relevant markets will tangibly benefit and must demonstrate the form and magnitude of these benefits (i.e. lower prices, increased capacity).

7. I fully support the Commissioner's original 27 June Application. When that Application was the only document on the case record, there was no reason for me to petition the Tribunal for Leave to Intervene at that time. I believe that specific Applicant claims submitted to the Tribunal on 15 August, and the Commissioner's failure to fully address those claims in her 29 August Reply raise substantive concerns about this case that I could not have anticipated prior to late August. The Tribunal should recognize that I had no reason to file within the originally established late June-to-late August filing timeframe, but I have valid and serious reasons for submitting this Motion based on new filings made within the last couple weeks.

8. In their filings of 15 August, the Applicants' made three claims related to consumer benefits

- The freedom to collude on pricing and capacity levels that they have enjoyed for the past 14 years (based on documents that I will refer to as the "original 1997 ATI agreements") had directly caused enormous price reductions for consumers due to the elimination of an alleged structural barrier to efficient interline pricing that has become known as "double marginalization", and that implementation of the recently proposed transborder joint venture agreement ("the TBJV") would lead to further "double marginalization" driven consumer pricing benefits
- Additionally, implementation of the TBJV would lead to other significant non-price consumer benefits driven by the "metal-neutrality" of the inter-alliance accounting arrangements, including increased flight capacity and major schedule quality improvements relative to the quality of schedules currently offered in transborder markets under non-metal-neutral accounting arrangements
- Other vague and unsubstantiated claims of efficiency driven non-price benefits, including frequent-flyer benefits, pricing and marketing program alignments and other product quality improvements, driven by sources that are not defined or explained in the Applicants' submissions but clearly are separate from consumer benefits driven by "double marginalization" or "metal-neutrality" based efficiency gains.

9. The Commissioner's 29 August reply clearly addressed the third, general set of efficiency gains, correctly noting that they are "in fact, illusory, achievable without the detrimental effects of the Alliance Agreements or the Proposed Merger, and/or unlikely to be greater than, and offset, those detrimental effects. The Commissioner clearly recognizes that it must reject consumer benefit claims out of hand where there is not only no quantifiable and verifiable evidence that any transborder consumer have ever, or will ever realize material benefits, but not even a plausible explanation of the exact form of the alleged benefits, or how they might be allegedly created in transborder markets, or the alleged magnitude that transborder consumers might actually realize.

10. However neither the Commissioner's 29 August reply nor Westjet's 29 August submissions substantively addressed the specific claims that "double marginalization" or "metal-neutrality" based efficiency gains would generate significant consumer benefits. Neither specifically mentioned either "double marginalization" or "metal-neutrality", even though those two issues constitute the most important of the Applicants' 15 August substantive claims. Both the Commissioner and Westjet offered important testimony on other issues of importance to the Tribunal, but I am requesting Leave to Intervene on these consumer benefits issues, where it appears that other parties do not appear to have the resources or expertise to fully address.

11. The Tribunal could fully reject the Applicants' "double marginalization" and "metal-neutrality" based consumer benefits claims solely on the basis that their 15 August Response failed to include any legitimate evidence related to transborder markets, and suffers from the same lack of coherent explanation seen with the other consumer benefit claims. But the Tribunal might be better served by demanding further testimony and scrutinizing these claims more carefully. Even if the Applicants' failed to properly explain these two theories of consumer benefit generation, and didn't bother to even provide footnote references to the documents where the theories are more fully elaborated, the Tribunal may wish to investigate the theories further before reaching any final judgments about the Applicants' claims. Granting this Motion for Leave to Intervene will provide the Tribunal with substantial testimony and evidence about these issues that it would not be able to obtain from any of the other parties to this case. Assuming the Applicants' retain the right to introduce further testimony about these theories, granting this Motion would ensure there is a case participant capable of responding to any new claims and evidence.

12. I believe the Applicants' "double marginalization" and "metal-neutrality" based consumer benefits claims are willfully false, and certainly do not meet any reasonable evidentiary standards for merger cases. Furthermore there is strong reason to believe that the Applicants have made these claims in order to create conditions favorable to sustainable anti-competitive market power. I have conducted extensive research and analysis of the source material supporting the Applicants' "double marginalization" and "metal-neutrality" based consumer benefits claims, and am already in a position to document the actual basis for these theories. I do not believe that the Tribunal or the Commissioner have the resources to replicate this analysis, or the industry expertise necessary to evaluate the underlying claims. If the Applicants' present new consumer benefit testimony, I would have the ability to provide critical comments in a timely manner that I do not believe any other party to this case could offer. Thus granting my Motion for Leave to Intervene would help the Tribunal's review by significantly adding to its understanding of these central issues and by accelerate the overall process of reviewing claims.

13. Thus I request that the Tribunal grant this Motion for leave to Intervene because these consumer benefits are not only relevant to the the Tribunal's mandate, and relevant to issues specifically raised by the Commissioner, but they are central to the evaluation of any airline merger/antitrust immunity case. I request that the Tribunal recognize that I have a unique and distinct perspective offered by no other parties to this case that will assist the Tribunal in deciding the issues before it. I have direct experience developing and managing the type of alliance arrangements raised by this case. I have conducted and published significant analysis of the consumer and financial impacts of a broad range of international airline mergers and alliances. I have directly worked with cross-border mergers and "metal-neutral" alliances. I have submitted detailed testimony and published articles about all of the key competitive issues I wish to raise with the Tribunal. I am the only current party to this case prepared to present objective evidence demonstrating why immunized alliances can create legitimate consumer benefits

under some conditions, but cannot create legitimate consumer benefits under all possible market and competitive conditions.

III. THE REQUEST FOR A WAIVER OF THE ORIGINAL DEADLINE FOR MOTIONS SHOULD BE GRANTED GIVEN THE VERY RECENT SUBMISSION OF ORIGINAL TESTIMONY ABOUT CONSUMER BENEFITS, THE IMPORTANCE OF CONSUMER BENEFITS ISSUES TO THE TRIBUNAL'S ANALYSIS, AND BECAUSE NO PARTY WILL BE DISADVANTAGED BY THIS WAIVER.

14. I fully appreciate the importance of Tribunal deadlines, and only request a waiver of this deadline due to the unique circumstances here. I had no reason and no ability to submit a Motion for Leave to Intervene within the original filing timeframe because I had no understanding of what exact consumer benefit claims the Applicants were making until after their 15 August filing, and no understanding of the Commissioner's ability to fully address those claims until after the deadline had passed. Had the Applicants not made consumer benefits claims related to "double marginalization" or "metal neutrality" I would have had no reason to submit this Motion. If the Commissioner's Reply demonstrated a full understanding of the basis of these claims and outlined detailed, substantive objectives to those claims, I would have had no reason to submit this Motion. Thus it would have been impossible for me to prepare and submit this Motion within the original filing deadlines after those conditions changed.

15. I have tried to respect the Tribunal's schedule by filing this Motion as rapidly as possible, given the time required to understand the Tribunal's procedural requirements and the time required to prepare these arguments in a professional manner. There are a variety of complex issue that the Tribunal must address in this case. I do not see any reason why a short extention of the time to file testimony on these consumer benefit issues will disadvantage any of the other parties to this case, and I believe the advantages of the waiver to allow this additional testimony will greatly offset any scheduling concerns this might create for the Tribunal.

IV. SCOPE OF INTERVENTION REQUESTED

16. This Motion for a Leave to Intervene is limited to the issue of whether the Applicants' original 1997 ATI agreements and the TBJV will drive large efficiency gains that will, in turn, create material benefits for transborder consumers. This encompasses the question of whether there is legitimate evidence that the Applicants' claimed sources of consumer benefits have ever generated material consumer benefits in the past, whether there is reasonable certainty that claimed future consumer benefits will actually be realized, and the form and magnitude of these claimed consumer benefits. The Tribunal must reach a clear conclusion as to the both the likelihood and magnitude of consumer benefits in order to evaluate under sections 90 and 92 of the Competition Act whether Applicants' agreements "has brought about or is likely

to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from" these arrangements, and would not have been achievable in the absence of these agreements. This motion also encompasses the issue of consumer detriments (i.e. negative consumer benefits potentially resulting from sources specifically claimed by the Applicants. This Motion does not encompass the technical evaluation of the reduction in competition in transborder markets that the alleged consumer benefits must be weighed against. Based on filings already before the Tribunal at this date, the other parties to the case can fully address the first side of the "reduced competition versus increased consumer benefits" equation; my motion is limited to the second side of that equation.

17. The scope of this Motion for a Leave to Intervene is limited to the filing of written testimony, and the filing of written responses to the submissions of other parties about these consumer benefits issues. I am not requesting the right to conduct oral examinations or request the discovery of documents, or to examine evidence subject to a confidentiality order issued by the Tribunal.

18. I am happy to observe these scope limitations since I see no reason why the Tribunal would not be able to fully address the central consumer benefits issues based solely on written testimony on the public record. But in the event that other parties to the case challenge my testimony using a broader range of procedural rights (such as demanding the right to orally cross-examine me), I would respectfully request the Tribunal to remain open to granting me comparable procedural rights at that time. While it is possible that the Applicants' may wish to submit highly detailed, market-specific data subject to confidentiality, such data could not possibly demonstrate significant consumer benefit generation unless it was possible to also present historical and/or more highly aggregated versions of this data that would not risk the disclosure of competitively sensitive data. Thus I would also request that the Tribune remain open to reconsidering the confidentiality issue, but only if it was not possible to evaluate specific claims on the basis of evidence on the public case record.

V. REVIEW OF MATTERS ADDRESSED IN THE MOTION AND THE TEST FOR INTERVENTION

19. In terms of the matters to be addressed in a Motion for Leave to Intervene as defined in section 43(2) of the Tribunal's procedural rules:

(a) the title of the proceeding is shown on page1

(b) My name and address and service contact are given in paragraph1

(c) the matters in issue that created my desire to intervene are described in paragraphs 4 and 12 and my unique and distinctive perspective are described in paragraphs 2,3, and13

(d) the competitive consequences should the Tribunal not uphold the Commissioner's position as mentioned in paragraphs 4 and 12 include consumer welfare losses for transborder consumers, risks that anti-competitive market power of transborder carriers would increase. Failure to uphold would fundamentally weaken critical legal protections for airline consumers, including the requirements that

mergers and ATI cannot be approved without objective, verifiable evidence of consumer benefits, and legitimate evidence that artificial market power will not be enhanced.

(e) My intervention in this case is intended to support the Commissioner's position

(f) My testimony, if leave to intervene is granted, would be in English

(g) I would propose to participate in the proceedings under limitations described in para. 16-18.

20. I believe I fully meet the stated criteria for the granting of intervenor status in this proceeding, In particular:

(a) The Competition Tribunal's decision in this case will directly affect my ongoing work to ensure that airline consolidation is properly justified by legally required evidence of consumer benefits, and that airline consolidation does not harm consumers or log-run industry efficiency by creating anti-competitive market power.

(b) These airline efficiency and competitive issues are not only relevant to the scope of the Tribunal's mandate, but have been explicitly identified as some of the most critical issues in this proceeding

(c) The representations in my Affidavit are directly responsive to case issues explicitly raised by the Commissioner and are based on substantive prior research and analysis that the Tribunal would be otherwise unable to produce on its own

(d) As the person who first identified how an immunized international airline alliance could generate both significant consumer benefits and operational efficiencies, and as someone who has been directly involved with over a dozen subsequent merger and alliance cases, I have a unique and highly relevant perspective to offer the Tribunal in this case. Furthermore, as one of the only people able to combine a detailed understanding of industry economics and competitive dynamics with a focus on longer-term consumer and efficiency issues, I can provide the Tribunal a very distinct perspective than all other case intervenors.

This filing has been served on the following parties:

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