PUBLIC VERSION

CT-2016-015

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering services at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION TO THE RESPONDENT'S MOTION CHALLENGING THE ADMISSIBILITY OF CERTAIN EVIDENCE

PART I: OVERVIEW

1. In this application, Air Transat A.T. Inc. ("**Air Transat**") provided a witness statement from Barbra Stewart dated October 31, 2017 (the "**Air Transat Statement**")[1] and Jazz Aviation LP ("**Jazz**") provided a witness statement from Rhonda Bishop dated November 10, 2017 (the "**Jazz Statement**")[2] (together these two documents are referred to as the "**Witness Statements**").

2. The Witness Statements testify to, among other issues, the fact that, in the ordinary course of business, Air Transat and Jazz each carried out competitive processes for in-flight catering. These companies analyzed the bids to determine what those bids would cost compared to what each company was currently paying for in-flight catering. Based on these analyses, Air Transat and Jazz made decisions about who to procure their in-flight catering from.

3. Vancouver Airport Authority ("**VAA**") alleges that the portions of the Witness Statements that testify to savings from these competitive processes (the "**Relevant Evidence**") is either opinion or hearsay evidence and should be struck.

4. The Relevant Evidence is not opinion evidence; rather it is evidence of the fact of what these companies expected to save. Even if it is opinion evidence, it meets the test to be admitted as Ms. Stewart and Ms. Bishop were well placed to report on the Relevant Evidence.

5. The Relevant Evidence is also not hearsay. Ms. Stewart and Ms. Bishop testify that they have personal knowledge of the matters to which they

[1] Witness Statement of Barbara Stewart, Air Transat AT Inc, dated October 31, 2017, Motion Record of the Respondent, Tab 2 ("**Air Transat Statement**").
[2] Witness Statement of Rhonda Bishop, Jazz Aviation LP, dated November 10, 2017, Motion Record of the Respondent, Tab 3 ("**Jazz Statement**").

testify, including the Relevant Evidence. In the alternative, if the evidence is hearsay, it should be admitted because it is necessary and reliable. VAA will be able to test this evidence on cross-examination.

6. Finally, if the Competition Tribunal (the "**Tribunal**") decides that the Relevant Evidence is hearsay or opinion, it should be admitted to reflect the reality of Tribunal proceedings which would be inefficient if every out of court statement and document had to be authenticated. VAA appears to acknowledge this reality because it has filed witness statements replete with hearsay and opinion evidence.

7. VAA's motion should be dismissed with costs.

PART II: SUMMARY OF FACTS

A. The Air Transat Statement testifies to the fact of what Air Transat thought it could save as a result of a competitive process for in-flight catering

8. The Air Transat Statement is provided by Ms. Stewart who testifies at the beginning of her statement that she has personal knowledge of the matters in her witness statement except where she has otherwise indicated. Air Transat has authorized her to provide her witness statement on its behalf.[3]

9. Ms. Stewart has 37 years of experience in the aviation industry.[4] From 2014 to 2017 she was Senior Director, Procurement. She testifies that she was responsible for all procurement activities at Air Transat as they relate to in-flight catering from 2014 to 2017.[5]

[3] Air Transat Statement, *supra* note 1 at paras 2-3.
[4] *Ibid* at para 6.
[5] *Ibid* at para 7.

10. According to Ms. Stewart, in 2015, when she was responsible for procurement of in-flight catering, Air Transat conducted a competitive request for proposals ("**RFP**") for in-flight catering at the eight stations in Canada, including YVR, where Air Transat obtained in-flight catering from Gate Gourmet Canada Inc. ("**Gate Gourmet**"). Air Transat conducted this process because, among other reasons, it was dissatisfied with the pricing and level of service that Air Transat received from Gate Gourmet.[6]

11. What did Air Transat do once it had received the bids in response to the RFP? According to Ms. Stewart, who was responsible for this process, Air Transat carefully considered the bids it received from both a price and service prospective.[7]

12. Ms. Stewart testifies that Air Transat combined the proposed pricing provided by the bidders with Air Transat's flight schedules and volumes by airport. Air Transat was thus able to compare, on a station-by-station and overall basis, the proposed catering and galley handling pricing of each of the bidders. In this way, Air Transat determined that the lowest proposed pricing, from Optimum Stratégies Inc. ("**Optimum**"), represented an approximate [redacted]% cost savings, or $[redacted] over [redacted] years for stations across the country, over the proposed prices by [redacted].[8]

13. It bears repeating that Ms. Stewart says she has personal knowledge of all the matters in her witness statement, unless otherwise indicated, including knowledge that, as a result of a process she was responsible for, Air Transat analyzed what it thought it could save as a result of the RFP process. This is the type of analysis that businesses conduct countless times in the ordinary course of business.

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[6] *Ibid* at para 23.
[7] *Ibid* at para 28.
[8] *Ibid* at para 29.

14. Ms. Stewart states that Air Transat wanted to switch to Optimum at all stations across Canada but that because of VAA's conduct, "Air Transat had no choice but to contract with Gate Gourmet for the supply of in-flight catering at YVR, despite Gate Gourmet not being Air Transat's preferred provider". [9]

15. Air Transat had to contract with Gate Gourmet for in-flight catering only at YVR. Because of this, "Air Transat was forced to [redacted] from Gate Gourmet, causing Air Transat [redacted] – approximately [redacted] – than what it would have paid to Optimum for service at YVR". [10]

16. VAA accepts that it is not hearsay for Ms. Stewart to testify to the RFP process. It objects that Ms. Stewart's testimony about this process becomes hearsay or opinion once Ms. Stewart testifies about the amounts that Air Transat thought it would save because of this process and the amounts that Air Transat paid Gate Gourmet because it could not switch to Optimum.

17. The nub of VAA's complaint is that the Relevant Evidence is hearsay and opinion because there is no indication as to how the figures were calculated or because documents were not attached to the Air Transat Statement.

18. As described above, Ms. Stewart does describe how Air Transat calculated the savings amounts in paragraph 29 of her witness statement. Air Transat combined the proposed pricing provided by bidders with Air Transat's flight schedules and volumes by airport so it could compare respective pricing. As a result of this process, Ms.

[9] *Ibid* at para 34.
[10] *Ibid* at para 35.

Stewart has direct knowledge of the fact that Air Transat thought it could save $[redacted].

19. Ms. Stewart also describes the basis for her knowledge of the fact that Air Transat would have to pay [redacted] to Gate Gourmet than it would have to Optimum. Once Air Transat was forced to contract with Gate Gourmet at only YVR (because of VAA's actions) it had [redacted] and pay higher prices.

20. It is true that the Air Transat Statement does not attach the documents that contain or support the information of which Ms. Stewart said she has personal knowledge. VAA recognizes this because it has contacted Air Transat and asked for the information that will allow it to test these claims. Air Transat, to the best of its ability, has said it will respond to VAA's request.[11]

21. The absence of documentary support does not, as described below, make Ms. Stewart's testimony about the fact of what Air Transat thought it would save hearsay or opinion. It simply goes to the weight the Tribunal will accord her testimony.

B. The Jazz Statement testifies to the fact of what Jazz thought it could save and did save through a competitive process

22. The Jazz Statement is provided by Ms. Bishop, who testifies at the beginning of her statement that she has personal knowledge of the matters in her witness statement except where she has otherwise indicated.[12]

[11] Affidavit of Amani Syed, dated September 17, 2018, Exhibits B and C, Commissioner's Motion Record, Tab 2 ("**Syed Affidavit**").
[12] Jazz Statement, *supra* note 2 at para 2.

23. Ms. Bishop has 26 years of experience in the aviation industry in a number of management roles. In particular, between 2010 and November 2017 (when she signed her statement) she was Director, In

-flight Services and Onboard Product.[13] Her responsibilities, among others, included negotiating, where possible, better products and services to reduce the cost of in-flight catering on board Jazz's aircraft.[14]

24. She testifies that in 2014 she provided strategic direction to the in-flight catering RFP process team with day-to-day responsibility for the 2014 RFP process.[15]

25. Until the end of 2014, Jazz procured in-flight catering from Gate Gourmet at nine stations in Canada, including YVR.[16] Like Air Transat, Jazz was becoming dissatisfied with Gate Gourmet and in 2014 decided to go to the marketplace with a competitive RFP for in-flight catering.[17]

26. Ms. Bishop testifies in detail about the RFP process Jazz undertook in paragraphs 31 to 40 of the Jazz Statement. These paragraphs include her testimony that Gate Gourmet submitted a non-compliant bid [redacted].[18]

27. Jazz decided to recommend awarding its business at eight of the nine stations in Canada to other firms but requested that Gate Gourmet provide pricing at YVR only.[19] The end result of this negotiation was that Jazz awarded Gate Gourmet a contract at YVR only that reflects a [redacted]% increase over the prices Jazz paid to Gate Gourmet at YVR in 2014.[20] Ms. Bishop explains that Jazz had no choice but to contract with Gate

[13] *Ibid* at para 7.
[14] *Ibid* at para 8.
[15] *Ibid* at para 8.
[16] *Ibid* at para 27.
[17] *Ibid* at para 28.
[18] *Ibid* at para 35.
[19] *Ibid* at para 37.
[20] *Ibid* at para 39.

Gourmet at YVR because only Gate Gourmet and CLS Catering Services Ltd. ("**CLS**") were authorized to operate at YVR and [redacted].[21]

28. Like Air Transat did, and is done in the ordinary course of business every day by businesses across the country, Jazz set out to analyze the result of the 2014 bids so that it could make a decision about which provider to choose.

29. Ms. Bishop testifies to how Jazz did this analysis. She states that "Jazz estimated the total costs of each bid by [redacted]. Jazz compared the costs of each bid [redacted], and to Jazz's actual 2014 costs, under its then-existing arrangement with Gate Gourmet".[22]

30. Ms. Bishop attaches to her witness statement as Exhibit 10 information from the 2014 bid evaluation. Again, as the person who was providing the strategic direction for this competitive process, on its face it is clear that she would have personal knowledge of what Jazz believed it would save as a result of this process.

31. Jazz decided to switch providers and selected Newrest and Sky Café at eight of the nine stations.[23] Ms. Bishop testifies that switching stations, in absolute terms, translated into actual savings of $2.9 million or 16% in 2015 alone.[24] Ms Bishop identifies the source of this information and attaches it as an exhibit: Chorus' 2015 Management's Discussion and Analysis of Results of Operations and Financial Condition.[25] This exhibit

[21] *Ibid* at para 44.
[22] *Ibid* at para 41.
[23] *Ibid* at para 49.
[24] *Ibid* at para 50.
[25] *Ibid*, Exhibit 12 at page 17.

is a public securities document, created in the ordinary course of business.

32. Finally, Ms. Bishop testifies that Jazz's inability to switch to a new-entrant provider at YVR has increased the foregone in-flight catering cost savings from January 2015 to April 2017. She describes how this analysis was done by "multiplying Jazz's actual flight volumes at YVR between January 1, 2015 and March 31, 2017 by the 2014 RFP pricing proposed by [redacted], and comparing it with Gate Gourmet's actual pricing for the period." The result of this analysis shows that Jazz paid approximately [redacted] more for in-flight catering at YVR.[26] Ms. Bishop attaches a copy of this analysis as Exhibit 13.

33. Ms. Bishop is testifying that she has personal knowledge of these savings claims. It is reasonable that Ms. Bishop, Director, In-flight Services and Onboard Products, whose responsibilities include conducting a monthly review to maintain target and costs in all areas and overseeing the budget and billings for all in-flight catering,[27] would have personal knowledge of this information.

34. The nub of VAA's complaint with Jazz is that because Ms. Bishop does not identify who prepared the documents and state that she did the calculations herself that it must be hearsay and opinion evidence.

35. The absence of this information does not, as described below, make Ms. Bishop's testimony about the fact of what Jazz thought it would save and did save hearsay or opinion. It goes to the weight the Tribunal accords her testimony.

[26] *Ibid* at para 54.
[27] *Ibid* at para 8.

36. As with Air Transat, VAA has contacted Jazz to request documents that will allow VAA to test these claims and Jazz has said it is willing to provide this information.[28]

C. VAA's witnesses provide hearsay and opinion evidence, demonstrating that the Tribunal should admit the Relevant Evidence even if it is hearsay or opinion

37. As demonstrated below, the Relevant Evidence is admissible because it is not hearsay or opinion. Even if the Relevant Evidence is found to be hearsay or opinion, it should still be admitted because Tribunal proceedings are to be dealt with as informally and expeditiously as possible.

38. Even VAA, who is a party to the proceeding, has filed witness statements that contain evidence which on its face is either hearsay or opinion. For example, the following statements are found in the Witness Statement of Craig Richmond, dated January 12, 2018 (the "**Richmond Statement**")[29] which statements are on their face hearsay or opinion:

a. To which flights and to which customers airlines offer freshly prepared meals;[30]

b. The importance of certain types of meals for attracting first class and business class passengers, and the importance of such customers to airline profitability;[31]

c. [redacted]

d. [redacted], and possibly other Asian airlines, with respect to high quality fresh meals;[33]

[28] Syed Affidavit, *supra* note 11, Exhibit A.
[29] Witness Statement of Craig Richmond, Vancouver Airport Authority, dated January 12, 2018, Commissioner's Motion Record, Tab 3 ("**Richmond Statement**").
[30] *Ibid* at para 17.
[31] *Ibid* at para 62.
[32] *Ibid* at para 64.

e. The extent to which airlines consider self-supply or double-catering to be feasible, and the extent to which those airlines self-supply or double cater their meals;[34]

f. The efficiency for in-flight caterers located on Sea Island and the benefits that in-flight caterers derive from their locations on Sea Island;[35]

g. The amount of investment required to set up a commercial flight kitchen on Sea Island and the consequences of such investments with respect to the in-flight caterers' long-term commitment to providing service to YVR;[36]

h. Speculation that the entry of a third caterer might cause one or both of the incumbent caterers to exit the market at YVR;[37]

i. The changes in the in-flight catering market at YVR, the actions of many airlines as a result, [redacted];[38] and

j. The effect of the exit of an in-flight catering firm on airlines.[39]

PART III: ISSUE IN DISPUTE

39. This motion raises the issue of whether the Tribunal should admit the Relevant Evidence.

[33] *Ibid* at para 64.
[34] *Ibid* at para 73.
[35] *Ibid* at para 85.
[36] *Ibid* at para 86.
[37] *Ibid* at para 99.
[38] *Ibid* at para 107 and Exhibit 20.
[39] *Ibid* at para 113.

PART IV: SUBMISSIONS

A. The Relevant Evidence is observation of facts, not inference from facts, and even if it is opinion, it meets the low test for admissibility

40. Ms. Stewart and Ms. Bishop testify to the facts of what various options arising from a competitive process would cost their respective companies for in-flight catering and hence what their companies saved by the option the companies chose.[40] Ms. Stewart and Ms. Bishop are not inferring from facts but rather are testifying to observed facts.

41. To the extent there is an argument about whether this is fact or opinion, it illustrates what Justice Dickson said in *R. v. Graat*:

> Except for the sake of convenience, there is little, if any virtue in any distinction resting on the tenuous, and frequently false, antitheses between fact and opinion. The line between "fact" and "opinion" is not clear.[41]

42. If the Tribunal does find that the fact of what these two companies expected to and did save is opinion then it should still be admitted. The Tribunal articulated the test for admissibility of such evidence properly when it relied on Justice Dickson's decision in *Graat*:

> Justice Dickson then went on to say that the admissibility of such evidence is on a rather simple basis – the witnesses had an opportunity for observation, they were in a position to give the Court real help. And in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at page 608, Sopinka and Lederman summarize the applicable rule in reference to Justice Dickson's articulation: Couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when based on the witness's perceptions. The real

[40] Air Transat Statement , *supra* note 1 at para 29; Jazz Statement, *supra* note 2 at paras 39-42, 50.
[41] *R v Graat* [1982] 2 SCR 819 at page 835. ("***Graat***").

issue will be the assessment and weight to be given to such evidence after it is admitted.[42]

43. Ms. Stewart and Ms. Bishop have knowledge of the competitive processes that their companies undertook with respect to in-flight catering. In fact, Ms. Stewart directly ran the process as the Senior Director, Procurement, responsible for all procurement activities related to in-flight catering[43] and Ms. Bishop provided strategic direction to the team in her role as Director, In-flight Services and Onboard Product.[44]

44. In the ordinary course of business, as any rational and reasonable business does, Ms. Stewart and Ms. Bishop have knowledge about what their companies could and did save as a result of these processes. They are well placed to provide the Tribunal with help given their positions.

45. Contrary to what VAA argues, Ms. Stewart and Ms. Bishop both testify to what these facts are with respect to the savings:

    a. **Air Transat.** Air Transat carefully considered the bids it received.[45] With respect to price, Air Transat combined the proposed pricing provided by the bidders with Air Transat's flight schedules and volumes by airport. Air Transat was thus able to compare, on a station-by-station basis, the proposed catering and galley handling pricing of each of the bidders. In this way, Air Transat determined that the lowest proposed pricing, from Optimum, represented an approximately [redacted]% cost savings, or $[redacted] over [redacted] years for stations across the country.[46]

[42] *Commissioner of Competition v Imperial Brush Co Ltd,* 2007 Comp Trib 22 at para 11 ("***Imperial Brush***").
[43] Air Transat Statement , *supra* note 1 at para 7.
[44] Jazz Statement, *supra* note 2 at paras 7-8.
[45] Air Transat Statement , *supra* note 1 at para 28.
[46] *Ibid* at para 29.

b. Jazz. Jazz evaluated the bids received in response to the 2014 RFP from a financial perspective [redacted].[47] In analyzing the RFP responses, Jazz estimated the total costs of each bid by [redacted]. Jazz compared the costs of each bid [redacted], and to Jazz's actual 2014 costs, under its then-existing arrangement with Gate Gourmet.[48]

46. The Federal Court of Appeal's decisions in *TREB*[49] and *Pfizer*[50] also support the admissibility of the Relevant Evidence. The FCA in *Pfizer* upheld the acceptance of a corporate executive's testimony about what his pharmaceutical company would have done in the "but for" world in circumstances where the witness had actual knowledge of the company's relevant, real world, operations.[51] Citing *Pfizer,* the FCA in *TREB* provided the following guidance about opinion evidence:

> Nevertheless, we think it is clear that lay witnesses cannot testify on matters beyond *their own* conduct and that of *their* business in the "but for" world. Lay witnesses are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the "but for" world, nor do they have the experiential competence. While questions pertaining to how their particular business might have responded to the hypothetical world are permissible provided the requisite evidentiary foundation is established, any witness testimony regarding the impact of the VOW restrictions on competition generally strays into the realm of inappropriate opinion evidence[52]

[47] Jazz Statement, *supra* note 2 at para 41. Ms. Bishop describes earlier in her statement at para 22, the five different types of Catering Events, each of which is associated with a particular aircraft type and level of service.
[48] *Ibid* at para 41.
[49] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2017 FCA 236 ("***TREB***").
[50] *Pfizer Canada Inc v Teva Canada Ltd*, 2016 FCA 161 ("***Pfizer***").
[51] *Ibid* at paras 105-108, 112, 121.
[52] *TREB*, *supra* note 49 at para 81.

47. Ms. Stewart and Ms. Bishop are providing evidence on an issue that they have experience with – savings generated from a competitive processes run by their companies. If Ms. Stewart and Ms. Bishop were speculating about market outcomes in light of their decisions from the competitive process this would be invalid opinion evidence, but they are not. They are not speculating about what their companies might have done in a "but for" world and they are certainly not providing opinion evidence beyond the conduct of their business.

48. VAA incorrectly argues that Ms. Stewart in particular has no basis for her opinion because Dr. Niels could not analyze the data that Optimum provided and Gate Gourmet provided about their charges to Air Transat.[53] However, Dr. Niels testifies it is not possible because Optimum data is [redacted].[54]

49. VAA's argument would only be material to the extent that Ms. Stewart was testifying that she undertook the type of analysis Dr. Niels contemplates. She is not. As described above, and is clear in Ms. Stewart's statement, the analysis that Air Transat did to calculate savings was based on the bids it received in combination with Air Transat's flight schedules and volumes.[55]

50. The Relevant Evidence is not opinion evidence; rather it is fact. Even if it is opinion evidence, it should be admitted as both Ms. Stewart and Ms. Bishop were well placed to perceive the savings their companies achieved as a result of the competitive processes they undertook.

[53] Memorandum of Fact and Law of the Respondent at paras 64-65.
[54] Expert Report of Dr. Gunnar Niels, dated July 4, 2018, at para 4.52, Motion Record of the Respondent, Tab 4 ("**Niels Report**").
[55] Air Transat Statement, *supra* note 1 at para 29.

B. The Relevant Evidence is not hearsay, and even if it is, it should be admitted because it is necessary and reliable

1. The Relevant Evidence is not hearsay

51. Hearsay is testimony of a statement made to a witness by a person who is not called as a witness offered to show the truth of the matter stated therein.[56]

52. If Ms. Stewart or Ms. Bishop were testifying that they were told by another airline that airlines saved costs from a competitive process, that would be hearsay. That is not the case with the Relevant Evidence.

53. The fundamental flaw in VAA's hearsay argument is that the Relevant Evidence is hearsay because the specific paragraphs of the Relevant Evidence do not describe how the witnesses have personal knowledge of the Relevant Evidence.

54. The problem with this argument is that it ignores both witnesses' statements that they have personal knowledge of what they are testifying to (unless otherwise indicated).[57]

55. It is clear on the face of the evidence, as described in detail above, why these two individuals should be presumed to have personal knowledge of the Relevant Evidence.

56. Compare the Air Transat and Jazz Statements to a situation where it is not clear on the face of the evidence why a witness would have personal knowledge of a statement: Mr. Richmond, the CEO of VAA, claims he is "[redacted]

[56] *Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6 at para 84.
[57] Air Transat Statement, *supra* note 1 at para 7; Jazz Statement, *supra* note 2 at paras 7-8.

[redacted]". [58]

57. There is no indication why Mr. Richmond, who does not work for [redacted], would have personal knowledge of how much [redacted] He does not say he has talked to representatives of [redacted] to obtain this information. He has not testified that he has gone on board these flights to witness exactly how many times [redacted]. He has not attached any documents to support this claim.

58. Even if it is not clear in the context of the affidavit from a corporate representative why that representative would have personal knowledge, which is not analogous to the Air Transat and Jazz statements, courts have held that corporate representatives can be considered to have personal knowledge if they are relying on corporate records. [59] This is the case for the Jazz Statement where Ms. Bishop attaches the corporate records to support her testimony.

2. The Relevant Evidence should be admitted, even if it is hearsay, because it is necessary and reliable.

59. The principled approach to hearsay involves an assessment of two indicia – reliability and necessity. These two factors must be assessed together to determine whether the truth of the evidence can be tested through cross-examination.[60]

60. Simply because the person who has direct knowledge of the fact is available to testify does not mean that the hearsay evidence is unnecessary. Instead, the nature of the evidence must be assessed to

[58] Richmond Statement, *supra* note 29 at para 73.
[59] *Attila Dogan Construction and Installation Co v AMEC Americas Ltd*, 2015 ABQB 120 at para 72 ("***Attila Dogan***"); *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at para 33.
[60] *Imperial Brush*, *supra* note 42 at para 12.

determine whether the person who does not have direct knowledge can reliably testify.

61. The business records exemption is an example where courts have recognized that documentary evidence can be tendered for the proof of its contents even though the creator of the document has not been called.[61] A record created in the ordinary course of business imbues that business record with very high circumstantial guarantees of reliability and so is admissible.[62] The reliability of business records offsets the necessity requirement such that mere expediency and convenience militate in favour of admitting the evidence.[63]

62. The assessment of the two indicia of necessity and reliability recognizes the reality that judicial proceedings would grind to a halt if every document or every out of court statement had to be proved by the person with direct knowledge.

63. **Air Transat.** The Air Transat savings claims are necessary and reliable. Air Transat has provided Ms. Stewart to testify on Air Transat's behalf, whose job it was to carry out the RFP to determine which in-flight caterer to select. Ms. Stewart's job was to be responsible for all procurement activities.[64]

64. Ms. Stewart's evidence is reliable, contrary to the reasons provided by VAA.[65]

65. *First*, Ms. Stewart has in fact provided information, as described in paragraphs 12 and 15 above, about how the requisite calculations were performed.

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[61] *Ares v Venner*, [1970] SCR 608.
[62] *R v B (KG)*, [1993] 1 SCR 740 at para 108.
[63] *Ibid*.
[64] Air Transat Statement, *supra* note 1 at para 7.
[65] Memorandum of Fact and Law of the Respondent at para 66.

66. *Second*, VAA has requested from Air Transat, and Air Transat has agreed to provide, documentation that supports these calculations.[66]

67. *Third*, VAA can test with Ms. Stewart what she knows about the calculations. It may be that Ms. Stewart is able to satisfy the court that the calculations were carried out in a reliable manner.

68. *Fourth*, VAA's assertion that Dr. Niels was unable to analyze the data to determine Air Transat's cost savings is irrelevant to determining the reliability of the analysis that Air Transat carried out. As described above, Air Transat is not purporting to carry out the analysis that Dr. Niels did; rather, it is simply testifying to the fact of what it expected to save based on the bids it received.

69. **Jazz.** The Jazz claims are necessary and reliable. Jazz has provided Ms. Bishop to testify on its behalf, and Ms. Bishop is responsible for in-flight catering including providing strategic direction to those at Jazz who carried out the RFP process.[67]

70. For many of the same reasons as Air Transat, VAA's concerns about reliability are overstated.

71. *First*, Ms. Bishop has in fact provided information, as described in paragraphs 29 - 32 above, about how the requisite calculations were performed.

72. *Second*, VAA has requested from Jazz, and Jazz has agreed to provide, documentation that supports these calculations.[68]

73. *Third*, in paragraph 50 of the Jazz Statement, a paragraph VAA seeks to strike, Ms. Bishop's testimony that "consistent with 2014 bid evaluation,

[66] Syed Affidavit, *supra* note 11, Exhibits B and C.
[67] Jazz Statement, *supra* note 2 at para 8.
[68] Syed Affidavit, *supra* note 11, Exhibit A.

in absolute terms, switching the service provider at the Switch Stations translated into actual savings of $2.9 million or 16% in 2015 alone" is supported by the attached Exhibit 12: Chorus' 2015 Management's Discussion and Analysis of Results of Operations and Financial Condition.

74. VAA does not seek to strike this exhibit. This is a public securities document for which there are repercussions if it contains false or misleading representations.[69] It is a document made in the ordinary course of business with indicia of reliability.

75. *Fourth*, VAA's assertions that the evidence from Dr. Niels' analysis undermines Jazz's testimony about the savings make the same mistake as VAA's argument about Air Transat, above.[70] Jazz is not purporting to conduct the same analysis that Dr. Niels has conducted.

76. Dr. Niels has conducted his analysis based on the invoicing data obtained from the various relevant caterers to calculate Jazz's savings per departure in 2015.[71] On the other hand, Jazz conducts two different savings analyses, neither of which is the same as what Dr. Niels has done.

77. The first analysis was done in 2014. As Ms. Bishop states in the Jazz Statement, to calculate savings, Jazz "estimated the total costs of each bid by [redacted]. Jazz compared the cost of each bid [redacted], and to Jazz's actual 2014 costs, under its then-existing arrangement

[69] *Securities Act*, RSNS 1989, c 418, ss 137-139.
[70] Memorandum of Fact and Law of the Respondent at para 87.
[71] Niels Report, *supra* note 54 at pp 142-143.

with Gate Gourmet."[72] Ms. Bishop is not purporting that Jazz analyzed the savings based on the invoice data for 2015.

78. The second analysis was done to determine cost savings from January 2015 to April 2017 (after which Jazz assigned its contracts with Sky Café and Newrest and Gate Gourmet to Air Canada). Ms. Bishop states that the analysis was done by "multiplying Jazz's actual flight volumes at YVR between January 1, 2015 and March 31, 2017 by the 2014 RFP pricing proposed by [redacted], and comparing it with Gate Gourmet's actual pricing for the period".[73]

3. Exhibit 10 is necessary, reliable and created in the ordinary course of business

79. Ms. Bishop testifies to the 2014 RFP bid evaluations that Jazz conducted. She provides the details, described in paragraph 41 of the Jazz Statement, about how Jazz evaluated the cost savings by estimating the total costs of each bid [redacted].

80. Exhibit 10 is the document that contains the information from the bid evaluation that was conducted in the ordinary course of business, giving it the necessary indicia of reliability.

81. This exhibit is necessary and reliable based on the supporting testimony from Ms. Bishop. It is information created in the ordinary course of business. At a minimum, Jazz clearly relied on the information contained in the 2014 RFP bid evaluation in Exhibit 10 when deciding which in-flight caterers to award its business. A business record is inherently

[72] Jazz Statement, *supra* note 2 at para 41.
[73] *Ibid* at para 54.

reliable where created in a context in which they are relied upon in the day to day affairs of a business.[74]

82. *Boroumand*,[75] relied on by VAA, in fact supports a finding that this exhibit is covered by the business records exemption. In *Boroumand*, the appellant alleged the judge erred in not admitting documents from money exchange enterprises purporting to show that the appellant received nearly two million dollars from Iran.[76]

83. What did the appellant do at trial to support the admission of these documents? Nothing. He did not file affidavit evidence about these documents nor did he call witnesses from the money exchange enterprises to authenticate these documents.[77]

84. Contrast what the appellant did in *Boroumand* with the evidence that has been provided to support this document. Jazz has filed a witness statement from Ms. Bishop who testifies that she is responsible for Jazz's in-flight catering, including providing strategic direction in the 2014 process.

85. In 2014, Jazz analyzed those bids in the ordinary course of business and subsequently made a decision based on the information contained in Exhibit 10.

86. While this evidence alone is enough to make the evidence necessary and reliable, VAA has asked for and will be provided with from Jazz the underlying documents that will allow VAA to further test this evidence in Exhibits 10 (and also 13), remedying the concerns driving the hearsay rule about a party's ability to properly test the evidence.[78]

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[74] *R v Baker*, 2014 ABQB 604 at para 40.
[75] *Boroumand v Canada*, 2016 FCA 313 ("***Boroumand***").
[76] *Ibid* at para 2.
[77] *Ibid* at para 6.
[78] Syed Affidavit, *supra* note 11, Exhibit A.

87. This evidence supports that this document was created in the ordinary course of business. Out of an abundance of caution, even though the Commissioner believes this evidence is admissible, the Commissioner will serve notice under the *Canada Evidence Act* by September 21, which timeframe will provide more than the 10 days notice required.

88. In conclusion, Ms. Stewart and Ms. Bishop have knowledge of the Relevant Evidence because of their roles when the two companies undertook the RFP process. Even if the Relevant Evidence is hearsay, it should still be admitted for the reasons described above.

C. In the alternative, the Relevant Evidence should be permitted even if it is hearsay or opinion

89. As described above, the Relevant Evidence is neither opinion nor hearsay evidence. However, even if it is, the Tribunal should admit it in this case.

90. Tribunal proceedings are to be dealt with as informally and expeditiously as possible.[79] While this does not mean the rules of evidence do not apply, it means these rules should be applied in a way that acknowledges the reality in which Tribunal proceedings operate.

91. The majority of evidence in Tribunal proceedings is submitted on behalf of market participants, usually corporations, who are not parties to the proceeding. To require every corporate representative to have personal knowledge of every statement could require a multitude of statements from each company.[80]

[79] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 9(2).
[80] *Attila Dogan*, *supra* note 59 at para 64.

92. VAA appears to acknowledge this reality because it has filed witness statements that are replete with hearsay and opinion evidence.

93. VAA itself has submitted witness statements in which corporate representatives have made statements with respect to which they have no personal knowledge (or even with respect to which VAA would have no corporate knowledge).

94. Examples of those statements are listed in paragraph 38 above and focus on the statement of Mr. Richmond, but VAA's other three statements to varying degrees contain these issues as well.

95. Focusing on two examples in Mr. Richmond's statement usefully demonstrates the issues that the strict application of the hearsay and opinion rules would cause.

96. First, Mr. Richmond testifies about VAA's consideration of Newrest's request to access YVR so that Newrest could provide in-flight catering. He describes a one-hour meeting that he had with Mr. Gugliotta where they apparently discussed [redacted].

97. Mr. Richmond states in paragraph 107 of his statement:

> … Mr. Gugliotta and I discussed the [redacted]. In that regard, attached as Exhibit "20" is a table showing revenues of in-flight caterers at YVR from 1999 to 2013".[81]

98. These two sentences are the extent of the information provided about Exhibit 20. Did Mr. Richmond create this chart himself? Did he even have it at the meeting he references immediately before attaching the

[81] Richmond Statement, *supra* note 29 at para 107.

chart? If not, who did? What was the source of the information that forms the basis of this chart?

99. The evidence in Mr. Richmond's own statement appears to show that this chart was not created for the April 1st meeting but was prepared by Mr. Eccott in July 2014 (Exhibit 36 of Mr. Richmond's statement). If that is the case, VAA has not provided a witness statement from Mr. Eccott to speak to this document. Furthermore, VAA has not provided the underlying information that would allow the information in this chart to be tested. VAA has not provided evidence from the person who presumably inputted this information into an accounting system, nor has VAA filed a business record notice to authenticate this information.

100. Second, Mr. Richmond makes a number of unsupported and opinion statements about the importance of fresh meals to first class passengers in paragraphs 62 to 64. In paragraph 62, Mr. Richmond testifies that "fresh meals are particularly important for attracting first class and business passengers, who are a key to airline profitability".[82] Mr. Richmond provides no details on why he has personal knowledge of how first class and business class passengers are key to airline profitability. He has never worked for an airline. He does not attach financial statements from airlines, nor has VAA called any airlines to testify.

101. In the next paragraph Mr. Richmond makes assertions and provides opinion about the relative size of Vancouver's business community to Calgary, San Francisco, Chicago and Toronto. He infers that having "high-quality services for first class and business class passengers flying out of YVR" stimulates demand.[83] He is giving an opinion about a complex competition and economic issue.

[82] *Ibid* at para 62.
[83] *Ibid* at para 63.

102. Finally, in paragraph 64, Mr. Richmond testifies he has been told by many different Asian airlines, including [redacted].[84] Mr. Richmond's testimony about this is on its face hearsay and so cannot be submitted for the truth of its contents. If VAA wants the Tribunal to make a finding of fact that Asian airlines value high quality fresh meals they would have to submit witness statements from these airlines. VAA has submitted none.

103. As stated above, there are many more examples of hearsay and opinion evidence in VAA's four witness statements. The two examples described above from Mr. Richmond's statement demonstrate why the Tribunal should be cautious in strictly applying the hearsay and opinion evidence rules at this stage before the evidence is tested.

104. The Commissioner will test VAA's evidence at the hearing, including the evidence described above, and, depending on the information provided during the cross-examination, may make submissions on its admissibility or weight.

105. Based on the issues raised above and by VAA, the parties would have to file many more witnesses statements extending the time and cost of the proceeding. This is unnecessary particularly where, as demonstrated above for the Relevant Evidence, VAA will have the opportunity to test the evidence and make submissions on its admissibility and weight.

[84] *Ibid* at para 64.

PART V: ORDER SOUGHT

106. The Commissioner respectfully requests that the motion be dismissed in its entirety with his costs of the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19TH DAY OF SEPTEMBER, 2018

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