

**SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF SKYGREECE AIRLINES S.A., AN INSOLVENT PERSON, PURSUANT TO
SECTION 50.4(1) THE
*BANKRUPTCY AND INSOLVENCY ACT ("BIA")***

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FACTUM OF THE APPLICANT, SKYGREECE AIRLINES S.A.

PART I. OVERVIEW

1. On this motion, the Applicant, SkyGreece Airlines S.A. (“SkyGreece”) seeks an extension of the Stay Period as defined in Justice Conway’s order dated September 8, 2015, at paragraph 3.
2. In addition, SkyGreece seeks an order approving the activities of the Proposal Trustee as disclosed in its First Report to the Court and an order for the following:
 - (a) approving interim financing on the terms described in the term sheet between SkyGreece and Ken Stathakis, an individual (“DIP Lender”), dated September 28, 2015 (“Emergency DIP Loan”) and declaring that the property, assets and undertakings of SkyGreece (the “Property”) are subject to a charge in the amount owing in respect of the DIP Loan (the “DIP Charge”), including, without limitation, any amounts owing in respect of advances made to pay any debts due to employees of SkyGreece.

- (b) declaring that the Property is subject to a charge in the amount of \$100,000, in respect of the fees and expenses of the trustee under proposal (the "Trustee"), including the fees and expenses of any financial, legal or other experts engaged by the Trustee in the performance of the Trustee's duties (the "Trustee Charge");
- (c) declaring that the Property is subject to a charge in the amount of \$150,000, in respect of the fees and expenses of any financial, legal or other experts engaged by SkyGreece for the purpose of these proceedings, including, without limitation, lawyers for SkyGreece in Canada, Greece and the United States, SkyGreece's Chief Restructuring Officer, aviation consultants and communications experts (the "Advisor Charge");
- (d) declaring that the Property is subject to a charge in the amount of \$80,000.00 in favour of the directors and officers of SkyGreece (including, without limitation, Brooks Pickering), to indemnify them against obligations and liabilities that they may incur as directors or officers after the filing of the notice of intention to make a proposal, including, without limitation, any liability that they may incur in respect of amounts due to employees pursuant to the laws of Greece, but specifically excluding any obligation or liability that is determined to be incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault. ("D&O Charge").

- (e) declaring that the DIP Charge, the Trustee Charge, the Advisor Charge, and the D&O Charge shall rank in priority to the interests of unsecured creditors, and that, as between them, they shall rank in the following order of priority:
- (i) First: the Trustee Charge and Advisor Charge, on a *pari passu* basis;
 - (ii) Second: the D&O Charge; and
 - (iii) Third: the DIP Charge.

PART II. FACTS

A. *Background*

3. SkyGreece is an international airline, headquartered in Markopoulo Mesogaias, Greece. It was founded in 2013.¹

4. On August 27, 2015, SkyGreece announced its decision to temporarily suspend flights owing to financial difficulties. At the time it suspended its operations, SkyGreece expected that it would begin a restructuring process and attempt to source new financing in order to resume operations.²

¹ Affidavit of Brooks Pickering sworn September 28, 2015 ("Pickering Affidavit") at para. 3 (SkyGreece Motion Record, Tab 2).

² Pickering Affidavit at para. 4.

5. SkyGreece remains committed to that goal.³
6. On September 3, 2014, SkyGreece filed a Notice of Intention to make a Proposal under section 50.4(1) of the *BIA*.⁴
7. SkyGreece commenced *BIA* proceedings on September 3, 2015, in the face of debt enforcement and regulatory proceedings which threatened its restructuring effort.⁵
8. On September 8, 2015, SkyGreece sought and obtained an order of this court extending the statutory stay of proceedings to regulatory proceedings by or before the Canadian Transportation Agency.⁶
9. Since September 8, 2015, SkyGreece has taken a number of positive steps to prevent the further erosion of its business enterprise and to facilitate the presentation of a viable proposal to its creditors. In particular:
 - (a) SkyGreece has implemented a communication strategy to address the concerns of customers affected by the cessation of operations, to identify stranded passengers (if any) and help them make alternate travel arrangements if necessary, and to gather claims and related information from these customers;

³ Pickering Affidavit at para. 4.

⁴ Pickering Affidavit at para. 5

⁵ Pickering Affidavit at para. 6.

⁶ Pickering Affidavit at para. 7

- (b) SkyGreece has been working to address the concerns of employees in Greece, in an effort to restore administrative functions that are essential to its restructuring and its ability to address the claims of creditors, including customers;
- (c) SkyGreece has prepared and sent out a notice to creditors;
- (d) SkyGreece has been in discussions with Bank of America with respect to the release of its plane, which is currently under seizure and grounded at Pearson International Airport in Toronto;
- (e) SkyGreece has been engaged in positive discussions with several third parties with respect to interim financing; and
- (f) SkyGreece has been engaged in positive discussions with three parties with respect to performing charter flights on their behalf.⁷

10. Detailed information in respect of SkyGreece and its restructuring objectives is provided below.

B. Corporate Structure and Governance

11. SkyGreece is incorporated pursuant to the laws of Greece, and its registered head office and executive office are located at Papadimitirou 33 K, Markopoulos, Mesogaias Greece. SkyGreece maintains regional offices for administrative purposes in

⁷ Pickering Affidavit at para. 8.

at 36-33 33rd Street, Long Island City, NY 11101, and in Toronto and Montreal through its General Sales Agent, Air Omega Holidays.⁸

12. SkyGreece's current directors are Fr. Nicholas Alexandris, Vasileios Alefantis, Panagiotis Chilakos, Petros Chilakos, and Vasileios Dorizas.⁹

13. Thus far, the focal point of the Notice of Intention has been on SkyGreece's financial and legal issues. In addition to Brooks Pickering, SkyGreece's Chief Restructuring Officer, SkyGreece has assembled an experienced team of experts ("Restructuring Team") to assist it with the restructuring, including:

- (a) Ernst & Young (Canada), Canadian Trustee, and its counsel Gowling Lafleur Henderson LLP;
- (b) Ernst & Young (Athens), Greek Audit;
- (c) Potamitis Vekris, Greek Counsel;
- (d) Dimitri Stavropolous, SkyGreece Corporate Counsel; and
- (e) Paliare Roland, Canadian Counsel.¹⁰

14. As the restructuring effort is just entering the business planning and operations phase, SkyGreece is finalizing its internal operations team, which presently includes:

⁸ Pickering Affidavit at para. 10.

⁹ Pickering Affidavit at para. 11.

¹⁰ Pickering Affidavit at para. 12.

- (a) Nick Manoudakis (finance), current CFO of SkyGreece Airlines, retained in a direct administrative finance role; and
- (b) Chris Sophinos (operations).¹¹

15. In addition, SkyGreece is currently sourcing and interviewing potential experts to assist with aviation operations requirements for the restructuring effort. SkyGreece has an extremely qualified and highly regarded flight operations and technical team who have provided recommendations for third-party experts. Recommendations have also been received from Bank of America's aviation department, Paliare Roland and several other venture capital and private equity sources, as well as from industry leaders in Greece.¹²

16. Ultimate decision making authority for SkyGreece and related responsibility resides with the Board of Directors. SkyGreece's Chief Restructuring Officer is leading the Restructuring Team and is providing advice to the Board.¹³

C. *Historical Operations and Financial Results*

17. SkyGreece commenced operating in 2013. Since its inception, an important part of its business plan has been to provide transportation to various niche destinations that are not well served by other commercial airlines.¹⁴

¹¹ Pickering Affidavit at para. 13.

¹² Pickering Affidavit at para. 14.

¹³ Pickering Affidavit at para. 15.

¹⁴ Pickering Affidavit at para. 16.

18. SkyGreece initially commenced operating as a charter/wet lease operator, servicing their clients' destinations globally.¹⁵

19. On May 23, 2015, SkyGreece began providing regular scheduled service (seasonal) for the months of May through to October (with most flights terminating by September 17th). At the time that it ceased operations, Sky Greece provided scheduled flight services between Athens, Thessaloniki, Toronto, Montreal, Budapest, Zagreb, and New York. SkyGreece operates fixed-cost charter/wet lease services during the remainder of the year.¹⁶

20. To carry on its business, SkyGreece has the following licenses and agreements in place:

- (a) SkyGreece holds an EU Aircraft Operating Certificate (AOC) and an EU Commercial Operating License issued by the Hellenic Civil Aviation Association (EASA). SkyGreece is also approved by the Canadian Transportation Authority (CTA) in Canada and the Federal Aviation Administration (FAA) in the United States.
- (b) SkyGreece has agreements in place with the following airport authorities:
 - Athens International Airport (Base)
 - Thessaloniki International Airport

¹⁵ Pickering Affidavit at para. 17.

¹⁶ Pickering Affidavit at para. 18.

- JFK International Airport (Gate Agreement)
 - Pearson International Airport
 - Pierre Elliott Trudeau International Airport
 - Budapest International Airport
 - Zagreb International Airport
- (c) SkyGreece operated the only non-stop flights between Zagreb and Toronto and between Budapest and Toronto.
- (d) SkyGreece has a General Sales Agent (GSA) agreement with Air Omega Holidays, Inc. (a related entity) for sales in Canada and the United States.
- (e) SkyGreece has a General Distribution System (GDS) agreement with Hahn Air Systems GmbH (“Hahn”), which permits SkyGreece to complete sales through the online systems used by travel agents.¹⁷

21. Notwithstanding the highly competitive nature of the airline industry, SkyGreece had quick success within the scheduled service market, managing to sell more than 8,000 seats within its first six weeks of sales.¹⁸

22. SkyGreece’s financial results were generally encouraging for a start-up airline. SkyGreece’s revenues for its overall period of operation (June 2014 to August 2015)

¹⁷ Pickering Affidavit at para. 19.

¹⁸ Pickering Affidavit at para. 20.

were in the range of \$11,000,000. Following a 2014 audited operating loss of approximately €3.94 million, initial unaudited results for the first six months of 2015 indicate a much smaller operating loss of less than €1.0 million.¹⁹

D. *Suspension of Flight Operations and Commencement of Restructuring Proceedings*

23. SkyGreece began to experience difficulties in late June 2015 in connection with the broader Greek financial crisis and the associated cross-border funding restrictions, which created an inability to access and maintain sufficient levels of cash, severely complicated fuel and parts purchases, and disrupted the Company's general ability to do business. Public response to the Greek crisis also resulted in a reduction in new reservations of more than 60%, which affected a majority of anticipated revenue.²⁰

24. On August 27, 2015, SkyGreece was forced to suspend its flight operations. At that time, SkyGreece employed approximately 85 staff, including flight crews, flight support services, reservations, finance, IT, administrative support, and management personnel. All of these employees are based in Greece.²¹

25. The financial difficulties experienced by SkyGreece resulted in action being taken on a number of different fronts by SkyGreece's stakeholders:

¹⁹ Pickering Affidavit at para. 21.

²⁰ Pickering Affidavit at para. 22.

²¹ Pickering Affidavit at para. 23.

- (a) SkyGreece employees in Greece stopped reporting to work, which created obstacles to accessing information and, initially, responding to passenger enquiries;
- (b) Bank of America took possession of SkyGreece's Boeing 767, located at Pearson International Airport;
- (c) A series of regulatory proceedings were commenced in Canada by a passenger rights advocate, and, subsequently, by the Canadian Transportation Agency;
- (d) Customers whose flights were cancelled asserted claims and sought charge backs against their credit accounts. It is expected that, where available, customers have or will seek indemnity from travel industry funds and insurers;
- (e) Various airport authorities seized or set-off against funds held on deposit; and
- (f) Hahn withheld payment of amounts collected on behalf of SkyGreece (including amounts held on account of flights that were completed), and has recently advised that it intends to refund customers whose flights were not completed.²²

²² Pickering Affidavit at para. 24.

26. In response to various proceedings against it and in an effort to gain control of a rapidly devolving situation, SkyGreece commenced *BIA* proceedings on September 3, 2015.²³

27. Since filing the Notice of Intention on September 3, 2015, SkyGreece has taken a number of steps to stabilize its situation and lay the groundwork for the resumption of flight operations once SkyGreece's current financial circumstances are addressed:

- (a) SkyGreece has opened lines of communication with all stakeholders, including passengers. In particular, SkyGreece has:
 - (i) Proactively contacted customer travel agents to confirm that their passengers are re-positioned. To date, SkyGreece has verbally confirmed that approximately 90% of all remaining passengers have been contacted. Further, to date, SkyGreece has also verbally confirmed that all of those contacted have been able to make alternative travel arrangements;
 - (ii) Opened up files with the Travel Industry Council of Ontario ("TICO") and the Office de la protection du consommateur ("OPC") in Quebec to make it possible for passengers from Ontario and Quebec to be compensated for their alternative travel arrangements from insurance funds collected by TICO and OPC which are paid for by passengers at the time of their ticket

²³ Pickering Affidavit at para. 25.

purchases. SkyGreece has been able to confirm that all passengers who booked through a “registered” travel agent in Ontario and who file a claim with TICO will be fully compensated for their alternative travel costs. Further, SkyGreece has been able to confirm that all passengers who booked through any travel agent in Quebec and who file a claim with OPC will be fully compensated for their alternative travel costs;

- (iii) Communicated with SkyGreece passengers by establishing a website (www.ey.com/ca/skygreece) (“Website”), hotline (855-941-7757), and email address (skygreece@ca.ey.com) for passengers to provide information and receive information about the claims process;
- (iv) Issued press releases to notify passengers that information is available on the E&Y website about filing claims;
- (v) Identified specific travel agents willing to assist stranded passengers in both North America and Europe and communicated this information through press releases and on the Proposal Trustee’s website;
- (vi) Sent notices to all known affected creditors, including passengers and those identified by Mr. Lukacs;

- (vii) Posted documents on the Website, including the Notice of Intention, notices to creditors, claim information and other court documents; and,
 - (viii) Accepted proofs of claim from creditors, including passengers.
- (b) SkyGreece has made efforts to identify and assist “stranded” passengers. At this time, SkyGreece is not aware that any passengers are currently stranded, with one possible exception. Mr. Lukacs advised on September 9, 2015, that he was aware of one passenger that was unable to return to Hungary. SkyGreece has not received any updates with respect to that passenger.
- (c) SkyGreece has been engaged in negotiations with various persons related to or familiar with the airline regarding interim financing for the restructuring proceedings. As discussed further below, these negotiations have resulted in a commitment to provide a loan of USD\$250,000, subject to court approval of a charge to secure the loan.
- (d) SkyGreece has been communicating and cooperating with Bank of America with respect to the Boeing 767 (defined below). In particular, since filing the Notice of Intention, Bank of America has engaged in ongoing, cooperative discussions about terms to release SkyGreece’s Boeing 767 once interim financing is in place and SkyGreece is in a position to resume flight operations.

- (e) SkyGreece has also been engaged in discussions with employees and various Greek agencies representing their interests, regarding the payment of amounts owing to them and their return to work. The payment of employee wages is an especially pressing issue. Under Greek law, the failure to pay employee wages can result in criminal liability on the part of directors and officers.

- (f) Lastly, having regard to the fact that it is not operating and in order to conserve cash, SkyGreece has suspended all non-essential expenses, including payment of certain insurance premiums. This has resulted in the recent suspension of its licence in Canada. SkyGreece's international licence has also been suspended.²⁴

28. SkyGreece is also now aware that, subsequent to the order of Justice Conway on September 8, 2015, Mr. Luckacs filed a complaint against SkyGreece with the Office of the Privacy Commissioner of Canada ("Privacy Commissioner") on September 10, 2015.²⁵

29. As set out in Mr. Luckacs' complaint, Mr. Lukacs alleges that private passenger information is not adequately secured on SkyGreece's booking website. Specifically, Mr.

²⁴ Pickering Affidavit at para. 26.

²⁵ Pickering Affidavit at para. 27.

Lukacs contends that he has accessed passenger information on the website by randomly changing numbers for passenger itineraries.²⁶

30. Upon Mr. Lukacs advising SkyGreece that he had commenced a complaint to the Privacy Commissioner, SkyGreece took steps to inform the third party service provider who operates the website about the privacy issue. The website operator reports that it has been unable to replicate the concern raised by Mr. Lukacs, and it is unclear at this time whether private passenger information has been accessed or is at risk. However, in the circumstances, SkyGreece has directed that the website be shutdown.²⁷

31. To date, SkyGreece has not been contacted by the Privacy Commissioner about the processing of Mr. Lukacs' complaint.²⁸

E. Assets and Liabilities

32. On review of available records and information, it appears that SkyGreece's only significant asset is its interest in a Boeing 767-300ER ("Boeing 767"), which is estimated to be valued at approximately USD\$5.0 million.²⁹

33. Bank of America, which provided lease financing in respect of the Boeing 767, claims that it is owed approximately \$2.5 million and that this amount is secured by an interest in the Boeing 767.³⁰

²⁶ Pickering Affidavit at para. 28.

²⁷ Pickering Affidavit at para. 29.

²⁸ Pickering Affidavit at para. 30.

²⁹ Pickering Affidavit at para. 31.

³⁰ Pickering Affidavit at para. 31.

34. In addition, SkyGreece has:

- (a) accounts receivable totalling approximately CAD\$1,269,000, including approximately USD\$600,000.00 that is currently in the possession of Hahn Air Systems GmbH (“Hahn Air”), a VAT credit of approximately €200,000.00, and past due charter revenue from Fly Olympic S.A. of approximately €116,000;
- (b) various cash bonds and security deposits totaling approximately CAD\$1,222,000 held as follows:
 - (i) a €146,000 bond held by the Hellenic Civil Aviation Authority (license);
 - (ii) a USD\$150,000 bond held by U.S. Customs and Border Protection (customs bond);
 - (iii) a security deposit of approximately CAD\$105,422.00 held by the Greater Toronto Airport Authority (“GTAA”) (landing fees);
 - (iv) a security deposit of approximately CAD\$53,000.00 held by Aeroport de Montreal (“ADM”) (landing fees);
 - (v) a security deposit of approximately €15,000 held by Zagreb International Airport (landing fees);

- (vi) a security deposit of approximately CAD\$100,000 held by Swissport (ground handling);
 - (vii) a security deposit of approximately CAD\$100,000 held by NavCanada (overflight);
 - (viii) a purchase deposit of approximately USD\$200,000 held by HiFly (deposit for Airbus 340-300);
 - (ix) a purchase deposit of approximately USD\$100,000 held by Jordan Aviation (deposit for Airbus 330-200); and,
 - (x) a security deposit of approximately CAD\$25,000 held by Newrest (catering).
- (c) Licences issued by aviation authorities in the European Union, Canada, and the United States; and
- (d) Gate agreements with airports in Toronto, Montreal, New York, Budapest, Athens, Thessaloniki, and Zagreb.³¹

35. Presently, given the potential for set off and other claims, no liquidation value has been assigned to Sky Greece's accounts receivable and funds held on deposit. Similarly, while the licences and gate agreements have significant enterprise value to SkyGreece given the cost to secure them and the fact that they are barriers to entry into

³¹ Pickering Affidavit at para. 32.

the industry, the transferability of those assets is open to dispute. Consequently, no liquidation value has been accorded to those assets either.³²

36. Currently, excluding passenger and employee claims, SkyGreece's liabilities are believed to be in excess of \$9.0 million CDN.³³

F. Restructuring Plan

1. Objective and timing

37. SkyGreece's objective continues to be to resume flight operations and to present a proposal to its creditors sometime in the first quarter of 2016, or sooner if possible.³⁴

38. Since the attendance before Justice Conway on September 8, 2015, SkyGreece has taken a number of positive steps to permit it to develop a long-term business plan and present a viable proposal to creditors. A number of these have already been described in paragraph 27, above.³⁵

39. Issues of immediate importance looking ahead include the need to maintain cash flow through interim financing, address pressing liability issues, and regularize the terms of the restructuring professionals' engagements. These items are elaborated upon below.³⁶

³² Pickering Affidavit at para. 33. **Note:** While the current list of creditors states that outstanding claims are in the range of \$12.0 CDN million, that amount is incorrect. The amount owing to Greenland Airport is only \$2,000.00 – not \$2.579 million as indicated on the creditor list.

³³ Pickering Affidavit at para. 34.

³⁴ Pickering Affidavit at para. 36.

³⁵ Pickering Affidavit at para. 37.

³⁶ Pickering Affidavit at para. 37.

2. Interim Financing

40. To date, third party sources have already provided security for the payment of professional fees to the extent of approximately CAD\$250,000.00.³⁷

41. SkyGreece has been negotiating a CAD\$1.5 million interim financing facility to fund the restructuring proceedings. SkyGreece is reasonably confident that it will be able to obtain a binding commitment and complete this financing in the next few weeks.³⁸

42. In order to address immediate needs, SkyGreece has secured a commitment to provide it with additional emergency funding in the amount of USD\$250,000.00 (“Emergency DIP Loan”) on the terms described in the Term Sheet.³⁹

43. Importantly, the Emergency DIP Loan:

- (a) creates a small hardship fund to be used to provide financial assistance to passengers who are stranded and who are otherwise unable to return home;
- (b) is conditioned upon it being secured by a charge over all of the property, assets and undertakings of SkyGreece, and ranking in priority to the claims of any unsecured creditors; and,

³⁷ Pickering Affidavit at para. 38.

³⁸ Pickering Affidavit at para. 39.

³⁹ Pickering Affidavit at para. 40.

- (c) is conditioned upon it being used only to fund professional fees, payment of arrears owing to employees, the hardship fund described above, and such other immediate and pressing restructuring expenses as are contemplated by SkyGreece's cashflow statement or are approved by the lender.⁴⁰

3. D&O Liability

44. An immediate concern relates to the payment of amounts owing to SkyGreece employees. SkyGreece's counsel in Greece has advised that there are a number of Greek laws that impose personal liability on officers and directors; in particular, directors and officers can be subject to significant civil and even criminal liability in the event that amounts due to employees remain unpaid.⁴¹

45. Consequently, for the restructuring effort to continue, it is essential that employees be paid and that SkyGreece's directors and officers be granted an indemnity and charge for liabilities that they incur by virtue of holding their office. SkyGreece has no director and officer liability insurance to cover these potential liabilities and SkyGreece is unable acquire such insurance at a reasonable cost at this time.⁴²

4. Administrative Charges

46. Similarly, the various professionals who are working on this matter are seeking assurances that they will be paid for their services. At the outset of these proceedings,

⁴⁰ Pickering Affidavit at para. 40.

⁴¹ Pickering Affidavit at para. 41.

⁴² Pickering Affidavit at para. 42.

the restructuring professionals were provided with cash retainers from third party sources. Those retainers will likely remain in place. However, given SkyGreece's very limited cash flow, the professionals are also requesting a charge over SkyGreece's Property to cover any unanticipated spikes in fees and expenses. This would also allow SkyGreece to more easily and predictably manage its cash flow.⁴³

G. *Alternatives to Restructuring*

47. At this juncture, the only available alternative to restructuring would be liquidation. However, in the circumstances, liquidation would be a poor outcome for creditors. It is premature at this time to determine the realizable value of SkyGreece's assets and an estimated dividend per creditor in a bankruptcy. As noted above, no liquidation value can be assigned to SkyGreece's accounts receivable and funds held on deposit in light of the potential for set off and other claims. As well, the transferability and value of SkyGreece's licences and gate agreements are open to dispute.⁴⁴

48. Allowing SkyGreece the time and space necessary to restructure, develop a plan, and secure the necessary financing to resume operations is in the interests of creditors and has the potential to offer a better result than can be realized currently under a liquidation plan.⁴⁵

⁴³ Pickering Affidavit at para. 43.

⁴⁴ Pickering Affidavit at para. 44.

⁴⁵ Pickering Affidavit at para. 45.

H. Foreign Proceedings

49. Given the concentration of interests in Greece, it appears possible that SkyGreece may eventually need to commence insolvency proceedings in that jurisdiction. It is unclear at this time whether those proceedings would be main proceedings or non-main proceedings. It may also be necessary for SkyGreece to commence non-main proceedings in those jurisdictions to which SkyGreece flies. No relief is being sought by SkyGreece at this time, but it may in the future ask that a foreign representative be appointed.⁴⁶

PART III. ISSUES

50. The following issues are raised on this motion:

- (a) **Should the stay period be extended?** Yes, it is appropriate in the circumstances to extend the stay up to and including November 17, 2015 to allow SkyGreece the time to pursue its restructuring efforts and make a viable proposal to its creditors.

- (b) **Should the Emergency DIP Loan and DIP Lender Charge be approved?** Yes, it is appropriate, in light of SkyGreece's financial condition and cash requirements, to approve the Emergency DIP Loan and to grant the DIP Lender Charge in favour of the DIP Lender with the requested priority.

⁴⁶ Pickering Affidavit at para. 46.

- (c) **Should the requested Administrative Charges be granted?** Yes, the court has jurisdiction to grant an Administration Charge and Directors' Charge with the priority requested, and this is an appropriate case in which to do so.

PART IV. LAW

A. *Extension of the 30-Day Stay Period*

51. The current stay period expires on October 2, 2015. SkyGreece is seeking an extension of the stay period up to and including November 17, 2015.

52. Section 50.4(9) of the *BIA* gives the court discretion to grant or extend a stay of proceedings:

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.⁴⁷

53. The intent of the *BIA* proposal sections is to give an insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation, not liquidation. Consequently, insolvent companies should have the chance to put forward their proposal.⁴⁸

54. As provided in section 50.4(9), the court may extend the stay if it is satisfied that (i) SkyGreece has acted and is continuing to act in good faith and with due diligence; (ii) SkyGreece is likely to be able to make a viable proposal if the extension is granted; and (iii) no creditor is materially prejudiced if the extension is granted.⁴⁹

55. In considering whether the requested extension should be granted by the court, a number of factors should be considered, including: the nature of the debtor's business, the industry in which it operates, the stage of proceedings, any equity for the secured creditors, whether the secured creditors support the restructuring, the interests of other creditors, whether there is an ongoing business with trade creditors and employees, whether the extension is supported, the debtor's progress

⁴⁷ *BIA*, s. 50.4(9).

⁴⁸ *In the Matter of the Proposal of Cogent Fibre Inc.*, 2015 ONSC 5139 (CanLII) at para. 8 [“*Cogent Fibre*”] (**SkyGreece Book of Authorities, Tab 1**). Also see: *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (CanLII) at paras. 38-43 [“*Colossus*”] (**SkyGreece Book of Authorities, Tab 2**).

⁴⁹ *BIA*, s. 50.4(9).

during the previous stay period, whether creditors will be prejudiced, and the comparative prejudice to the debtor, creditors and other if the stay is not granted.⁵⁰

56. In this case, circumstances exist that make the extension request appropriate. The requested extension will further the remedial purpose of the *BIA* since, among other things, it will provide SkyGreece the time to facilitate its restructuring and engage in further discussions with stakeholders and others in order to explore and put forward a viable proposal that is in the interests of all stakeholders.

57. In addition, SkyGreece has acted and continues to act in good faith and with due diligence as evidenced by the numerous steps it has taken since commencing these *BIA* proceedings to facilitate its restructuring process.

58. As outlined in the Pickering Affidavit, SkyGreece is committed to its restructuring and to making a viable proposal to creditors. SkyGreece has taken many positive steps in the last twenty days to stabilize its operational and financial situation, reach out to stakeholders, and lay the groundwork for the resumption of flight operations.⁵¹ These steps are described in more detail in the Pickering Affidavit and include, among others:

- (a) SkyGreece has implemented a communication strategy to address the concerns of customers affected by the cessation of operations, to identify stranded passengers (if any) and help them make alternate travel

⁵⁰ *Lehndorff General Partners Ltd. (Re)* (1993), 17 CBR (P) 24 (Ont. Gen. Div) at paras. 7-8 (**SkyGreece Book of Authorities, Tab 3**); *Dura Automotive Systems (Canada) Ltd., Re*, 2010 ONSC 1102 (Ont. Sup. Ct.) at paras. 9 and 24 (**SkyGreece Book of Authorities, Tab 4**); *Federal Gypsum Co., Re*, 2007 NSSC 347 at paras. 24-29 (**SkyGreece Book of Authorities, Tab 5**).

⁵¹ Pickering Affidavit at paras 4, 8, 12-14, and 26.

arrangements if necessary, and to gather claims and related information from these customers;

- (b) SkyGreece has been working to address the concerns of employees in Greece, in an effort to restore administrative functions that are essential to its restructuring and its ability to address the claims of creditors, including customers;
- (c) SkyGreece has prepared and sent out a notice to creditors;
- (d) SkyGreece has been in discussions with Bank of America with respect to the release of its plane, which is currently under seizure and grounded at Pearson International Airport in Toronto;
- (e) SkyGreece has been engaged in positive discussions with several third parties with respect to interim financing; and
- (f) SkyGreece has been engaged in positive discussions with three parties with respect to performing charter flights on their behalf.⁵²

59. In light of the foregoing, this court has jurisdiction to extend the stay period up to and including November 17, 2015, and it is appropriate to do so. The extension will allow SkyGreece's to continue its restructuring efforts and afford it the time and opportunity to put forward a viable proposal to its creditors.

⁵² Pickering Affidavit at para. 8.

B. Emergency DIP Loan and DIP Lender Charge

60. On this motion, SkyGreece also seeks approval for an emergency interim loan of \$250,000.00 (“Emergency DIP Loan”) and related DIP Lender Charge under section 50.6(1) of the *BIA*.

61. The Court has the authority under section 50.6(1) of the *BIA* to authorize the Emergency DIP Loan and DIP Charge.⁵³ Section 50.6(1) provides:

On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.⁵⁴

62. In deciding whether an order under section 50.6(1) is appropriate, the court is to consider, among other things, the factors set out in section 50.6(5):

- (a) the period during which the debtor is expected to be subject to proceedings under this *Act*;
- (b) how the debtor’s business and financial affairs are to be managed during the proceedings;

⁵³ *Colossus*, *supra* note 48, at para. 3

⁵⁴ *BIA*, s. 50.6(1).

- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.⁵⁵

63. As addressed in the Pickering Affidavit, SkyGreece is facing an imminent liquidity crisis as SkyGreece lacks the necessary cash-flow to fund its restructuring efforts while it sources longer term interim financing. Without the Emergency DIP Loan, there will be little likelihood of a viable proposal. At present, SkyGreece's major assets consist of:

- (a) various licences and other rights, which have no liquidation value;
- (b) accounts receivable from its intermediary payments processor and others which are subject to as yet undetermined set off rights; and
- (c) a Boeing 767 airplane, which is subject to a security interest in favour of Bank of America, having a net value to SkyGreece of \$2.5 million.⁵⁶

⁵⁵ *BIA*, s. 50.6(5). Also see: *OVG Inc. (Re)*, 2013 ONSC 1794 at para. 24 (**SkyGreece Book of Authorities, Tab 6**); *Colossus*, *supra* note 48, at paras. 3-10.

⁵⁶ Pickering Affidavit at paras. 31-33.

64. If approved, these *BIA* proceedings are expected to run at least until November 17, 2015. Apart from the Emergency DIP Loan, SkyGreece does not, and will not, have access to funds from operations or other sources during this period.⁵⁷

65. Among other requirements, the Emergency DIP Loan will fund immediate needs that are crucial for the success of SkyGreece's restructuring, including:

- (a) the creation of a hardship fund to be used to provide financial assistance to passengers who are stranded and who are otherwise unable to return home, and to persons who are in severe financial distress as a result of SkyGreece's suspension of flight operations; and
- (b) the payment of professional fees and arrears owing to employees.⁵⁸

66. In the circumstances, the Emergency DIP Loan is justified and the DIP Lender Charge will not be materially prejudice creditors. To the contrary, the Emergency DIP Loan is essential for the presentation of a viable proposal to SkyGreece's creditors. SkyGreece's business and financial affairs are being closely managed by a team of restructuring experts, under the supervision of and in consultation with the Proposal Trustee and its counsel.⁵⁹ Consequently, the broader interests of creditors will be protected notwithstanding the DIP Lender Charge.

⁵⁷ Pickering Affidavit at para. 40.

⁵⁸ Pickering Affidavit at para. 40.

⁵⁹ Pickering Affidavit at paras. 12-14, 37 and 40.

C. Administrative Charges

67. In addition to the DIP Lender Charge, SkyGreece is also seeking approval for the following charges:

- (a) a first-priority administrative charge under section 64.2 of the *BIA* over SkyGreece's Property in the amount of \$100,000, in respect of the fees and expenses of the Trustee, including the fees and expenses of any financial, legal or other experts engaged by the Trustee in the performance of the Trustee's duties ("Trustee Charge");
- (b) a further charge under section 64.2 in the amount of \$150,000, in respect of the fees and expenses of any financial, legal or other experts engaged by SkyGreece for the purpose of these proceedings, including, without limitation, lawyers for SkyGreece in Canada, Greece, and the United States, SkyGreece's Chief Restructuring Officer, aviation consultants and communications experts ("Advisor Charge"); and
- (c) a charge under section 64.1(1) for a Directors and Officers Charge in the amount of \$80,000 in favour of the directors and officers of SkyGreece (including, without limitation, Brooks Pickering), to indemnify them against obligations and liabilities that they may incur as directors or officers after the filing of the notice of intention, including, without limitation, any liability they may incur for amounts due to employees pursuant to the laws of Greece ("D&O Charge").

(a) Trustee and Advisor Charges

68. SkyGreece is requesting a first-priority administration charge to provide security for the fees and disbursements of the Proposal Trustee, counsel to the Proposal Trustee, SkyGreece's counsel, and other advisors through a charge over all present and after-acquired assets of SkyGreece in the amount of \$250,000.00.

69. Section 64.2 of the *BIA* provides:

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.⁶⁰

⁶⁰ *BIA*, s. 64.2.

70. The court is empowered by section 64.2 to grant an administration charge. The section is permissive and does not specify any particular criteria for consideration for the court's exercise of its discretion to grant the charge.⁶¹ The court also has jurisdiction to grant a super-priority for such charges.⁶²

71. In *Re Canwest Publishing*, Justice Pepall provided a non-exhaustive list of factors to be considered in approving such an administrative charges, including:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable; and
- (e) the position of the secured creditors likely to be affected by the charge.⁶³

72. The amounts sought for the Trustee and Advisor Charges are commensurate with the complexity of SkyGreece's business and the scope of professional services that are essential in order to restructure SkyGreece's business and make a viable proposal to creditors. SkyGreece has assembled an experienced team of experts, including:

- (a) Ernst & Young (Canada), Canadian Trustee, and its counsel Gowling Lafleur Henderson LLP;

⁶¹ BIA, s. 64.2. Also see: *Colossus*, *supra* note 48, at paras. 11-15.

⁶² *Colossus*, *supra* note 48, at para. 12.

⁶³ *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54 (**SkyGreece Book of Authorities, Tab 6**).

- (b) Ernst & Young (Athens), Greek Audit;
- (c) Dimitri Stavropolous, SkyGreece Corporate Counsel;
- (d) Potamitis Vekris, Greek Counsel; and
- (e) Paliare Roland, Canadian Counsel.⁶⁴

73. Various professionals who are working on this matter are seeking assurances that they will be paid for their services. At the outset of these proceedings, the restructuring professionals were provided with cash retainers from third party sources. However, given SkyGreece's limited cash flow, a charge over SkyGreece's Property to cover any unanticipated spikes in fees and expenses is appropriate and will allow SkyGreece to more easily and predictably manage its cash flow going forward.⁶⁵

74. Consequently, the charges sought are reasonable and fair given the tasks required to effect a successful restructuring. It is respectfully submitted that the Trustee Charge and Advisor Charge be granted in the amount and priority requested.

(b) D&O Charge

75. Section 64.1(1) of the *BIA* provides statutory authority to grant a directors' and officers' charge on a super-priority basis.

76. Section 64.1 provides:

⁶⁴ Pickering Affidavit at para. 12.

⁶⁵ Pickering Affidavit at para. 43.

(1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

77. In this case, it is appropriate to extend coverage to the directors, officers and members of the restructuring team. First, SkyGreece has no insurance in place that would respond to claims and SkyGreece cannot obtain insurance at a reasonable cost.⁶⁶

78. Second, it is important to SkyGreece's restructuring effort to have the D&O Charge in place in order to keep directors and officers involved in the restructuring and protect them against liabilities that they could incur during the restructuring. The D&O Charge is a very modest one and is necessary for the effective continuation of these

⁶⁶ Pickering Affidavit at paras. 41-42.

BIA proceedings, having regard to the material exposure to directors and officers for liability and sanction for operating liabilities.⁶⁷

79. As indicated in the Pickering Affidavit, there are a number of Greek laws that impose personal liability on officers and directors, including significant civil and even criminal liability in the event that amounts due to employees remain unpaid. Consequently, it is essential that SkyGreece's directors and officers be granted an indemnity and charge for any liabilities that they may incur after the filing of the notice of intention by virtue of holding their office.


80. Accordingly, SkyGreece requests that the court approve the D&O Charge, to rank second in priority after the Trustee Charge and Advisor Charge, in the maximum amount of \$80,000.

PART V. RELIEF SOUGHT

81. SkyGreece respectfully requests that this Court order the relief sought in the form attached to the Notice of Motion at Schedule "A".

⁶⁷ Pickering Affidavit at paras. 41-42.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of September 2015.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the left.

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SCHEDULE A - CASES

Canwest Publishing Inc./Publications Canwest Inc., Re, 2010 ONSC 222

Colossus Minerals Inc. (Re), 2014 ONSC 514 (CanLII)

Dura Automotive Systems (Canada) Ltd., Re, 2010 ONSC 1102 (Ont. Sup. Ct)

Federal Gypsum Co., Re, 2007 NSSC 347

Lehndorff General Partners Ltd. (Re) (1993), 17 CBR (P) 24 (Ont. Gen. Div)

OVG Inc. (Re), 2013 ONSC 1794

Re Cogent Fibre Inc., 2015 ONSC 5139 (CanLII)

SCHEDULE B – STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Section 50.4(9):

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

Section 50.6:

Order — interim financing

(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

- (a) they may not make an application under subsection (1) unless they are carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (5) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
 - (b) how the debtor's business and financial affairs are to be managed during the proceedings;
 - (c) whether the debtor's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
 - (e) the nature and value of the debtor's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Section 64.1

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the

secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Section 64.2:

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF SKYGREECE AIRLINES S.A., AN
INSOLVENT PERSON, PURSUANT TO SECTION 50.4(1) THE *BANKRUPTCY AND INSOLVENCY ACT* (“*BIA*”)**

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT

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