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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

<p>IN RE:</p> <p>ASPEN AIR CORPORATION and ASPEN AIR U.S. CORP.,</p> <p>Debtors.</p>	<p>Case No. 18-60662-15</p> <p>MOTION FOR SUPPLEMENTAL ORDER RECOGNIZING COURT OF QUEEN'S BENCH ORDER</p>
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DELOITTE RESTRUCTURING INC., the Foreign Representative of Aspen Air Corporation and Aspen Air U.S. Corp. (the "Aspen Companies"), by and through counsel, James A. Patten, hereby moves this Court pursuant to 11 U.S.C. § 1521(a)(7) to recognize paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 28, 29, and 30 of the June 27, 2018 order issued by the Court of Queen's Bench of Alberta in Bankruptcy and Insolvency, court file numbers 25-2386427 and 25-2386434, in the matter of the Division I Proposal Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp.

In support hereof, the Foreign Representative states as follows:

1. This instant proceeding was commenced on July 9, 2018. The Recognition Hearing is scheduled for August 1, 2018 pursuant to an order of this Court [Doc. # 9].

2. The Foreign Main Proceeding, which this Court is requested to recognize, is pending before the Court of Queen's Bench of Alberta in Bankruptcy and Insolvency, in the matter of the Division I Proposal Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp., 25-2386427 and 25-2386434. An order has been entered by the Court of Queen's Bench, a copy is attached hereto as Exhibit "A" (the "Order"), which provides for certain immediate relief.¹ Specifically, the Order provides:

- a. At paragraph 2, the Aspen Companies are granted until and including August 20, 2018, to file a proposal to their creditors under section 50.4 of the Canadian Bankruptcy and Insolvency Act, RSC 1985, c B-3.
- b. At paragraphs 3 and 4, that the Proposal Trustee and the Foreign Representative, counsel to the Proposal Trustee and Foreign Representative, as well as the Canadian and U.S. counsel to the Aspen Companies are allowed to be paid their reasonable fees and disbursements by the Aspen Companies as part of these proceedings; that the Aspen Companies are authorized and directed to pay the accounts of the Proposal Trustee and Foreign Representative, counsel for the Proposal Trustee and Foreign Representative, and Canadian and U.S. counsel for the Aspen Companies for work performed in connection with these proceedings; for an Administration Charge on all of the assets, rights, undertakings and properties of the Aspen Companies, of every nature and kind whatsoever, and whenever situated including all proceeds thereof (the "Property") as security for their professional fees and disbursements, provided that any charge shall not exceed an aggregate amount of CAD \$150,000.00; and that the Administration

¹ Unless otherwise noted, capitalized terms herein shall have the same meaning as used in the Order.

Charge is to have a senior priority described in paragraphs 12, 13, 14, 15, and 16 of the Order.

- c. At paragraphs 5, 6, 7, and 8, for approval of the DIP Term Sheet, dated June 21, 2018, between the Aspen Companies and CF Financial Corporations the DIP Lender; that the Aspen Companies are authorized and empowered to perform their obligations under the DIP Term Sheet to obtain or borrow funds pursuant thereto in order to finance their working capital requirements and other general corporate purposes and capital expenditures; that borrowing under the DIP Facility shall not exceed the principal amount of CAD \$250,000.00; that the Aspen Companies and DIP Lender are authorized and empowered to execute and deliver such credit agreements, mortgages, charges, pledge agreements, security agreements, hypothecs and security documents, guarantees and other definitive documents as were contemplated by the DIP Term Sheet or as may reasonably be required by the DIP Lender pursuant to the terms thereof together with such modifications as may be agreed upon by the Aspen Companies and DIP Lender and consented to by the Proposal Trustee; and that the DIP Lender shall be entitled to the benefit of and is granted a charge on the Property to secure all obligations of the definitive documents incurred and an amount not to exceed CAD \$250,000.00 and shall have a senior priority described in paragraphs 12, 13, 14, 15, and 16 of the Order.
- d. At paragraphs 9, 10, and 11, that the Aspen Companies shall indemnify their directors and officers from all claims relating to the obligations of liabilities that they may incur and which have accrued after the commencement of the Proposal

Proceeding of reason of or in relation to their respective capacities as directors and officers of the Aspen Companies, except where such obligations or liabilities are incurred as a result of such directors' or officers' gross negligence, willful misconduct, or gross or intentional fault; that the directors and officers of the Aspen Companies are entitled to the benefit of and are granted a charge against the Property in an amount not to exceed CAD \$150,000.00 as security for the indemnity provided as it relates to the obligation and liabilities of the directors and officers may incur after the commencement after the Proposal Proceedings; and that the directors and officers and charge shall have the priority set out in paragraphs 12, 13, 14, 15, and 16 of the Order.

- e. At paragraphs 12, 13, 14, 15, and 16, that the priority of the Administration Charge, the DIP Lender's Charge, and the D&O Charge, as among them are first the Administration Charge to the maximum of CAD \$150,000.00, second the DIP Lender's Charge to a maximum of CAD \$250,000.00, and third to the D&O Charge to a maximum of \$150,000.00; that each of the charges are charged upon the Property and shall rank first in priority to the other security interests, trusts, deemed trust, liens, charges in encumbrance, claims of secured creditors, statutory or otherwise in favor of any person notwithstanding the order of perfection or attachment; that the filing, registration or perfection of the charges shall not be required and the charges shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the charges coming into existence; that the Aspen Companies shall not grant any encumbrance over the Property that rank in priority to, or *pari passu*

with any of the Administration Charge, DIP Lender's Charge, and D&O Charge unless the Aspen Companies also obtain prior written consent of the Proposal Trustee, the DIP Lender, and beneficiaries of the Administration Charge and D&O Charge or upon further order of the Court of Queen's Bench; and that the foregoing charges shall not be rendered invalid or irreversible or otherwise limited or impaired in any way.

- f. At paragraph 18, that certain suppliers scheduled on Schedule B to the Order are each deemed to be a critical supplier of the Aspen Companies who are authorized to pay such critical suppliers amounts owing for goods and services supplied and received by the Aspen Companies prior to June 6, 2018; and that the maximum aggregated amount shall not to exceed CAD \$250,000.00 or the U.S. equivalent of such amount.
- g. At paragraphs 19, 20, and 21, that the Aspen Companies and Proposal Trustee are authorized and empowered to implement the Sale and Investor Solicitation Process attached to the Order as Schedule C and to proceed, carry out and implement any corresponding sales, marketing or tendering processes in accordance with the Sale and Investor Solicitation Process; that the Aspen Companies are authorized to enter into any resulting agreement or transaction which may arise in connection therewith as the Aspen Companies and the Proposal Trustee determine necessary and advisable in order to complete any of the various steps contemplated by the Sale and Investor Solicitation Process; that nothing shall act as an authorization or approval of the transfer or vesting of any or all of the Aspen Companies property, assets, or undertakings under any Sale

and Investor Solicitation Process agreement all of which shall be subject to a further order of the Court of Queen's Bench.

3. The relief granted by the foregoing provisions of the Order are functionally equivalent to the relief allowed by 11 U.S.C. §§ 364 and 506 and Rules 4001(c), 603, F.R. Bankr. P.

4. Bankruptcy Code §1520 identifies the effects of recognition of a Foreign Main Proceeding which include: the application of §§ 361 and 362 with respect to the Debtor and property of Debtor within the territorial jurisdiction of United States; and §§ 363, 549, and 552 with respect to the transfer of an interest of the Debtor and property within the territorial jurisdiction of United States. Code § 1521(a)(7) provides additional relief that may be granted upon recognition including "any additional relief that may be available to a trustee, except for relief available under §§ 522, 544, 545, 547, 548, 550, and 724(a). "The relief available under § 1521(a)(7) is a non-exhaustive list. *Vitro v. ACP Master, Ltd (In re Vitro)*, 455 B.R. 571, 579 (Bankr. N.D. Tex. 2011); *In re Pro-Fit Int'l Ltd*, 391 B.R.850, 866 (Bankr. C.D. Cal. 2008); *In re Condor Ins. Ltd*, 601 F.3d 319, 324-25 (5th Cir. 2010). This Court is authorized to grant such additional relief as is consistent with the principles of comity and satisfies the "fairness" considerations of § 1507(b). *In re U.S. Steel Can, Inc.*, 571 B.R. 600, 609 (Bankr. S.D. N.Y. 2017). Code § 1522 provides that the Court may grant relief under § 1521 "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

5. The Foreign Representative seeks the grant of additional relief available to a trustee or chapter 11 debtor-in-possession as provided by §§ 364 and 506 and related Bankruptcy Rules. Debtor-in-possession loans with a super-priority are permitted under § 364(d). *In re Yellowstone Mt. Club, LLC*, 2008 Bankr. LEXIS 4062, *47 (Bankr. D. Mont. 2008). A

surcharge on property of the estate for payment of professional fees, under particular circumstance, is permitted under § 506(c). *In re Desert Gardens IV, LLC*, 2012 Bankr. LEXIS 1075, *7-8, (Bankr. D. Ariz. 2012); *Compton Impressions, Ltd. v. Queen City Bank, N.A. (In re Compton Impressions, Ltd.)*, 217 F.3d 1256, 1261 (9th Cir. 2000). While, domestically, there may be a high bar for a surcharge under § 506(c), it is expressly authorized by the Canadian Bankruptcy and Insolvency Act, RSC 1985, c. B-3, §§ 50.6 and 64.2.

6. As early as 1883, the principles of comity “have provided the method by which foreign bankruptcies have been recognized in American jurisprudence.” *Iida v. Kitahara (In re Iida)*, 377 B.R. 243, 253 (B.A.P. 9th 2007) (citing *Canada S. Railway Company v. Gebhard*, 109 U.S. 527, 539 (1883)). The U.S. Supreme Court, in the *Canada S. Railway* case, enforced under the principle of international comity an arrangement approved by the Canadian Parliament, that would have been unconstitutional if enacted by Congress. The Supreme Court held that it is axiomatic that the laws of a country have no “extra-territorial force” but “things done in one country under the authority of law may be of binding effect in another country.” *Canada S. Railway*, at 536. Under Chapter 15, once the proceeding has commenced, the Foreign Representative may seek the relief provided by Chapter 15 in furtherance of the foreign proceeding. A bankruptcy court may authorize the Foreign Representative, in the exercise of the bankruptcy court’s discretion, to “entrust the administration and/or distribution of the debtor’s assets located within the United States to a foreign trustee . . . as long as the interests of the creditors are sufficiently protected.” *Iida*, at *259; see, § 1522. Chapter 15 implements the principles of comity recognized since 1883

7. Here, the charges authorized by the Order will institute a senior lien on the Aspen Companies’ property in the United States. With respect to the real property, there are but two

existing lienholders, the Yellowstone County Treasurer for property taxes and the Alberta Treasury Branches for a mortgage lien. Priming the property tax lien is legally problematic and the Foreign Representative expressly waives any ability to accomplish that. However, the Alberta Treasury Branches is subject to the Order which is based on Canadian law; the Alberta Treasury Branches has an expectation to be bound by the laws of Canada and orders of its courts and is bound by the Order. With respect to the senior liens granted by the Order on collateral of the Alberta Treasury Branches, this Court should recognize the Order and not engage in the ordinary adequate protection analysis under the principles of comity.

8. Granting the supplemental relief as hereby requested is appropriate. Such relief assures the professionals employed by the Canadian Debtors, the Proposal Trustee and Foreign Representative, the DIP Lender, and the Directors and Officers that the charges expressly authorized by Canadian law will be recognized by this Court. Recognizing such relief as described in the Order is an appropriate exercise of this Court's discretion and is necessary to effectuate the purposes of Chapter 15, protect the assets of the Aspen Companies, and allows the Proposal Trustee and Foreign Representative to conduct to the Foreign Proceeding including those that relate to property within the United States, all in accordance with the Order.

9. Notice of this motion has been given to the lienholders of Aspen Air U.S. Corp. who are the Yellowstone County Clerk and Recorder (property taxes), the Alberta Treasury Branches (mortgage lien), American Welding & Gas, Inc. and Principal Leasing Company, LLC as lessors under personal property leases. There are no other lien holders of record.

WHEREFORE, the foregoing reasons Deloitte Restructuring Inc., respectfully requests this Court pursuant to 11 U.S.C. § 1521(7) to recognize paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,12,13,14, 15, 16, 17, 18, 19, 20, 21, 28, 29, and 30 of the Order.

Dated this 12th day of July, 2018.

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By: /s/ JA Patten
James A. Patten
Attorney for the Foreign Representative

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify, under penalty of perjury, that on the 12th day of July, 2018, a copy of the foregoing was served by electronic means pursuant to LBR 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities and/or by mail on the following parties:

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By: /s/JA Patten
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