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**VIA E-MAIL:** [secretariat@otc-cta.gc.ca](mailto:secretariat@otc-cta.gc.ca)

May 20, 2016

**The Secretary**

CANADIAN TRANSPORTATION AGENCY  
Secretary  
15 Eddy Street  
17<sup>th</sup> Floor Mailroom  
Gatineau QC J8X 4B3

**SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács  
v. Air Canada  
Case No.: 15-05627  
Our File No.: LIT-2015-000544  
Air Canada's Response to the Applicants' Request  
to Extend Time Limit and File New Evidence**

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Dear Madam Secretary:

1. Please find Air Canada's Response to the Applicants' Request to submit rebuttal evidence and for an extension (the "Request to Extend Time and File New Evidence") filed pursuant to sections 30 (2) and 34 (2) of the *Canadian Transportation Agency Rules* (the "Agency Rules").

## **1. Summary of Air Canada's position**

2. Air Canada objects to the Applicants' Request to Extend Time and File New Evidence, as the New Evidence is irrelevant.
3. The New Evidence does not relate to the purposes identified by the Applicants for their filing. A reading *on its face* of the New Evidence clearly demonstrates that Air Canada's reply was based on the understanding that the passengers refused accommodation, which triggered a goodwill offer. It neither supports, nor relates to the Applicants' disputed allegation that Air Canada limits its liability below the limits of the *Montreal Convention of 1999*, in the case of Controllable Delays.
4. Air Canada analyses passengers' claims on a case by case basis. The very fact that Air Canada has declined or reduced a claim does not equate to a systematic limit or denial of expenses in Controllable Delays, nor does it falsify its Response filed on January 20, 2016.
5. The Request to Extend Time and File New Evidence further amounts to an attempt to extend the Application's Scope by indirectly incorporating new claimants and a new distinct matter and widening the issue currently before the Agency. Air Canada respectfully submits that such scope extension is unnecessary, inefficient, excessive and disproportionate.
6. Subsidiarily, should the Agency allow the Applicants' Request to File New Evidence, filed on the eve of the Applicants' Reply deadline, Air Canada would be left without an opportunity to respond to the new issues raised by the New Evidence. Furthermore, the Agency would draw conclusions affecting the rights of Air Canada and Mr. and Ms. Rubeinstein (The "New Claimants") in its Judgment on the Merits of the present Application, without a fair adjudication process.
7. The Request to File New Evidence rather supports Air Canada's position that the Attempt to Extend the Scope of the Application beyond the Agency's quasi-judicial individual complaint mechanism raises serious concerns of procedural fairness and inefficient use of Parties' and the Agency's Resources.
8. Finally, Air Canada formally takes issue with the Applicants' inappropriate syllogism based on the New Evidence that Air Canada's representations are false, as outlined in paragraph 3 b of the Request to Extend Time and File New Evidence.

## **2. The Applicants' Summary of the Facts**

9. Air Canada denies the Summary of Facts as presented by the Applicants, and refers to the Agency's Record, denying anything not in conformity therewith.
10. Without limiting the foregoing, it specifically relies on paragraphs 5,6,7,21,22, 28 and 30 of its Response filed in the Agency's Record on January 20, 2016 as well as Ms. Twyla Robinson's Statement, Exhibit A-6 to Air Canada's Response, in its entirety.
11. The "Impugned Policy" as labelled by the Applicants are Internal Recommendations for Customer Service Representatives in handling Passenger Expense Refund Requests. The Internal Recommendations do not constitute liability limits in the case of controllable situations. Limits only apply in the case of goodwill offers where Air Canada is not bound to reimburse passengers.
12. The Application is based on Mr. Johnson's Cancellation of flight AC 889 on December 10, 2013, under uncontrollable circumstances. Within this context, and without being liable to do so under the *Montreal Convention of 1999*, Air Canada reimbursed Mr. Johnson the sum of \$CAD222.00, based on goodwill. Having another opportunity to review Mr. Johnson's claim, Air Canada formally offered in its Response to compensate Mr. Johnson for the totality of his claim, by offering an additional goodwill payment of \$CAD 309.56.

## **3. The Additional Evidence filed by the Applicants is irrelevant**

13. Air Canada objects to the filing of the New Evidence as included in support of the Applicant's Request to Extend Time and File New Evidence. It further reserves all of its rights in defending any claim or allegations *vis à vis* the New Evidence in the event the Agency were to allow it in the record. The New Evidence is irrelevant, and a reading *on its face* neither supports nor relates to the Applicants' allegations that Air Canada applies an "Impugned Policy" in cases of Delays that are within its control and the unwarranted conclusion that Air Canada's representations are false.
14. More precisely, without going into its merits, a reading of the New Evidence *on its face* confirms that Air Canada has denied the full compensation requested by the New Claimants on the understanding that they were offered accommodation and refused, the whole as appears from page 1 (bottom) and 2 of Exhibit "I" of Dr. Hymie Rubenstein's Statement. Indeed, the goodwill offer presented by the Air Canada Customer Service Agent was made on Air Canada's understanding that the New Claimants "were offered accommodation by [Air Canada's] agent and declined." Air Canada nevertheless made a goodwill offer.

15. While the *Montreal Convention of 1999* provides for a liability limit for claims based on Delays, said claims remain subject to the rules of evidence and damage mitigation. Without embarking into the merits of Air Canada's reply to the New Claimants, as this is unnecessary, the New Evidence is clearly irrelevant to the purposes identified by the Applicants in their Request to Extend Time and File New Evidence.

**4. The New Evidence unnecessarily and unfairly widens the Application's Scope and its Incorporation in the Reply contravenes Procedural Fairness and the sound administration of justice**

16. The introduction of New Evidence equates to an unnecessary extension of the Application's scope via the introduction of new facts, generated through a distinct matter, for which the Applicants stated that they will need 10 business days to "incorporate (...) into their Reply"<sup>1</sup>.
17. Air Canada submits that the Agency's stability and clarity of rulings will be greatly affected where it would have to rule on new unrelated facts, brought as circumstantial evidence, while bypassing the exchange of arguments process provided to Parties under the Agency Rules. Procedural Fairness to Parties will also be importantly hindered in such an environment, having to respond to an uncircumscribed Application, and losing the opportunity to file a full Response, not to mention important efficiency concerns.
18. Even where Air Canada would have an opportunity to respond to the New Evidence following the Applicant's Reply, a new debate on the New Evidence will hinder and delay the fair conduct of the current matter, being based on Mr. Johnson's flight cancellation for uncontrollable circumstances. The conduct of a parallel exchange based on a distinct matter will severely infringe the sound administration of justice, including the optimal use of Agency and Party resources, as well as being disproportionate and unnecessary, further going against the *Agency Rules* 4 and 5.
19. The incorporation of New Evidence, widening the Application's scope, in combination with the remedies sought in the Application, is excessive, unnecessary and disproportionate, as well as being outside of the Agency's mandate and jurisdiction, including of its individual complaint-driven mechanism<sup>2</sup> Air Canada's comments provided in its April 6 letter, in Response

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<sup>1</sup> Request to Extend Time and File New Evidence, at paragraph 4 of page 3.

<sup>2</sup> *Gabor Lukacs v. Porter Airlines Inc.* 121-C-A-2016, at para 75; *Canada Transportation Act*, s. 67(2); *Cheung v. West Jet*, 324-AT-A-2015 at paras 59-68; *Newrot v. Sunwing*, 432-C-A-2013 at paras 120, 134; *In re: determinations of what constitutes an "air service" and the criteria to be applied by the CTA*; 390-A-2013 at para 25; *Azar v. Air Canada*, 442-C-A-2013 at para 6.

to the Applicants' March 18 third Notice of Written Questions and Production of Documents, were to the same effect.

For the reasons above, Air Canada respectfully requests that the Agency dismiss the Applicant's Request to Extend Time Limit and File New Evidence.

Subsidiarily, should the Agency grant the Applicants' Request to Extend Time and File New Evidence, Air Canada respectfully requests to be entitled to file a New Response to the Reply.

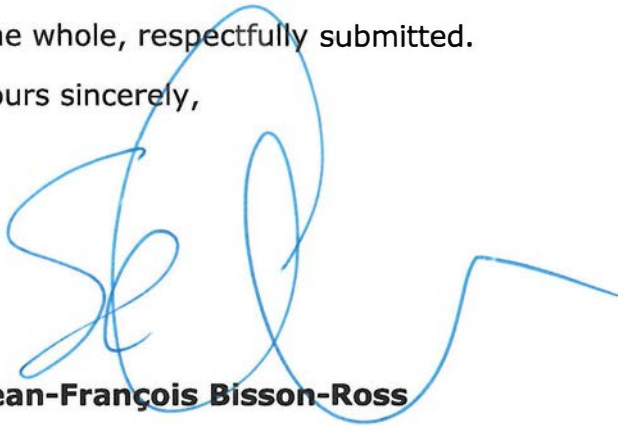
Documents Relied on:

Air Canada relies on all materials that have been served and filed with the Agency in the present proceeding, including but not limited to:

- a. Air Canada's Response and its attachments filed on January 20, 2016
- b. Air Canada's Response to the Applicants' March 18, 2016 Notice of Written Questions and Production of Documents

The whole, respectfully submitted.

Yours sincerely,



**Jean-François Bisson-Ross**

Counsel - Litigation

JFBR/sa

- c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson  
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