

JAN 05 2023



No.  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JULIE EDGE AND RYAN SHARP

PLAINTIFFS

AND:

WESTJET AIRLINES LTD.,  
WESTJET ENCORE LTD.,  
SWOOP INC.

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**NOTICE OF CIVIL CLAIM**

**This action has been started by the plaintiffs for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiffs and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **THE PLAINTIFFS' CLAIM**

### **PART 1: STATEMENT OF FACTS**

#### *Overview*

1. WestJet Airlines Ltd., WestJet Encore Ltd., and Swoop Inc. (“**WestJet**”) are Canadian air carriers which collectively operate several hundred flights per day, carrying thousands of airline passengers to and from destinations in North America, Central America, the Caribbean and Europe. Airline passengers rely on WestJet to provide reasonable services and treatment when they agree to fly with the airline. The minimum standards of treatment owed by WestJet to airline passengers are prescribed in the Air Passenger Protection Regulations, SOR/2019-150 (the “**APPR**”). Among the APPR’s provisions to ensure that airline passengers are treated fairly, the APPR mandate minimum compensation to be paid by air carriers to passengers who have had their flights delayed and/or cancelled, or who have been denied boarding in prescribed scenarios.
2. This class action arises from WestJet’s refusal to provide compensation to airline passengers in violation of the APPR. Airline passengers, who have already dealt with excessive delays and cancellations to accompany staggering wait times at airports, are being nearly-universally denied compensation by WestJet that they are legally entitled to receive under the APPR. Through this lawsuit, the Plaintiffs and Class Members seek to hold WestJet accountable for its conduct and to ensure that airline passengers receive the compensation to which they are entitled.

***The Parties***

3. The Plaintiff Julie Edge is a resident of British Columbia. The Plaintiff Edge purchased a ticket for flight WO602 (reservation code X88GTJ) operated by Swoop that was scheduled to depart on March 12, 2022 at 12:35 from Abbotsford International Airport (YXX) with a final destination of Puerto Vallarta International Airport (PVR) (“**Flight WO602**”). Flight WO602 was scheduled to arrive at Puerto Vallarta International Airport (PVR) on March 12, 2022 at 19:20. At 17:11 on March 11, 2022, the Plaintiff Edge received an email from Swoop advising that Flight WO602 was delayed due to “Crew Resources”. Flight WO602’s departure and arrival times were revised to 16:00 and 22:45, respectively. At 20:45 on March 11, 2022, the Plaintiff Edge received another email from Swoop advising that Flight WO602 was delayed again due to “Crew Resources”. Flight WO602’s departure and arrival times were further revised to 16:05 and 22:50, respectively. At 8:45 on March 12, 2022, the Plaintiff Edge received an additional email from Swoop advising that Flight WO602’s arrival and departure times were again revised to 16:00 and 22:45, respectively. Flight WO602 departed Abbotsford International Airport (YXX) more than three hours later than originally scheduled.
4. The Plaintiff Ryan Sharp is a resident of British Columbia. The Plaintiff Sharp had a ticket for Flight WO602 which was purchased by the Plaintiff Edge. On March 11, 2022 Flight WO602’s departure and arrival times were revised to 16:00 and 22:45, respectively, due to “Crew Resources”. On March 11, 2022 Flight WO602’s departure and arrival times were further revised to 16:05 and 22:50, respectively, due to “Crew Resources”. On March 12, 2022 Flight WO602’s departure and arrival times were reverted again to 16:00 and 22:45, respectively, due to “Crew Resources”. Flight WO602 departed Abbotsford International Airport (YXX) more than three hours later than originally scheduled.
5. The Plaintiff Edge sought compensation for the travel delay from Swoop on March 26, 2022 on behalf of herself, the Plaintiff Sharp and their two children. Swoop denied the Plaintiffs’ compensation on the basis that the delay was necessary for safety reasons due to the crew of the airplane requiring rest. From the information provided, it is impossible for the Plaintiffs to understand how these crew constraints were not within Swoop’s control.

6. The Plaintiff Edge filed a request for compensation under the Air Passenger Protection Regulations with the Canadian Transportation Authority on April 25, 2022 on behalf of herself, the Plaintiff Sharp and their two children. As of the date that this Notice of Civil Claim was filed, the Canadian Transportation Authority has not responded to the Plaintiff Edge's request.

7. The Plaintiffs bring this claim on their own behalf and on behalf of the following class:

All passengers of WestJet-operated or code-share flights, between December 15, 2019 and the date this action is certified as a class action, who reached their destination at least 3 hours after scheduled arrival because of a flight disruption resulting from staffing issues or crew constraints, of which they were informed within 14 days of their scheduled departure time, and for which they were denied compensation for inconvenience by WestJet on the basis that this flight disruption was required for safety purposes

(collectively, the "**Class**", "**Class Members**" and "**Class Period**")

8. The Defendant, WestJet Airlines Ltd., is a company incorporated pursuant to the laws of Alberta and extra-provincially registered pursuant to the laws of British Columbia with a head office at Suite 2400 - 525 - 8th Avenue SW, Calgary, Alberta T2P 1G1 and an address for service and delivery in British Columbia at AHBL Corporate Services Ltd., 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8 ("**WestJet Airlines**").

9. The Defendant, WestJet Encore Ltd., is a company incorporated pursuant to the laws of Alberta and extra-provincially registered pursuant to the laws of British Columbia with a head office at 2400, 525 - 8 Avenue SW, Calgary, Alberta T2P 1 G1 and an address for delivery at c/o AHBL Corporate Services Ltd., 2700-700 West Georgia St, Vancouver, BC, V7Y 188. WestJet Encore Ltd. is a wholly owned subsidiary of WestJet Airlines Ltd. ("**WestJet Encore**", collectively with WestJet Airlines, the "**WestJet Defendants**").

10. The Defendant, Swoop Inc., is a company incorporated pursuant to the laws of Alberta, and extra-provincially registered pursuant to the laws of British Columbia, with a head office at 2400-525 8<sup>th</sup> Avenue SW, Calgary, Alberta, T2P 1G1 and an address for service and delivery

in British Columbia at AHBL Corporate Services Ltd., 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8. Swoop is owned by WestJet Airlines Ltd. (“**Swoop**”).

11. The WestJet Defendants and Swoop are collectively “**WestJet**”.
12. The Defendants are each individually a commercial airline that operates domestic passenger flights within Canada and international passenger flights to and from Canada, under the authority and requirements of the *Canada Transportation Act*, SC 1996, c 10 and related enactments. WestJet, Canada’s second largest airline, has a fleet of over 150 aircraft with which the air carrier operates 700 flights per day, transporting over 22 million guests a year.

#### ***The Canadian Transportation Agency***

13. The Canadian Transportation Agency is an independent and quasi-judicial tribunal of the Government of Canada (the “**CTA**”). The CTA has responsibilities relating to, among other transportation matters, air transportation in Canada. These responsibilities include, but are not limited to, administering acts and regulations related to Canadian transportation and implementing government-wide regulatory initiatives. One of the CTA’s three mandates is to provide consumer protection for air passengers. The CTA derives its authority from legislation including the *Canadian Transportation Act*, SC 1996, c 10.

#### ***Domestic, International and Transborder Flights***

14. Flights operated or code-shared by the Defendants which have both their departure and destination locations in Canada are domestic flights (a “**Domestic Flight**” and “**Domestic Flights**”).
15. Flights operated or code-shared by the WestJet Defendants which have one point in Canada and another not in Canada and flights operated by Swoop which have one point in Canada and another in neither Canada nor the United States are international flights (an “**International Flight**” and “**International Flights**”).
16. Flights operated or code-shared by Swoop which have one point in Canada and another in the United States are transborder flights (a “**Transborder Flight**” and “**Transborder Flights**”).

### ***The Air Passenger Protection Regulations***

17. The APPR were developed by the CTA in consultation with air carriers including WestJet. The APPR set out the minimum obligations air carriers owe their passengers. A purpose of the APPR is to empower airline passengers to hold air carriers accountable for delaying and/or cancelling flights, which are rights that did not exist for Canadian travelers prior to the introduction of the APPR. However, due to extended processing times and blanket denials by air carriers, the APPR process has not been an efficient process for passengers seeking compensation under the regulations. As of August 2022, the backlog for APPR claims was at least 18,200 claims.
18. The APPR were introduced in 2019 pursuant to s. 86.1 and s-ss. 86.11(1), 86(1) and 177(1) of the *Canadian Transportation Act* and were implemented in two stages. On July 15, 2019, provisions of the APPR came into effect requiring airlines to meet new obligations concerning communication, denied boarding, tarmac delay, baggage and the transportation of musical instruments. The remaining obligations on flight disruptions and seating of children came into effect on December 15, 2019.

### **When the APPR Apply**

19. The APPR apply to all flights that land or take off in Canada. However, if a passenger's flight itinerary involves flights between two locations outside of Canada that connect with a flight either to or from Canada, whether the APPR apply is dependent on the type of fare and the airline operating that flight.
20. The APPR will apply to a flight with a destination and an arrival outside of Canada with a connection within Canada if: 1) the flight is part of a single through fare; and 2) at least one flight on that single through fare begins or ends in Canada. The CTA provides the following explanation of a single through fare: “[a]irlines have agreed to allow multiple flights to be booked by a passenger using one ticket. The passenger purchases this fare in one transaction, using a single currency (with no conversion).” If the flights on the passenger's itinerary were not purchased in one transaction with a single currency, then the APPR do not apply to the flight with a destination and arrival outside of Canada.

21. If a passenger's itinerary involves a single through fare, then any individual leg on that itinerary with a departure or a destination in Canada is covered by the APPR. For the individual leg on that itinerary without a destination or arrival in Canada, the APPR apply if one of two conditions are met:
- a. the same airline operates the leg within Canada and the leg outside of Canada; or
  - b. two different airlines operate the two legs, but one airline is carrying the passenger on behalf of another airline under a commercial agreement as between the airlines.
22. For example, if a passenger's flight itinerary, which constitutes a single through fare, involves a leg from Toronto to Frankfurt followed by a leg from Frankfurt to Munich, the leg between Frankfurt and Munich is covered by the APPR if the same air carrier operates both legs or if each leg is operated by a different airline, but one air carrier is operating their leg on behalf of another under a commercial agreement.

*Mandatory Compensation Under the APPR*

23. The APPR impose specific obligations on airlines and provide rights to passengers. Among the provisions mandating that airlines treat passengers fairly, the APPR require air carriers to provide passengers minimum levels of compensation in prescribed circumstances when passengers' flights have been delayed and/or cancelled, or passengers have been denied boarding.
24. Whether an air carrier must compensate passengers depends on the reason for the delay and/or cancellation, or denial of boarding. Section 10 of the APPR prescribes a non-exhaustive list of situations in which the delay and/or cancellation or denial of boarding of a flight is deemed to be outside of an air carrier's control. The prescribed circumstances include: war or political instability; illegal acts or sabotage; and meteorological conditions or natural disasters that make the safe operation of the aircraft impossible. If a flight is delayed and/or cancelled for a reason outside of the carrier's control, the APPR at s. 18(1) mandate that the airline provides alternative travel arrangements or a refund to the passenger. If a passenger is denied boarding for a reason outside of the carrier's control, the airline must provide alternative travel arrangements for the passenger.

25. Section 11 of the APPR provide that air carriers do not owe passengers any mandatory minimum monetary compensation when a flight is delayed and/or cancelled or there is a denial of boarding for a reason that is “within the air carrier’s control but is required for safety purposes”.
26. Section 12 of the APPR provide that air carriers owe passengers mandatory minimum monetary compensation when a flight is delayed and/or cancelled or there is a denial of boarding that is within the air carrier’s control but is not required for safety purposes.
27. The mandatory minimum compensation owed to passengers who have had their flight delayed and/or cancelled due to a circumstance within the air carrier’s control and not required for safety purposes is set out in s. 19 of the APPR:

#### **Compensation for delay or cancellation**

**19** (1) If paragraph 12(2)(d) or (3)(d) applies to a carrier, it must provide the following minimum compensation:

- (a) in the case of a large carrier,
  - (i) \$400, if the arrival of the passenger’s flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours,
  - (ii) \$700, if the arrival of the passenger’s flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or
  - (iii) \$1,000, if the arrival of the passenger’s flight at the destination that is indicated on the original ticket is delayed by nine hours or more; and
- (b) in the case of a small carrier,
  - (i) \$125, if the arrival of the passenger’s flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours,
  - (ii) \$250, if the arrival of the passenger’s flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or
  - (iii) \$500, if the arrival of the passenger’s flight at the destination that is indicated on the original ticket is delayed by nine hours or more.

#### **Compensation in case of refund**

(2) If paragraph 12(2)(c) or (3)(c) applies to a carrier and the passenger’s ticket is refunded in accordance with subsection 17(2), the carrier must provide a minimum compensation of

- (a) \$400, in the case of a large carrier; and
- (b) \$125, in the case of a small carrier.

28. The mandatory minimum compensation owed to passengers who were denied boarding due to a circumstance within the air carrier's control and not required for safety purposes is set out in s. 20 of the APPR:

**Compensation for denial of boarding**

**20** (1) If paragraph 12(4)(d) applies to a carrier, it must provide the following minimum compensation:

- (a) \$900, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by less than six hours;
- (b) \$1,800, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours; and
- (c) \$2,400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more.

29. Passengers are therefore entitled to mandatory minimum compensation when their flight was delayed and/or cancelled or they were denied boarding for a reason that was within the carrier's control and not required for safety purposes.

*Delays, Cancellations and Denials of Boarding due to Crew Constraints are not "Required for Safety Purposes"*

30. The APPR, at s. 1(1), provide a definition of "required for safety purposes":

*required for safety purposes* means required by law in order to reduce risk to passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system as defined in subsection 101.01(1) of the Canadian Aviation Regulations but does not include scheduled maintenance in compliance with legal requirements.

31. A decision by an airline to delay, cancel or deny boarding on a flight because the decision is "required for safety purposes" means that the delay, cancellation or denial of boarding was:  
i) required by safety decisions made within the authority of the pilot of the aircraft; or ii) a

decision made in accordance with a safety management system as defined in subsection 101.01(1) of the Canadian Aviation Regulations, SOR/96-433.

32. The *Canadian Aviation Regulations*, SOR/96-433 defines “safety management system” at s. 101(1), as:

***safety management system*** means a documented process for managing risks that integrates operations and technical systems with the management of financial and human resources to ensure aviation safety or the safety of the public.

33. The *Canadian Aviation Regulations*, SOR/96-433 sets out the requirement for a “safety management system” at s. 197.03:

107.03 A safety management system shall include

- (a) a safety policy on which the system is based;
- (b) a process for setting goals for the improvement of aviation safety and for measuring the attainment of those goals;
- (c) a process for identifying hazards to aviation safety and for evaluating and managing the associated risks;
- (d) a process for ensuring that personnel are trained and competent to perform their duties;
- (e) a process for the internal reporting and analyzing of hazards, incidents and accidents and for taking corrective actions to prevent their recurrence;
- (f) a document containing all safety management system processes and a process for making personnel aware of their responsibilities with respect to them;
- (g) a quality assurance program;
- (h) a process for conducting periodic reviews or audits of the safety management system and reviews or audits, for cause, of the safety management system; and
- (i) any additional requirements for the safety management system that are prescribed under these Regulations.

34. Further, Transport Canada describes the goals for “safety management systems”, which are to continue to reduce the total aircraft accident rate where this cannot be achieved by further improvements to technology. This includes the effectiveness of any “safety management system” in discovering hazards, rating hazards, finding the root causes of hazards, responding to hazards and their causes, and monitoring corrective actions to see if they worked. If a carrier

does not take steps to correct problems found by inspectors in conjunction with a “safety management system”, the carrier will be fined or shut down.

35. The Defendants do not publish their Safety Management System, and they are not available for passengers to review.
36. The Canadian Transport Agency has held that crew absences or shortages due to the action or inaction of the carrier are foreseeable, are within the air carrier’s control, and do not constitute “required for safety reasons”.<sup>1</sup>
37. Following the language of the APPR s. 1(1), a delay, cancellation or denial of boarding is only “required for safety purposes” when proceeding with a flight would violate a Safety Management System, or if the disruption is a safety decision made within the authority of the pilot of the specific aircraft involved in the delay or cancellation. Other reasons for the delay, cancellation or denial of boarding that are within the control of the airline fall within the APPR, s. 19.

### ***The Tariffs***

38. A tariff forms part of the contract of carriage between an air carrier and its passengers. Each air carrier has a tariff setting out passengers’ rights and obligations, as well as the rights of the air carrier and the responsibilities it has towards passengers. Tariffs typically include information about fares, rates and charges, among other terms and conditions. Air carriers are permitted to set the terms and conditions in their tariffs, but tariffs must meet certain legislative requirements. The CTA mandates that air carriers respect and abide by their tariffs and the provisions therein.<sup>2</sup>
39. Tariffs can apply to a Domestic Flight, an International Flight and/or a Transborder Flight. The CTA requires every air carrier that offers and/or sells air transportation to, from, and within Canada to have a tariff. Air carriers typically have separate tariffs for Domestic Flights, for International Flights and, when applicable, for Transborder Flights, as this makes it easier for air carriers to meet the different filing requirements for the types of tariffs.

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<sup>1</sup> Canadian Transport Agency decisions No 122-C-A-2021, No 89-C-A-2022, and No 107-C-A-2022.

<sup>2</sup> <https://otc-cta.gc.ca/eng/air-carrier-tariffs-posted-websites>

40. Under section 67 of the *Canada Transportation Act*, and Part V, Division I of the Air Transportation Regulations, SOR/88-58, the Defendants are required by law to:
- a. publish a Tariff in respect of flights travelling within Canada;
  - b. prominently display a notice that the Domestic Tariff is available for public inspection; and
  - c. include the terms and conditions of carriage, clearly stating the air carrier's policies *inter alia* regarding fares, charges and fees.
41. Under Part V, Division II of the Air Transportation Regulations, SOR/88-58, the Defendants are required by law to:
- a. publish a Tariff in respect of itineraries with a destination outside of Canada;
  - b. prominently display a notice that the International Tariff is available for public inspection; and
  - c. include the terms and conditions of carriage, clearly stating the air carrier's policies *inter alia* regarding fares, charges and fees.
42. The duties that the WestJet Defendants owe to their passengers are governed by a single set of tariffs consisting of a domestic tariff for passengers on Domestic Flights and an international tariff for passengers on International Flights.
43. The duties which Swoop owes to its passengers on Domestic Flights, International Flights and Transborder Flights are set out in its domestic tariff, international tariff and transborder tariff, respectively.

#### *The Domestic Tariffs*

44. The WestJet Defendants' domestic tariff in effect on the date this Notice of Civil Claim was filed has been in effect since December 5, 2022 (the "**December 2022 Domestic Tariff (WestJet Defendants)**"). Preceding the December 2022 Domestic Tariff (WestJet Defendants) included tariffs effective as of September 20, 2022 (the "**September 2022 Domestic Tariff (WestJet Defendants)**"), April 27, 2022 (the "**April 2022 Domestic Tariff (WestJet Defendants)**"), November 10, 2021 (the "**November 2021 Domestic Tariff (WestJet Defendants)**"), and December 19, 2019 (the "**December 2019 Domestic Tariff (WestJet Defendants)**").

(**WestJet Defendants**”). All of the WestJet Defendants’ domestic tariffs governing Domestic Flights departing or landing on or after December 15, 2019 are collectively the “**Domestic Tariffs (WestJet Defendants)**”.

45. The December 2022 Domestic Tariff (WestJet Defendants) prescribes the following definitions relevant to this claim:

“Air Crew” means the Flight Crew and one or more persons who, under the authority of the Carrier, perform in-Flight duties in the passenger cabin of an aircraft of the Carrier;

“Air Transportation Contract” means with respect to a Domestic Transportation, a contract entered into between the Passenger and the Carrier for the provision of a Flight to the Passenger and/or goods in the form of a Reservation and confirming itinerary issued by the Carrier”;

“Carrier” means, as applicable, WestJet, WestJet Encore Ltd., and/or WestJet Link;

“Code-share” means a marketing arrangement in which two or more carriers (the marketing or contracting carrier(s)) sell seats using their own airline code on a Flight that the other operates (the operating or actual carrier);

“Controllable but required for Safety Purposes” means, when used in reference to flight delays, cancellations, diversions or a Denial of Boarding, a factor considered to be within the Carrier’s control but legally required to reduce risk to passengers, excluding scheduled maintenance;

“Denial of Boarding” means, when a carrier is unable to permit a passenger to occupy a seat on board a flight because the number of seats that may be occupied on the flight is less than the number of passengers who have checked in by the required time, hold a confirmed reservation and valid travel documentation and are present at the boarding gate at the required boarding time;

“Destination” means the ultimate stopping place according to the contract of carriage, as shown on the Ticket;

“Domestic Transportation” means air transportation between points in Canada;

“Flight” means the movement of an aircraft with Passengers and/or goods from the point of take-off at the Origin to a point or points of landing thereafter, inclusive of the point of landing at the Destination;

“Marketing Carrier” or “Contracting Carrier” means a carrier that sells seats using its own airline code for a flight that another carrier operates (the operating or actual carrier);

“Origin” means the initial starting place of the journey as shown on the Ticket;

“Operating Carrier” or “Actual Carrier” means the carrier that operates the actual Flight;

“Passenger” means any person, except members of the Air Crew, carried or to be carried in an aircraft with the consent of the Carrier pursuant to a valid contract of carriage;

“Tariff” means this Tariff, the terms and conditions of carriage applicable to the provision of an air service and other incidental and ancillary services; and

“Ticket” means either a paper or electronic document issued by or on behalf of the Carrier which includes the Passenger’s Flight coupons. The Ticket serves as evidence of payment of a Fare, Tax, Charge, Fee, and Surcharge, and constitutes for the Passenger proof of their contract of carriage. In instances where a Ticket exists as an electronic document, the Carrier issues to the Passenger, as proof of purchase, an Itinerary/Receipt.

46. The December 2022 Domestic Tariff (WestJet Defendants), Rule 5, section A, states that the tariff applies to the carriage of all passengers on flights operated or marketed by WestJet, WestJet Encore Ltd. or WestJet Link:

1. This Tariff shall apply to the carriage of Passengers and their accompanying Baggage, and to all services incidental thereto, marketed (carrying a WestJet flight number) by WestJet and operated by WestJet, WestJet Encore Ltd., or WestJet Link.
2. With the approval of the CTA, the Carrier may enter into Code-share agreements with other air carriers whereby it will market, as its own, Flights operated by those other carriers. In such cases, this Tariff is applicable to the transportation of Passengers and their Baggage on all Flights operated by other carriers yet marketed and sold as the Carrier.

47. The December 2022 Domestic Tariff (WestJet Defendants), as prescribed under “Rule 5: Application of Tariff” at page 13, forms part of the contract between the WestJet Defendants and each passenger:

4. The contents of this Tariff shall form part of any Air Transportation Contract between the Carrier and a Passenger (including with respect to the Passenger’s goods). If there is a conflict between this Tariff and that contract, this Tariff shall prevail.

48. The other Domestic Tariffs (WestJet Defendants) each contain a nearly identical clause as the December 2022 Domestic Tariff (WestJet Defendants) incorporating each respective tariff into the WestJet Defendants' contract with passengers.
49. The December 2022 Domestic Tariff (WestJet Defendants), Rule 95, section A, sets out in which circumstances the WestJet Defendants must provide monetary compensation to passengers and in what amounts compensation is owed:

(A) Compensation for denial of boarding due to situations within the Carrier's control:

[...]

3. Amount of Compensation:

- a. The Carrier will provide compensation in the amounts set out below to passengers who are denied boarding due to situations within the Carrier's control. Compensation will be paid as soon as operationally feasible, and no later than 48 hours after the denial of boarding. If compensation cannot be provided to the passenger prior to the boarding of the Flight as part of alternative travel arrangements, the Carrier will provide written confirmation of what is owed.
- b. The amount of compensation will be determined based on the estimated arrival time of the Flight reserved as part of alternative travel arrangements. adjustment will be made to the amount of compensation if the expected time of arrival and the actual time of arrival are different. Arrival means that one of the doors of the aircraft has been opened after landing to allow passengers to leave the aircraft.
- c. Regardless of the fare paid, passengers are entitled to monetary compensation as follows:
- i. \$900 CAD, if the arrival of the passenger at the destination that is indicated on the original ticket is delayed by less than six (6) hours;
  - ii. \$1,800 CAD, if the arrival of the passenger at the destination that is indicated on the original ticket is delayed by six (6) hours or more, but less than nine (9) hours; and
  - iii. \$2,400 CAD, if the arrival of the passenger at the destination that is indicated on the original ticket is delayed by nine (9) hours or more.
- d. The Carrier will compensate the passenger in the form of money unless it offers compensation in another form that has a greater monetary value

than the applicable amounts referred to in this section, the passenger has been informed of the monetary value in writing and the alternative form of compensation does not expire. The passenger must confirm in writing that the passenger has been informed of the right to monetary compensation and has chosen to accept the alternative form of compensation.

[...]

(C) For Flights Departing On or After December 15, 2019: Compensation for Inconvenience resulting from Delays or Cancellations within the Control of the Carrier

If a passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed by at least three hours, and the delay is caused by a situation under the Carrier's control, compensation will be provided if a passenger files a request for compensation with the carrier before the first anniversary of the day on which the flight delay occurred.

Within 30 days from the date on which the carrier receives the request, the carrier will provide the compensation or an explanation why the compensation is not payable.

The Carrier will provide compensation in the following amounts to Passengers who are delayed due to delay or cancellation and when that delay is within the Control of the Carrier and when the passenger was informed 14 days or less about the delay. Regardless of the Fare paid, Passengers are entitled to a monetary compensation as follows:

- a. no compensation if the delay is less than three hours;
- b. \$400, if the delay is three hours or more but less than six hours;
- c. \$700, if the delay is more than six hours but less than nine hours; and
- d. \$1000, if the delay is more than nine hours.

If a Passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed and the passengers ticket is refunded, the Carrier will compensate the passenger in the amount of \$400, if compensation is requested by the passenger.

The Carrier will compensate the Passenger in the form of money unless it offers compensation in another form that has a greater monetary value than the applicable amounts referred to in this section, the Passenger has been informed of the monetary value in writing and the alternative form of compensation does not expire. The passenger must confirm in writing that the Passenger has been informed of the right to monetary compensation and had chosen to accept the alternative form of compensation.

50. Swoop's domestic tariff in effect on the date this Notice of Civil Claim was filed has been in effect since April 4, 2022 (the "**April 2022 Domestic Tariff (Swoop)**"). All Swoop domestic tariffs governing Domestic Flights departing or landing on or after December 15, 2019 are collectively the "**Domestic Tariffs (Swoop)**".
51. The April 2022 Domestic Tariff (Swoop) prescribes the following definitions relevant to this claim:

"Affected Flight" means the flight involved in a schedule irregularity.

"Air Crew" means the flight crew and one (1) or more persons who, under the authority of the Carrier, perform in-flight duties in the Passenger cabin of an aircraft of the Carrier;

"Air Transportation Contract" means with respect to Domestic Transportation, a contract entered into between the Traveller and the Carrier for the provision of a Flight to the Traveller and/or goods in the form of a Reservation and confirming itinerary issued by the Carrier.

"Air Transportation Regulations" means the regulations respecting air transportation, sor/88-58 as amended from time to time, and any substitute regulations prescribed in relation to the subject-matter therein;

"Carrier" means: Swoop Inc.

"Controllable Schedule Irregularity" means a flight delay, cancellation or diversion that is considered to be within the Carrier's control. Some examples include mechanical issues, the Carrier's IT system failures and delays or cancellations due to operational requirements;

"Domestic Transportation" means air transportation between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country.

"Passenger" means any person, except members of the crew, carried or to be carried in an aircraft with the consent of the carrier pursuant to a valid contract of carriage.

"Schedule Change" means the following:

- a) The cancellation of a scheduled flight where no Swoop flight of comparable routing is available within three (3) hours of the original time of departure; or
- b) A change in the scheduled departure time of a Swoop flight which exceeds three (3) hours

“Schedule Irregularities” means the following:

- a) Delays in the scheduled departure or arrival of the carrier’s flights;
- b) Cancellation of flight, or omission of a scheduled stop, or;
- c) Substitution of aircraft or of a different class of service, or;
- d) Schedule changes which require rerouting of a passenger at departure time of his or her original flight.

“Tariff” means a schedule of fares, rates, charges or terms and conditions of carriage applicable to the provision of an air service and other incidental services.

“Ticket” means either a paper or electronic document issued by or on behalf of the carrier which includes the passenger’s flight coupons. The ticket serves as evidence of payment of air fare and constitutes for the passenger proof of their contract of carriage. It also has detailed information to ensure proper processing and handling. In instances where a ticket exists as an electronic document, the carrier issues to the passenger, as proof of purchase, an itinerary/receipt.

52. The April 2022 Domestic Tariff (Swoop), Rule 5, section A states that the tariff applies to the carriage of all passengers on flights featuring aircraft operated by Swoop, and forms part of the contract between passengers and Swoop:

1. The obligations of the Carrier under the Air Passenger Protection Regulations (“APPR”) form part of the tariff and supersede any incompatible or inconsistent term and condition of carriage set out in the tariff to the extent of such inconsistency or incompatibility, but do not relieve the Carrier from applying terms and conditions of carriage that are more favourable to the passenger than the obligations set out in the APPR. According to APPR definitions and interpretations, Swoop is considered a “small carrier”.
2. This Tariff is applicable to the transportation of passengers and their accompanying baggage using aircraft operated by Swoop.
3. Air transportation will be subject to the rules, rates, fares and charges published or referred to in this tariff in effect on the date which the ticket is issued for transportation from all points of origin.
4. Unless the fare rule governing a specific fare basis code applicable to the transportation purchased by the passenger states otherwise, the general rules contained in this tariff will apply.
5. The content of this tariff constitutes the contract between the carrier and the passenger. Should there be a conflict between this tariff and any other document issued or posted by the carrier, this tariff will prevail.

53. The April 2022 Domestic Tariff (Swoop), Rule 90, section F, sets out in what circumstances Swoop must provide monetary compensation to passengers and in what amounts compensation is owed, which mirrors the compensation provisions in the APPR:

(F) Compensation for Inconvenience Resulting from Delays or Cancellations within the Control of the Carrier

For flights departing on or after December 15, 2019, if a passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed by at least three hours, and the delay is caused by a situation under the Carrier's control, compensation will be provided if a passenger files a request for compensation with the Carrier before the first anniversary of the day on which the flight delay occurred.

Within 30 days from the date on which the carrier receives the request, the carrier will provide the compensation or an explanation why the compensation is not payable.

The Carrier will provide compensation in the following amounts to passengers who are delayed due to delay or cancellation and when that delay is within the Control of the Carrier and when the passenger was informed 14 days or less about the delay. Regardless of the Fare paid, passengers are entitled to a monetary compensation as follows:

- a. no compensation if the delay is less than three hours;
- b. \$125, if the delay is three hours or more but less than six hours;
- c. \$250, if the delay is more than six hours but less than nine hours; and
- d. \$500, if the delay is more than nine hours.

The Carrier will compensate the passenger in the form of money unless it offers compensation in another form that has a greater monetary value than the applicable amounts referred to in this section, the passenger has been informed of the monetary value in writing and the alternative form of compensation does not expire. The passenger must confirm in writing that the passenger has been informed of the right to monetary compensation and has chosen to accept the alternative form of compensation.

54. The Domestic Tariffs (WestJet Defendants) and the Domestic Tariffs (Swoop) are collectively the "**Domestic Tariffs**".
55. The Domestic Tariffs confirm that the APPR's minimum mandatory compensation provisions form part of the contract between WestJet and passengers on Domestic Flights. WestJet is therefore contractually obligated to provide passengers with the compensation detailed

therein when a flight is delayed and/or cancelled or boarding is denied due to a situation within WestJet's control and not required for safety purposes.

*The International Tariffs*

56. The WestJet Defendants' international tariff in place on the date this Notice of Civil Claim was filed was effective as of December 6, 2022 (the "**December 2022 International Tariff (WestJet Defendants)**"). Preceding the December 2022 International Tariff included tariffs effective as of September 14, 2022 (the "**September 2022 International Tariff (WestJet Defendants)**") and September 9, 2021 (the "**September 2021 International Tariff (WestJet Defendants)**"). All of the WestJet Defendants' international tariffs governing International Flights departing or landing on or after December 15, 2019 are collectively the "**International Tariffs (WestJet Defendants)**".

57. The December 2022 International Tariff (WestJet Defendants) includes the following definitions relevant to this claim:

Air crew means the flight crew and one (1) or more persons who, under the authority of the Carrier, perform in-flight duties in the Passenger cabin of and aircraft of the Carrier;

Air service includes a live flight and a ferry flight;

Air transportation contract means with respect to international service, a contract entered into between the Passenger and the Carrier for the provision of air service to the Passenger and its goods in the form of a reservation and confirming itinerary issued by the Carrier or an agent of the Carrier authorized for that purpose;

Carrier means WestJet, a body corporate licensed to provide domestic air services, international air services and non-scheduled international air services under the CTA, and having its head office at 22 Aerial Place NE, Calgary, Alberta, Canada. T2E 3J1;

Code-share means a marketing arrangement in which two or more airlines i.e. marketing carrier(s) or contracting carrier(s) sell seats using their own airline code on a flight that one of them operates (i.e. the operating or actual carrier);

Denial of boarding means when a carrier is unable to permit a Passenger to occupy a seat on board a flight because the number of seats that may be occupied on the flight is less than the number of Passengers who have checked in by the required time, hold a confirmed reservation and valid travel documentation and are present at the boarding gate at the required boarding time;

Destination means the point of which the Passenger(s) to be transported on a flight is bound, and including stopover destinations, but does not include a connection;

International service means scheduled or non-scheduled air services (excluding charters) for the transportation of Passengers and goods between, from and to points within Canada on the one hand and points outside of Canada on the other hand;

Marketing carrier or contracting carrier means a carrier that sells seats using its own airline code for a flight that another carrier operates (the operating or actual carrier);

Operating carrier or actual carrier means the carrier that operates the actual flight;

Origin means the point from which a flight commences with the Passengers to be transported;

Passenger means any person, except members of the crew, carried or to be carried in an aircraft with the consent of the Carrier pursuant to an agreement (a valid contract of carriage);

Required for safety purposes means required by law in order to reduce risk to Passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system as defined in subsection 101.01(1) of the Canadian Aviation Regulations but does not include scheduled maintenance in compliance with legal requirements;

Tariff means a tariff of terms and conditions of carriage applicable to the provision of international and ancillary services thereto;

Ticket means the electronic confirmation generated by the Carrier's central reservations system, or confirmation number, baggage check and accompanying notices that incorporate this contract of carriage.

58. The December 2022 International Tariff (WestJet Defendants), Rule 12, section A, states that the tariff applies to the traffic and transportation of passengers and goods using aircraft operated by the WestJet Defendants in respect of international and transborder flights:

(A) Application

This tariff shall apply to the traffic and transportation of Passengers and goods using aircraft operated by the Carrier in respect of:

(1) An international and transborder service

59. The December 2022 International Tariff (WestJet Defendants), Rule 12, section C, states that the tariff forms part of the air transportation contract between each passenger and the WestJet Defendants:

## (C) Incorporation of tariff into air transportation Contract

The contents of this tariff shall form part of any air transportation contract between the Carrier and a Passenger (including with respect to the Passenger's goods), and if there is a conflict between this tariff and that contract, this tariff Shall prevail.

60. The December 2022 International Tariff (WestJet Defendants) under Rule 12 also prescribes that the rules, fares and charges applicable to each passenger's flight are those in effect on the date of each passenger's departure.

61. The December 2022 International Tariff (WestJet Defendants), Rule 100, sections I and J, set out in what circumstances the WestJet Defendants must provide monetary compensation to passengers and in what amounts:

I) Compensation for denial of boarding due to situation within the Carrier's control.

[...]

(3) Amount of compensation:

(a) The carrier will provide compensation in the amounts set out below to Passengers who are denied boarding due to situations within the carrier's control and who have not accepted a benefit in exchange for willingly giving up their seat. Compensation will be paid as soon as operationally feasible, and no later than 48 hours after the denial of boarding. If compensation cannot be provided to the Passenger before the boarding of the flight as part of alternative travel arrangements, the carrier will provide written confirmation of what is owed.

(b) The amount of compensation will be determined based on the estimated arrival time of the flight reserved as part of alternative travel arrangements. Adjustment will be made to the amount of compensation if the expected time of arrival and the actual time of arrival are different. Arrival means that one of the doors of the aircraft has been opened after landing to allow Passengers to leave the aircraft.

(c) Regardless of the fare paid, Passengers are entitled to monetary compensation as follows:

(i) \$900 CAD, if the arrival of the Passenger at the destination that is indicated on the original ticket is delayed by less than six (6) hours;

(ii) \$1,800 CAD, if the arrival of the Passenger at the destination that is indicated on the original ticket is delayed by six (6) hours or more, but less than nine (9) hours; and

(iii) \$2,400 CAD, if the arrival of the Passenger at the destination that is indicated on the original ticket is delayed by nine (9) hours or more.

[...]

(J) Applicability

[...]

(5) Compensation for inconvenience resulting from delays or cancellations within the control of the Carrier if a Passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed by at least three hours, and the delay is caused by a situation under the Carrier's control, compensation will be provided if a Passenger files a request for compensation with the Carrier before the first anniversary of the day on which the flight delay occurred.

Within 30 days from the date on which the Carrier receives the request, the Carrier will provide the compensation or an explanation why the compensation is not payable.

The Carrier will provide compensation in the following amounts to Passengers who are delayed due to delay or cancellation and when that delay is within the control of the Carrier and when the Passenger was informed 14 days or less about the delay. Regardless of the fare paid, Passengers are entitled to a monetary compensation as follows:

- (a) no compensation if the delay is less than three hours;
- (b) \$400, if the delay is three hours or more but less than six hours;
- (c) \$700, if the delay is more than six hours but less than nine hours;
- and
- (d) \$1000, if the delay is more than nine hours.

If a Passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed and the Passengers ticket is refunded, the Carrier will compensate the Passenger in the amount of \$400, if compensation is requested by the Passenger.

The Carrier will compensate the Passenger in the form of money unless it offers compensation in another form that has a greater monetary value than the applicable amounts referred to in this section, the Passenger has been informed of the monetary value in writing and the alternative form of compensation does not expire. The Passenger must confirm in writing that the Passenger has been informed of the right to monetary compensation and has chosen to accept the alternative form of compensation.

62. Swoop's international tariff in effect on the date this Notice of Civil Claim was filed has been in effect since September 4, 2018 (the "**September 2018 International Tariff (Swoop)**").

All Swoop international tariffs governing International Flights departing or landing on or after December 15, 2019 are collectively the “**International Tariffs (Swoop)**”.

63. The September 2018 International Tariff (Swoop) includes the following definitions relevant to this claim:

“Affected Flight” means the flight involved in a schedule irregularity.

“Air Crew” means the flight crew and one (1) or more persons who, under the authority of the Carrier, perform in-flight duties in the Passenger cabin of an aircraft of the Carrier;

“Air Transportation Contract” means with respect to international service, a contract entered into between the Passenger and the Carrier for the provision of air service to the Passenger and its goods in the form of a reservation and confirming itinerary issued by the Carrier or an agent of the Carrier authorized for that purpose;

“Air Transportation Regulations” means the regulations respecting air transportation, sor/88-58 as amended from time to time, and any substitute regulations prescribed in relation to the subject-matter therein;

“Canada” means the ten provinces of Canada, the Yukon Territory, the Districts and Islands comprising the Northwest Territories of Canada and Nunavut.

“Carrier” means: Swoop Inc. a body licensed to provide scheduled domestic air services, scheduled international air services and non-scheduled international air services by the Canadian Transportation Agency;

“Controllable Schedule Irregularity” means a flight delay, cancellation or diversion that is considered to be within the Carrier's control. Some examples include mechanical issues, the Carrier's IT system failures and delays or cancellations due to operational requirements;

“Destination” means the ultimate stopping place according to the contract of carriage, as shown on the ticket.

“International Transportation” means air transportation between Canada and a point in the territory of another country.

“Origin” means the initial starting place of the journey as shown on the ticket.

“Passenger” means any person, except members of the crew, carried or to be carried in an aircraft with the consent of the carrier pursuant to a valid contract of carriage.

“Schedule Irregularities” means the following:

- a) Delays in the scheduled departure or arrival of the carrier's flights;

- b) Cancellation of flight, or omission of a scheduled stop, or;
- c) Substitution of aircraft or of a different class of service, or;
- d) Schedule changes which require rerouting of a passenger at departure time of his or her original flight.

“Tariff” means a schedule of fares, rates, charges or terms and conditions of carriage applicable to the provision of an air service and other incidental services.

“Ticket” means either a paper or electronic document issued by or on behalf of the carrier which includes the passenger’s flight coupons. The ticket serves as evidence of payment of air fare and constitutes for the passenger proof of their contract of carriage. It also has detailed information to ensure proper processing and handling. In instances where a ticket exists as an electronic document, the carrier issues to the passenger, as proof of purchase, an itinerary/receipt.

“United States of America” or the “United States” or the “U.S.A.” means the area comprising the 48 contiguous Federated States, The Federal District of Columbia, Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, Midway and Wake Islands.

64. The September 2018 International Tariff (Swoop), Rule 5, section A states that the tariff applies to the traffic and transportation of passengers and goods using aircraft operated by Swoop in respect of International Flights, and forms part of the contract between each passenger, as that term is defined in the tariff, and Swoop:

1. The obligations of the Carrier under the Air Passenger Protection Regulations (“APPR”) form part of the tariff and supersede any incompatible or inconsistent term and condition of carriage set out in the tariff to the extent of such inconsistency or incompatibility, but do not relieve the Carrier from applying terms and conditions of carriage that are more favourable to the passenger than the obligations set out in the APPR. According to APPR definitions and interpretations, Swoop is considered a “small carrier”.

2. This Tariff is applicable to the transportation of passengers and their accompanying baggage using aircraft operated by Swoop.

3. (a) For travel originating in Canada.:

Air transportation will be subject to the rules, rates, fares and charges published or referred to in this tariff in effect on the date which the ticket is issued for transportation from all points of origin.

(b) For travel other than that originating in Canada or the U.S.A.:

Air transportation will be subject to the rules, rates, fares and charges published or referred to in this tariff in effect on the date of commencement of the carriage as indicated for the first flight segment of a ticket.

4. Unless the fare rule governing a specific fare basis code applicable to the transportation purchased by the passenger states otherwise, the general rules contained in this tariff will apply.

5. The content of this tariff constitutes the contract between the carrier and the passenger. Should there be a conflict between this tariff and any other document issued or posted by the carrier, this tariff will prevail.

65. The September 2018 International Tariff (Swoop), Rule 90, section F, sets out in what circumstances Swoop must provide monetary compensation to passengers and in what amounts compensation is owed, which mirrors the compensation provisions in the APPR:

(F) Compensation for Inconvenience Resulting from Delays or Cancellations within the Control of the Carrier

For flights departing on or after December 15, 2019, if a passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed by at least three hours, and the delay is caused by a situation under the Carrier's control, compensation will be provided if a passenger files a request for compensation with the Carrier before the first anniversary of the day on which the flight delay occurred.

Within 30 days from the date on which the carrier receives the request, the carrier will provide the compensation or an explanation why the compensation is not payable.

The Carrier will provide compensation in the following amounts to passengers who are delayed due to delay or cancellation and when that delay is within the Control of the Carrier and when the passenger was informed 14 days or less about the delay. Regardless of the Fare paid, passengers are entitled to a monetary compensation as follows:

- a. no compensation if the delay is less than three hours;
- b. \$125, if the delay is three hours or more but less than six hours;
- c. \$250, if the delay is more than six hours but less than nine hours; and
- d. \$500, if the delay is more than nine hours.

The Carrier will compensate the passenger in the form of money unless it offers compensation in another form that has a greater monetary value than the applicable amounts referred to in this section, the passenger has been informed of the monetary value in writing and the alternative form of compensation does not expire. The

passenger must confirm in writing that the passenger has been informed of the right to monetary compensation and has chosen to accept the alternative form of compensation.

66. The International Tariffs (WestJet Defendants) and the International Tariffs (Swoop) are collectively the “**International Tariffs**”.
67. The International Tariffs confirm that the APPR’s minimum mandatory compensation provisions form part of the contract between WestJet and passengers on International Flights. WestJet is therefore contractually obligated to provide passengers with the compensation detailed therein when a flight is delayed and/or cancelled or boarding is denied due to a situation within WestJet’s control and not required for safety purposes.

*The Transborder Tariffs*

68. Swoop’s transborder tariff in effect on the date this Notice of Civil Claim was filed has been in effect since December 31, 2021 (the “**December 2021 Transborder Tariff (Swoop)**”). All Swoop transborder tariffs governing Transborder Flights departing or landing on or after December 15, 2019 are collectively the “**Transborder Tariffs (Swoop)**”.
69. The December 2021 Transborder Tariff (Swoop) includes the following definitions relevant to this claim:

AFFECTED FLIGHT MEANS THE FLIGHT INVOLVED IN A SCHEDULE IRREGULARITY.

AIR CREW MEANS THE FLIGHT CREW AND ONE(1) OR MORE PERSONS WHO, UNDER THE AUTHORITY OF THE CARRIER, PERFORM IN-FLIGHT DUTIES IN THE PASSENGER CABIN OF AN AIRCRAFT OF THE CARRIER;

AIR TRANSPORTATION REGULATIONS MEANS THE REGULATIONS RESPECTING AIR TRANSPORTATION, SOR/88-58 AS AMENDED FROM TIME TO TIME, AND ANY SUBSTITUTE REGULATIONS PRESCRIBED IN RELATION TO THE SUBJECT-MATTER THEREIN;

CANADA MEANS THE TEN PROVINCES OF CANADA, THE YUKON TERRITORY, THE DISTRICTS AND ISLANDS COMPRISING THE NORTHWEST TERRITORIES OF CANADA AND NUNAVUT.

CARRIER MEANS SWOOP INC. A BODY LICENSED TO PROVIDE SCHEDULED DOMESTIC AIR SERVICES, SCHEDULED INTERNATIONAL AIR SERVICES AND NON-SCHEDULED INTERNATIONAL AIR SERVICES BY THE CANADIAN TRANSPORTATION AGENCY;

CONTROLLABLE SCHEDULE IRREGULARITY MEANS A FLIGHT DELAY, CANCELLATION OR DIVERSION THAT IS CONSIDERED TO BE WITHIN THE CARRIER'S CONTROL. SOME EXAMPLES INCLUDE MECHANICAL ISSUES, THE CARRIER'S IT SYSTEM FAILURES AND DELAYS OR CANCELLATIONS DUE TO OPERATIONAL REQUIREMENTS.

DESTINATION MEANS THE ULTIMATE STOPPING PLACE ACCORDING TO THE CONTRACT OF CARRIAGE AS SHOWN ON THE TICKET.

DOMESTIC TRANSPORTATION MEANS AIR TRANSPORTATION BETWEEN POINTS IN CANADA, FROM AND TO THE SAME POINT IN CANADA OR BETWEEN CANADA AND A POINT OUTSIDE OF CANADA THAT IS NOT IN THE TERRITORY OF ANOTHER COUNTRY.

INTERNATIONAL TRANSPORTATION MEANS AIR TRANSPORTATION BETWEEN CANADA AND A POINT IN THE TERRITORY OF ANOTHER COUNTRY.

ORIGIN MEANS THE INITIAL STARTING PLACE OF THE JOURNEY AS SHOWN ON THE TICKET.

PASSENGER MEANS ANY PERSON, EXCEPT MEMBERS OF THE CREW, CARRIED OR TO BE CARRIED IN AN AIRCRAFT WITH THE CONSENT OF THE CARRIER PURSUANT TO A VALID CONTRACT OF CARRIAGE.

“Schedule Change” means the following:

- a) The cancellation of a scheduled flight where no Swoop flight of comparable routing is available within three (3) hours of the original time of departure; or
- b) A change in the scheduled departure time of a Swoop flight which exceeds three (3) hours

SCHEDULE IRREGULARITIES MEANS THE FOLLOWING:

- 1) DELAYS IN THE SCHEDULED DEPARTURE OR ARRIVAL OF THE CARRIER'S FLIGHTS;
- 2) CANCELLATION OF FLIGHT, OR OMISSION OF A SCHEDULED STOP, OR;
- 3) SUBSTITUTION OF AIRCRAFT OR OF A DIFFERENT CLASS OF SERVICE; OR
- 4) SCHEDULE CHANGES WHICH REQUIRE REROUTING OF A PASSENGER AT DEPARTURE TIME OF HIS OR HER ORIGINAL FLIGHT.

TARIFF MEANS A SCHEDULE OF FARES, RATES, CHARGES OR TERMS AND CONDITIONS OF CARRIAGE APPLICABLE TO THE PROVISION OF AN AIR SERVICE AND OTHER INCIDENTAL SERVICES.

TICKET MEANS EITHER A PAPER OR ELECTRONIC DOCUMENT ISSUED BY OR ON BEHALF OF THE CARRIER WHICH INCLUDES THE PASSENGER'S FLIGHT COUPONS. THE TICKET SERVES AS EVIDENCE OF PAYMENT OF AIR FARE AND CONSTITUTES FOR THE PASSENGER PROOF OF THEIR CONTRACT OF CARRIAGE. IT ALSO HAS DETAIL INFORMATION TO ENSURE PROPER PROCESSING AND HANDLING. IN INSTANCES WHERE A TICKET EXISTS AS AN ELECTRONIC DOCUMENT, THE CARRIER ISSUES TO THE PASSENGER, PROOF OF PURCHASE, AN ITINERARY/RECEIPT. TRAFFIC MEANS ANY PERSONS OR GOODS THAT ARE TRANSPORTED BY AIR.

UNITED STATES OF AMERICA OR THE UNITED STATES OR THE U.S.A. MEANS THE AREA COMPRISING THE 48 CONTIGUOUS FEDERATED STATES, THE FEDERAL DISTRICT OF COLUMBIA, ALASKA, HAWAII, PUERTO RICO, THE U.S. VIRGIN ISLANDS, AMERICAN SAMOA, GUAM, MIDWAY AND WAKE ISLANDS.

70. The December 2021 Transborder Tariff (Swoop), Rule 5, section A states that the tariff applies to the traffic and transportation of passengers and goods using aircraft operated by Swoop Inc in respect of transborder flights, and forms part of the contract between each passenger and Swoop:

1. The obligations of the Carrier under the Air Passenger Protection Regulations (“APPR”) form part of the tariff and supersede any incompatible or inconsistent term and condition of carriage set out in the tariff to the extent of such inconsistency or incompatibility, but do not relieve the Carrier from applying terms and conditions of carriage that are more favourable to the passenger than the obligations set out in the APPR. According to APPR definitions and interpretations, Swoop is considered a “small carrier”.

(1) THIS TARIFF IS APPLICABLE TO THE TRANSPORTATION OF PASSENGERS AND THEIR ACCOMPANYING BAGGAGE USING AIRCRAFT OPERATED BY SWOOP.

(2) AIR TRANSPORTATION WILL BE SUBJECT TO THE RULES, RATES, FARES AND CHARGES PUBLISHED OR REFERRED TO IN THIS TARIFF IN EFFECT ON THE DATE WHICH THE TICKET IS ISSUED FOR TRANSPORTATION FROM ALL POINTS OF ORIGIN.

(3) UNLESS THE FARE RULE GOVERNING A SPECIFIC FARE BASIS CODE APPLICABLE TO THE TRANSPORTATION PURCHASED BY THE PASSENGER STATES OTHERWISE, THE GENERAL RULES CONTAINED IN THIS TARIFF WILL APPLY.

(4) THE CONTENT OF THIS TARIFF CONSTITUTES THE CONTRACT BETWEEN THE CARRIER AND THE PASSENGER. SHOULD THERE BE A CONFLICT BETWEEN THIS TARIFF AND ANY OTHER DOCUMENT ISSUED OR POSTED BY THE CARRIER, THIS TARIFF WILL PREVAIL.

71. The December 2021 Transborder Tariff (Swoop), Rule 90, sets out in what circumstances Swoop must provide monetary compensation to passengers and in what amounts compensation is owed, which mirrors the compensation provisions in the APPR:

(A) APPLICABILITY

THE RULE APPLIES TO ALL PASSENGERS IRRESPECTIVE OF THE TYPE OF FARE ON WHICH THEY ARE TRAVELLING. DEFINITIONS OF SITUATIONS WITHIN AND OUTSIDE OF THE AIRLINE'S CONTROL:

SITUATIONS WITHIN AIRLINE CONTROL ARE ANY SITUATIONS NOT COVERED BY THE TWO CATEGORIES BELOW. FOR EXAMPLE, THEY INCLUDE COMMERCIAL OVERBOOKING; SCHEDULED MAINTENANCE OF AN AIRCRAFT THAT IS NECESSARY

TO COMPLY WITH LEGAL REQUIREMENTS; OR MECHANICAL MALFUNCTION OF THE AIRCRAFT IDENTIFIED DURING SCHEDULED MAINTENANCE.

SITUATIONS WITHIN AIRLINE CONTROL BUT REQUIRED FOR SAFETY PURPOSES ARE TYPICALLY UNFORESEEN EVENTS LEGALLY REQUIRED TO REDUCE SAFETY RISK TO PASSENGERS. WHILE THIS INCLUDES MECHANICAL PROBLEMS, IT DOES NOT INCLUDE SCHEDULED MAINTENANCE OR MECHANICAL PROBLEMS IDENTIFIED DURING SCHEDULED MAINTENANCE. SAFETY DECISIONS MADE BY THE PILOT AND THOSE MADE UNDER AN AIRLINE'S SAFETY MANAGEMENT SYSTEM WOULD ALSO FALL INTO THIS CATEGORY.

SITUATIONS OUTSIDE AIRLINE CONTROL INCLUDE: WAR, OR POLITICAL INSTABILITY; ILLEGAL ACTS OR SABOTAGE; METEOROLOGICAL CONDITIONS OR NATURAL DISASTERS THAT MAKE THE SAFE OPERATION OF THE AIRCRAFT IMPOSSIBLE; INSTRUCTIONS FROM AIR TRAFFIC CONTROL; A NOTICE TO AIRMEN (AS DEFINED IN THE CANADIAN AVIATION REGULATIONS); A SECURITY THREAT; AIRPORT OPERATION ISSUES; A MEDICAL EMERGENCY; A COLLISION WITH WILDLIFE; A LABOUR DISRUPTION WITHIN THE CARRIER OR WITHIN AN ESSENTIAL SERVICE PROVIDER SUCH AS AN AIRPORT OR AN AIR NAVIGATION SERVICE PROVIDER; A MANUFACTURING DEFECT IN AN AIRCRAFT THAT REDUCES THE SAFETY OF PASSENGERS AND THAT WAS IDENTIFIED BY THE MANUFACTURER OF THE AIRCRAFT CONCERNED, OR BY A COMPETENT AUTHORITY; AND AN ORDER OR INSTRUCTION FROM AN OFFICIAL OF A STATE OR A LAW ENFORCEMENT AGENCY OR FROM A PERSON RESPONSIBLE FOR AIRPORT SECURITY.

...

(F) Compensation for Inconvenience Resulting from Delays or Cancellations within the Control of the Carrier

(G) Claims Made for Delay, Cancellation or Denied Boarding

(H) Schedule Changes

...

For flights departing on or after December 15, 2019, if a passenger is informed 14 days or less before the departure time on their ticket that the arrival of their flight at the destination that is indicated on their ticket will be delayed by at least three hours, and the delay is caused by a situation under the Carrier's control, compensation will be provided if a passenger files a request for compensation with the Carrier before the first anniversary of the day on which the flight delay occurred.

Within 30 days from the date on which the carrier receives the request, the carrier will provide the compensation or an explanation why the compensation is not payable.

The Carrier will provide compensation in the following amounts to passengers who are delayed due to delay or cancellation and when that delay is within the Control of the Carrier and when the passenger was informed 14 days or less about the delay. Regardless of the Fare paid, passengers are entitled to a monetary compensation as follows:

- a. no compensation if the delay is less than three hours;
- b. \$125, if the delay is three hours or more but less than six hours;
- c. \$250, if the delay is more than six hours but less than nine hours; and
- d. \$500, if the delay is more than nine hours.

The Carrier will compensate the passenger in the form of money unless it offers compensation in another form that has a greater monetary value than the applicable amounts referred to in this section, the passenger has been informed of the monetary value in writing and the alternative form of compensation does not expire. The passenger must confirm in writing that the passenger has been informed of the right to monetary compensation and has chosen to accept the alternative form of compensation.

72. The December 2021 Transborder Tariff (Swoop) confirms that the APPR's minimum mandatory compensation provisions form part of the contract between Swoop and passengers on Transborder Flights. Swoop is therefore contractually obligated to provide passengers with the compensation detailed therein when a flight is delayed and/or cancelled or boarding is denied due to a situation within Swoop's control and not required for safety purposes.

*The Tariffs Generally*

73. The Domestic Tariffs, the International Tariffs and the Transborder Tariffs (Swoop) are collectively the "**Tariffs**".
74. The Tariffs are contracts of adhesion between WestJet and each of its passengers, including the Plaintiffs and Class Members. Travel on WestJet-operated flights and flights operated by WestJet's code-share partners where WestJet was the "marketing carrier" are all subject to the Tariffs. The rights and obligations in the Tariffs governed the relationship between WestJet and Class Members.

*The Terms of the APPR are Mirrored in the Tariffs*

75. The APPR, s. 19 states:

19 (1) If paragraph 12(2)(d) or (3)(d) applies to a carrier, it must provide the following minimum compensation:

- (a) in the case of a large carrier,
  - (i) \$400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours,

(ii) \$700, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or

(iii) \$1,000, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more; and

(b) in the case of a small carrier,

(i) \$125, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours,

(ii) \$250, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or

(iii) \$500, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more.

76. Section 19 of the APPR applies in cases of delay or cancellation that is within the carrier's control (s. 12), and is not required for safety purposes (s. 11). In the case of either delay or cancellation, if the carrier does not inform the passenger more than 14 days before the delay or cancellation occurs, the carrier must provide at least the minimum compensation as set out in s. 19.

77. The compensation schedule set out in s. 19 of the APPR is substantially the same as in the Domestic Tariffs and the International Tariffs. According to s. 2(1) of the APPR, airlines must comply with the provisions in the APPR unless the terms in the airline's tariff are more favourable to passengers, in which case the airline's tariffs govern.

78. The APPR prescribe different mandatory minimum compensation depending on whether the carrier is a "large carrier" or a "small carrier" and provides the following definitions:

**large carrier** means a carrier that has transported a worldwide total of two million passengers or more during each of the two preceding calendar years.

**small carrier** means any carrier that is not a large carrier.

79. According to the December 2022 International Tariff (WestJet Defendants) at Rule 12, section E, the WestJet Defendants are each a "large carrier".

80. According to the April 2022 Domestic Tariff (Swoop) at Rule 5, section A, the September 2018 International Tariff (Swoop) at Rule 5, section A and the December 2021 Transborder Tariff (Swoop) at Rule 5, section A, Swoop is a “small carrier”.

*The Tariffs can Provide More Favourable Terms than the APPR*

81. According to s. 2(1) of the APPR, airlines must comply with the provisions in the APPR unless the terms in the airline’s tariff are more favourable to passengers, in which case the airline’s tariffs govern.

*WestJet’s Misconduct*

82. WestJet has, for a period of time unknown to the Plaintiffs but well known to the Defendants, denied claims for compensation under the APPR for delayed and cancelled flights and denial of boarding resulting from crew shortages.
83. WestJet controls all aspects of hiring, scheduling, and management of WestJet staff, including the crews for all of WestJet’s flights. WestJet’s business decision to schedule flights when they knew or ought to have known that they would not have sufficient staff to ensure that booked flights are properly crewed is an issue entirely within the control of WestJet, and any resulting crew shortages are of WestJet’s own making. WestJet cannot regularly and consistently fail to employ sufficient staff to crew flights, and then attempt to classify resulting disruptions as “required for safety purposes”.
84. WestJet’s classification of disruptions due to crew shortages as being required for safety purposes does not align with the provisions of the APPR or with guidance provided by the CTA, both in decisions that it has rendered and in guidelines published by the Agency. WestJet knows or ought to know this and has taken this position with respect to delays, cancellations and boarding denials due to crew shortages in breach of its contract with Class Members.
85. The APPR are incorporated by reference into each contract entered between WestJet and each Class Member through the Tariffs.

86. By denying the Plaintiffs and Class Members compensation that they are legally entitled to under the APPR, WestJet has breached each contract that it has entered into with each individual Class Member.

### ***Harm to the Plaintiffs***

87. As a result of WestJet's breach of contract, the Plaintiffs and the Class Members have been denied compensation mandated by ss. 19-20 of the APPR for inconvenience caused by flights that were delayed and/or cancelled or for denial of boarding.

### **PART 2: RELIEF SOUGHT**

88. The Plaintiffs claims, on their own behalf and on behalf of the Class Members:

- a. An order certifying this action as a class proceeding under the *Class Proceedings Act*, RSBC 1996, c. 50 (the "*Class Proceedings Act*");
- b. a declaration that WestJet breached the terms of its contract with each and every Class Member;
- c. general damages;
- d. pre-judgment and post-judgment interest under the *Court Order Interest Act*, RSBC 1996, c 79; and
- e. such further and other relief as this Honorable Court may deem just.

### **PART 3: LEGAL BASIS**

#### ***Breach of Contract***

89. The Tariffs are standard form contracts of adhesion drafted by WestJet. When each of the Class Members purchased a ticket for a flight operated by WestJet, each Class Member entered into a contract with WestJet that included the Tariff applicable to that flight.

90. The rights and obligations of Class Members and WestJet are governed by the Tariffs and the APPR.

91. The Tariffs included the mandatory compensation provisions of the APPR, and therefore the terms of the APPR formed part of the contracts entered into between WestJet and each Class Member. WestJet had a contractual obligation to comply with the APPR, which included providing compensation to the Plaintiffs and Class Members if their flights were delayed and/or cancelled, or if they were denied boarding, for a reason within WestJet's control and not required for safety purposes.
92. By refusing to comply with the provisions of the APPR by misclassifying the flight disruptions due to crew constraints as decisions made for safety purposes, WestJet has breached the contracts between WestJet and the Plaintiffs and Class Members.
93. The Plaintiffs and Class Members have suffered damages as a result of WestJet's breach of contract. The Plaintiffs and Class Members are entitled to liquidated damages pursuant to their contracts by WestJet whereby WestJet complies with the terms of the APPR and provides for the Plaintiffs and Class Members compensation as prescribed by ss. 19-20 of the APPR.

#### ***Limitation Periods***

94. The Plaintiffs and Class Members plead and rely on the doctrines of postponement, discoverability, and fraudulent concealment per *Pioneer Corp v. Godfrey*, 2019 SCC 42 to postpone the running of the limitation period until the date on which this Notice of Civil Claim was filed.
95. The Plaintiffs and Class Members could not reasonably have known that WestJet unjustly denied them compensation to which they were entitled. The Plaintiffs and Class Members who have filed complaints with the CTA could not reasonably have expected that an adjudication by the CTA would take the length of time that it has and/or will and therefore should not be prejudiced by any delay, if there is any, in commencing civil proceedings. The harm is ongoing.
96. The Plaintiffs and Class Members plead and rely on the *Limitation Act*, SBC 2012, c 13, and in particular on ss. 8 and 21(3). In the alternative, or in the addition, the Plaintiffs and Class

Members rely on the *Limitation Act*, SBC 2012, c 13, s. 30 and the *Limitation Act*, RSBC 1996, c 266.

***Service***

97. The Plaintiffs and Class Members have the right to service this Notice of Civil Claim on the Defendants pursuant to the Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28, s 10 (CJPTA), because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based.
98. The Plaintiffs and Class Members rely on the following grounds, in that this action concerns a business carried on in British Columbia (CJPTA, s 10(h)).

Plaintiffs' address for service:

Slater Vecchio LLP  
1800 - 777 Dunsmuir Street  
Vancouver, BC V7Y 1K4

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street  
Vancouver, BC  
V6Z 2E1

Date: January 5, 2023



Signature of lawyer for plaintiffs

**Anthony Vecchio K.C.**

**Saro Turner**

**Sam Jaworski**

Counsel for the Plaintiffs

**Slater Vecchio LLP**

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(c) serve the list on all parties of record.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION  
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiffs claim the right to serve this pleading on the Defendants WESTJET AIRLINES LTD., WESTJET ENCORE LTD., and SWOOP INC. outside British Columbia on the ground that the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*) applies because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based. The Plaintiffs and Class Members rely on the following grounds, in that this action concerns:

- a. restitutionary obligations that, to a substantial extent, arose in British Columbia (*CJPTA*, s 10(f)); and
- b. a business carried on in British Columbia (*CJPTA*, s 10(h)).

**Appendix**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This is a proposed class proceeding regarding loot boxes in video games.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

*[Check one box below for the case type that best describes this case.]*

A personal injury arising out of:

a motor vehicle accident

medical malpractice

another cause

A dispute concerning:

contaminated sites

construction defects

real property (real estate)

personal property

the provision of goods or services or other general commercial matters

investment losses

the lending of money

an employment relationship

a will or other issues concerning the probate of an estate

a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

*[Check all boxes below that apply to this case]*

a class action

maritime law

aboriginal law

constitutional law

conflict of laws

none of the above

do not know

**Part 4:**

*Class Proceedings Act, RSBC 1996, c 50*

*Court Order Interest Act, RSBC 1996, c 79*