IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *ARBITRATION ACT, 1991*, SO 1991 C. 17, BETWEEN:

[redacted]

Claimant

-and-

[redacted]

Respondent

Award

The Honourable J. Douglas Cunningham, Q.C.
Arbitrator

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I. INTRODUCTION AND BACKGROUND

1. This arbitration arises from an ongoing, long-term contractual relationship between the [redacted]", or the Claimant) and [redacted] Inc. ("[redacted]", or the Respondent). Under the Affinity Program Agreement (the "APA"),[i] the parties agreed that [redacted] would become the key financial services partner for [redacted] customer loyalty program, [redacted].

2. The APA sets out a 10-year term for the Affinity Program, which launched on January 1, 2014. Despite this arbitration, the parties continue to work together on various initiatives under the scope of the Affinity Program, and there remain numerous [redacted] products in the marketplace on which [redacted] miles continue to be earned by customers.

3. The parties come to this arbitration, not in a spirit of acrimony, but rather to seek guidance as to how they can preserve and grow their important relationship. Both [redacted] and [redacted] seek a continuing, mutually beneficial partnership in which each shares the same understanding of their respective rights and responsibilities, and has the comfort and certainty necessary to make the most of that partnership.

4. The parties seek direction regarding "Co-branded Broader Bank Products" ("CBBBP"), which is a defined term under the APA. The contract definition of CBBBPs – together with APA provisions governing each party's rights and responsibilities in respect of CBBBPs – is a key issue at stake in this arbitration. In particular, the parties disagree as to (i) the appropriate interpretation

of CBBBPs under the APA, (ii) the scope of [redacted] consent rights under the APA to permit the issuance of certain products by [redacted] as CBBBPs, and accordingly, (iii) [redacted] ability to fund the [redacted] miles for those products from two pools of "free" miles which are available under the APA for CBBBPs.

5. In addition to direction regarding the interpretation of the APA and CBBBPs, [redacted] also seeks damages as against [redacted] in the amount of $313,030.34 for unpaid invoices on [redacted] miles resulting from one particular product (the 2015 [redacted]).

A. Jurisdiction

6. My jurisdiction in this matter is not in dispute. Pursuant to section 9.2(5) of the APA, the parties have agreed by way of their Arbitration Agreement dated March 31, 2017 to submit their dispute regarding the interpretation of the APA to me.

B. Pleadings and Evidence

7. The final form of pleadings in this arbitration consist of the following:

a. [redacted] Amended Amended Notice of Arbitration, dated December 23, 2016.

b. [redacted] Amended Amended Response, dated March 20, 2017.

c. [redacted] Amended Reply, dated March 29, 2017.

8. Over the course of four hearing days (April 17, 18, 20, and 25, 2017), I heard testimony from the following witnesses, each of whom delivered at least one affidavit:

a. [redacted]): [redacted] was Associate Vice President Relationship Management for [redacted] Credit Cards beginning in January 2014, at the time

of the Affinity Program's launch, and through to June 2016. His evidence primarily concerned the day-to-day interactions between [redacted] and [redacted] under the scope of the APA.

b. [redacted]): [redacted] was Executive Vice President and Head of [redacted] between 2012 and 2013. In this role, he was involved in the negotiations between [redacted] and [redacted] that led to the APA.

c. [redacted]): [redacted] was Senior Vice President of Corporate Development at [redacted] between 2012 and 2013. She was one of the lead negotiators on behalf of [redacted] for the APA.

d. [redacted]): [redacted] was [redacted] Vice President, [redacted] between 2010 and July 2015. In this role, she was heavily involved in the negotiations leading to the APA, and was a lead contact for [redacted] in its ongoing relationship with [redacted] following the launch of the Affinity Program.

e. [redacted] was President and CEO of [redacted] from November 2008 to March 2016. He was involved in the negotiations that led to the APA and in the operation of the Affinity Program itself following its launch in January, 2014.

f. [redacted] has, since 2007, been the General Manager of [redacted] relationship with key financial services partners: first with [redacted], then with [redacted], and since the launch of the Affinity Program in January 2014, with [redacted]. His evidence primarily concerned the day-to-day interactions between [redacted] and [redacted]

under the scope of the Affinity Program, though [redacted] was also involved on behalf of [redacted] in the negotiations that led to the APA.

9. In addition to the evidence of the above witnesses (including exhibits to their affidavits and oral testimony), the documentary record before me consisted of a 3-volume Joint Book of Documents and a Book of Agreements. Endnote references to the evidentiary record are included throughout this Award, but are not intended to reflect an exhaustive cataloguing of the relevant evidence on any point or issue.

10. I have also received written submissions and had the benefit of oral argument from both parties over two hearing days on May 1-2, 2017.

II. ISSUES FOR DETERMINATION

11. In their respective pleadings, both [redacted] and [redacted] identify a series of nine questions that they wish to have addressed in this arbitration:

a. When introducing a new type of CBBBP:

- Are there items, other than the enumerated items in s. 2.5(2) of the APA that require [redacted] consent?

- Are the factors listed in Section 2.2(3) of the APA applicable after the 18-month period referred to in that section?

b. Is there a minimum duration during which [redacted] Products must be offered in order to qualify as a CBBBP?

c. Can a promotional Broader Bank Product qualify as a CBBBP?

d. Is there a requirement that CBBBPs provide commercial benefits to both parties that outweigh the financial costs associated with them?

e. In what circumstances is [redacted] entitled to have Miles issued at no additional cost pursuant to s. 6.3(5) of the APA?

f. Are the products associated with the 2016 Bundles and 2017 Products, identified in the Product Addendums attached as Schedule B to [redacted] Amended Amended Notice of Arbitration, CBBBPs for which [redacted] is entitled to have miles issued at no additional cost, pursuant to sections 6.3(1)(f) and 6.3(5) of the APA?

g. Are the products associated with the 2015 [redacted] CBBBPs under the APA?

h. Do the 414,000,000 Miles available under s. 6.3(5) of the APA for each of the second through sixth Program Years carry over year-over-year (until the end of the sixth Program Year) if no CBBBP is in existence for which the miles may be instructed to be posted?

12. In my view, at the heart of these 9 individual questions is a simpler set of issues that I will address in my reasons below, and in so doing I have arrived at conclusions in respect of the above 9 questions:

a. What is the scope of [redacted] consent right in section 2.5(2) of the APA?

b. Which of the various [redacted]-related products put in issue by the parties are valid CBBBPs within the meaning of the APA (including [redacted] section 2.5(2) consent right)?

c. Do the miles made available under section 6.3(5) of the APA carry over in years where there is no CBBBP in existence?

III. FACTS

13. The factual background to this arbitration is largely not in dispute between the parties. There is broad agreement as to the events leading to the execution of the APA and the running of the Affinity Program since its launch. I do not consider it necessary to recount these facts in detail to the parties in this Award – instead a brief summary of the relevant background follows.

14. The main sources of disagreement relate primarily to more subjective questions of what one person or party may have understood or intended with respect to the APA and the Affinity Program at various points in time.

15. In general, I would note at the outset that I found all six of the witnesses who testified as part of this arbitration to be credible and honest. Each witness provided, to the best of their ability, their recollection of relevant events. Apart from this general observation, I have not found it necessary, in coming to my final determinations, to make any competing findings of credibility as between witnesses even on those limited areas of factual disagreement between the parties.

A. [redacted] and [redacted] Business Model

16. The [redacted] loyalty program was originally launched as [redacted] loyalty program in 1984. [redacted] was subsequently spun-off to [redacted] in 2002, which continues to own and operate [redacted].[ii]

17. [redacted] primary business is the creation and sale of "Loyalty Units" such as [redacted] Miles. [redacted] enters into agreements with "accumulation partners", to whom [redacted] sells its Loyalty Units, and "redemption partners", from whom [redacted] purchases rewards which are then delivered to members upon redemption of their Loyalty Units.[iii]

18. Between 1991 and 2013, [redacted] was among [redacted] most important accumulation partners. [redacted] customers earned [redacted] miles through a suite [redacted] co-branded credit cards, as well as two non-credit card products: the [redacted] and the [redacted] Unlimited Chequing Account.[iv]

B. [redacted] RFP

19. Although this partnership with [redacted] generated a substantial portion of [redacted] total revenue, with their agreement set to expire at the end of 2013, [redacted] began to explore the possibility of a new accumulation partner in the financial services sector.[v]

20. [redacted] had grown dissatisfied with certain aspects of its relationship with [redacted], and sought a financial services partner that (i) would be open to more of a true partnership, as opposed to a vendor-purchaser arrangement and (ii) would be willing to put additional upfront and ongoing capital into the [redacted] program.[vi]

21. In or around late 2012, [redacted] approached [redacted] about the possibility of migrating the [redacted] program from [redacted].[vii] [redacted] subsequently issued a Request for Partnership Proposal on January 23, 2013 (the "RFP") to [redacted] and at least one other competing bank, the [redacted]

22. The RFP set out [redacted] goal of "seeking a new co-branded credit card and broader bank accumulation arrangement with a core financial services partner…in the nature of a partnership".[ix] This introductory principle was carried through a series of proposed contract terms in the RFP, in which [redacted] sought commitments from bidders with respect to "Broader Bank Products", defined as "broader bank product and service offerings that will provide [redacted] Mile accumulation opportunities".

23. The Broader Bank Products commitments sought by [redacted] in the RFP included:[x]

a. A commitment to launch a subset of Broader Bank Products no later than the end of Year 2;

b. A minimum annual commitment to purchase [redacted] Miles in respect of Broader Bank Products by Year 3;

c. A minimum marketing commitment for Broader Bank Products starting in year 2.

24. Also included by [redacted] in the RFP proposed contract terms was a provision for the successful proponent to receive 1 free [redacted] mile for every 20 miles purchased in respect of Broader Bank Products. This would come to be known as the "1 for 20" provision in the eventual APA.[xi]

25. The evidence of both parties from around the time of the RFP is consistent: [redacted] made it abundantly clear, and [redacted] understood, that Broader Bank Products were an important area that [redacted] wished to grow as part of its new banking "partnership". That said, the parties also agree Broader Bank Products were not the main focus of discussions or negotiations between the parties; the primary focus was instead on the [redacted] credit card portfolio, which represented the large majority of [redacted] revenues.[xii]

C. Initial Negotiations: RFP Response and Term Sheet

26. [redacted] delivered its formal response to the RFP on March 8, 2013 ("RFP Response"). This RFP Response was then appended to the Term Sheet that was subsequently negotiated between the parties, and the Term Sheet itself then formed the basis of the final APA.

27. [redacted] RFP Response confirmed that the bank would approach the relationship with a "partnership mentality". In Schedule E of the RFP Response, [redacted] stated under the heading "Building a Collaborative Partnership with [redacted]":

> [redacted] looks forward to working with [redacted] to determine the best ways to leverage your unique value proposition to sell additional products. We acknowledge that finding the right mix of opportunities will require a close collaboration between [redacted] and [redacted].

28. Schedule E of the RFP Response then goes on to list some "early considerations" for Broader Bank Products. [redacted] proposed list of possible Broader Bank Products included both short-term promotional products (using [redacted] Miles as sign-up incentives for customers), and longer-term "ongoing earn" products.

29. Another important aspect of [redacted] RFP Response was the proposed up-front signing fee: [redacted] offered a $75,000,000 signing fee to be paid on the program launch date of January 1, 2014,

with a subsequent payment of $25,000,000 upon the renewal of [redacted] agreement with [redacted] (its primary redemption partner).[xiii] [redacted] RFP Response also offered rates per [redacted] Mile that were higher than what [redacted] was then receiving from [redacted].[xiv]

30. [redacted] witnesses gave evidence that at or around the time of the RFP Response (and beyond), there was significant hesitation and even skepticism on the part of [redacted] with respect to the viability of long-term, ongoing earn Broader Bank Products.[xv] There is some disagreement between the parties as to whether (or to what extent) [redacted] communicated this skepticism to [redacted] during the negotiations.[xvi]

31. Regardless, there is no doubt that [redacted] RFP Response (and ultimately, the APA itself) offered no commitments to launch any ongoing-earn Broader Bank Products.[xvii] Instead, the Term Sheet that was negotiated by the parties in the wake of [redacted] RFP Response (and which then formed the basis of key APA terms) included two important provisions relating to Broader Bank Products.

a. First, section 4.2.1 of the Term Sheet was an acknowledgement on the part of both parties of the importance of Broader Bank Products, and an agreement that it was a "strategic priority of Issuer to work with [redacted] to identify and formulate mutually beneficial co-brand programs for Issuer products in addition to Cards". Section 4.2.1 of the Term Sheet expressly notes that Schedule E of the RFP Response, together with s. 7.1.7 of the Term Sheet (described below) provide [redacted] "proposed broader bank product and service offering".

b. Second, section 7.1.7 of the Term Sheet contains a commitment on the part of [redacted] to launch "[redacted]-linked acquisition incentives on non-credit card products […] which [redacted] envisions could include chequing/savings accounts, mortgages, and registered

> retirement savings plans". This provision was consistent with [redacted] existing comfort with offering acquisition bonuses for signing up for banking products (so no significant research or expense was required to launch such promotional products), and did not trigger the "skepticism" that [redacted] felt towards longer-term, ongoing earn Broader Bank Products.

32. Section 7.1.7 of the Term Sheet was carried through to section 2.2(2) of the APA with minimal changes:

> Section 2.2(2): Prior to March 31, 2014, the Bank shall make available [redacted] linked acquisition incentives on one or more non-Credit Card products of the Bank or its Canadian-domiciled Affiliates, which specific products are to be determined in accordance with the terms of this Agreement and a Product Addendum with respect thereto, but which the Bank envisions could include chequing/savings accounts, mortgages, and registered retirement savings plans.

33. Section 4.2.1 of the Term Sheet, for its part, was carried through to the final agreement as the "research" commitment found in section 2.2(3) of the APA":

> Section 2.2(3): During the eighteen (18) month period following the Co-Branded Program Launch Date [January 1, 2014], the Bank shall cooperate with Aeroplan to research and identify opportunities for Broader Bank Products that the Parties mutually agree would be commercially practicable and mutually beneficial to launch as Co-Branded Broader Bank Products. The Bank and [redacted] shall use commercially reasonable efforts to launch any such Co-Branded Broader Bank Products identified through this process and that meet the foregoing criteria on a timeframe designed to expand

34. Notably, between section 4.2.1 of the Term Sheet and section 2.2(3) of the APA, a contractual distinction arose between "Broader Bank Products" on the one hand, and "Co-Branded Broader Bank Products" on the other. The Term Sheet adopted [redacted] original RFP definition of

Broader Bank Products to mean essentially [redacted] non-credit card products to which [redacted] miles are attached.

35. In the final APA, however, "Broader Bank Products" was defined as [redacted] financial products and services "other than the Co-Branded Cards", whereas Co-Branded Broader Bank Products was defined as those Broader Bank Products "which offer [redacted] miles in connection with the sign-up, opening, holding or use thereof".

D. APA Negotiations: the Break Fee and 414,000,000 Miles

36. On April 8, 2013, [redacted] board of directors decided to move forward solely with [redacted] to negotiate a final agreement.[xviii] Negotiations ensued over the following months and led to the original APA dated June 26, 2013. Importantly, both parties understood that as part of [redacted] existing agreement with [redacted], [redacted] would have 30 days to exercise a "right to match" any contract entered into between [redacted].[xix]

37. [redacted] was understandably concerned about the possibility of [redacted] exercising this right to match, since considerable time and resources would have to be spent in order to have the programs and products in place for the anticipated January 1, 2014 launch of the Affinity Program. This led to the separate negotiation of an "Offer Agreement" between [redacted] and [redacted], which contemplated the payment of a break fee by [redacted] to [redacted] in the event that [redacted] exercised its right to match.[xx]

38. By mid-June 2013, prior to the execution of the initial APA, [redacted] was still not satisfied with the amount of break fee on offer from [redacted]. Conversely, [redacted] remained concerned that it had been unable to secure any firmer commitments from [redacted] with respect to Broader Bank Products.[xxi]

39. Very early on the morning of June 21, 2013, [redacted] came up with a possible solution, one which was quickly approved internally at [redacted] and then presented to [redacted] that same morning at a high-level meeting between [redacted]) and [redacted] (Group Chief Executive of [redacted] parent company).[xxii] There is some disagreement between the parties as to some of the details surrounding the presentation of this solution, the meeting between [redacted], and how the solution was incorporated into the final APA, but the following facts are not in dispute:[xxiii]

a. [redacted] would increase its up-front signing fee payable to [redacted] from $75,000,000 to $100,000,000.

b. [redacted] would agree to a break fee increase from $50,000,000 to $80,000,000.

c. The APA would include a new section 6.3(5), which in its original form, created a pool of 414,000,000 [redacted] Miles in each of Program Years 2 to 6, to be used by [redacted] in respect of Broader Bank Products, if [redacted] signed up over 250,000 new [redacted] credit card accounts in the first Program Year.

40. This solution was intended to carry minimal risk for both parties, and to satisfy important outstanding commercial concerns for both [redacted].[xxiv] The increased up-front payment had always been one of [redacted] desired goals, and it would be used by [redacted] to fund the increased break fee in the event that [redacted] exercised its right to match.

41. At the same time, either [redacted] would be incentivized to sign up a large number of new credit card holders, which would generate significant long-term earnings for [redacted]. If successful in reaching the threshold number of new [redacted] credit card accounts, either [redacted] or

[redacted] would then be incentivized to introduce Broader Bank Products in order to access the pool of "free" miles, again in keeping with [redacted] stated commercial objectives.[xxv]

42. [redacted] was confident in its ability to secure the new [redacted] Credit Card accounts, and so it viewed the additional $25 million up-front payment as essentially pre-purchasing the 414,000,000 miles in Program Years 2-6, miles which had a net present value of approximately $25 million. [redacted] therefore obtained its desired increase to the break fee at what it perceived to be minimal risk, confident that if [redacted] decided to exercise its right to match, its competitor would be funding [redacted] own break fee.[xxvi]

43. The new section 6.3(5) of the APA underwent several changes from its original introduction to its final executed form. The parties agree there was an initial misunderstanding as to the "new" [redacted] accounts that would serve as the trigger: [redacted] understood it as 250,000 net new accounts, meaning customers that were not previous [redacted] cardholders, whereas [redacted] understood it as 250,000 accounts that were **new to** [redacted]. [xxvii]

44. This misunderstanding was eventually resolved by reducing the trigger number to 150,000 and clarifying that it was **net new accounts.** At the same time, the language of s. 6.3(5) was changed so that this pool of miles could be used by [redacted] in respect of CBBBPs, rather than Broader Bank Products. The parties disagree as to the significance of these changes as they relate to the interpretation of s. 6.3(5) in its final form, which I shall address below.

45. With these outstanding issues apparently resolved, the APA was executed on June 26, 2013.

E. Post-execution of the APA

46. Considerable evidence was presented over the course of the hearing that post-dates the execution of the APA. For reasons set out below, I have given little weight to this evidence in my interpretation of the relevant APA provisions. As such, I do not consider it necessary to summarize the details of the various interactions between the parties in the years since the execution of the APA.

47. For the purposes of this Award, let me say that both [redacted] have worked diligently to carry out the Affinity Program in good faith and to their best of their abilities.

48. In so doing, since the launch of the Affinity Program on January 1, 2014, [redacted] has introduced 10 different [redacted]-related products and product bundles (the "Products").[xxviii]

49. At issue in this arbitration is whether these Products (3 of them in particular identified by [redacted], and 1 identified by [redacted]) are CBBBPs within the meaning of the APA, and whether [redacted] can therefore fund the [redacted] miles offered in connection with these products out of the "1 for 20" and 414,000,000 pools of miles (the "[redacted] Pools").

50. There is some disagreement as between the parties regarding the facts surrounding each of these Products and the circumstances in which they were launched. I have summarized the key non-contentious facts relating to each of the Products below, using the short-hand descriptions employed by the parties over the course of the hearing.

Product Name	**Ongoing-earn component**	**Product Addendum**	**Consented to by Aimia**	**Price paid for [redacted] Miles**	**Product in issue**
2014 January Banking Offer	No.	No.	No formal consent. [redacted] was aware of the Product details and considered its launch to satisfy [redacted] obligation under s. 2.2(2) of the APA.	$0.014/mile, paid by [redacted].	No.
2014 February Banking Offer	No.	No.	No formal consent. [redacted] was aware of the Product details and considered its launch to satisfy [redacted] obligation under s. 2.2(2) of the APA.	$0.014/mile, paid by [redacted].	No.
2014 Fall Cross-Sell	No.	No.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, paid by [redacted].	No.
2014-2015 [redacted] Auto Finance	No.	Yes.	[redacted] did not consent to the Product Addendum, but allowed the Product to be treated "exceptionally" as a CBBBP, with no eligibility for the [redacted] Pools.	$0.0133/mile, which is the CBBBP rate adjusted to include the 1 for 20 miles.	No.
2015 [redacted] (Merchant Services)	No.	No.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, paid by [redacted].	No.
2015 [redacted] (Bundles)	No.	No.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, not paid by [redacted].	Yes, by [redacted].
2016 [redacted] (Merchant Services)	No.	No.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, paid by [redacted].	No.
2016 [redacted] (Bundles)	No.	Yes.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, paid by [redacted].	Yes, by [redacted].
[redacted] Miles for Quotes	No.	Yes.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, paid by [redacted].	Yes, by [redacted].
2017 [redacted]	No.	Yes.	No formal consent. [redacted] was aware of the Product details and allowed the Product to go to market.	$0.014/mile, paid by [redacted].	Yes, by [redacted].

51. As the above table makes clear, all of the Products share the following three things in common:

a. None of the Products provide customers with the ability to earn [redacted] Miles on an ongoing basis, but are instead limited to promotional offers of [redacted] Miles in connection with the sign-up and acquisition of [redacted] banking products;

b. Despite [redacted] position that its consent under s. 2.5(2) of the APA has been either expressly refused or never formally sought in respect of all of the Products, [redacted] has allowed all of the Products to go to market on a without prejudice basis;

c. The rate per [redacted] Mile charged by [redacted] has been the APA's stipulated rate for CBBBPs of $0.014/mile.[xxix]

IV. POSITIONS OF THE PARTIES

52. I begin by setting out the proposed answers offered by both [redacted] in respect of the nine specific questions identified by the parties:

Issue	**[redacted] Position**	**[redacted] Position**
A) When introducing a new type of CBBBP: *i) Are there items, other than the enumerated items in s. 2.5(2) of the APA that require [redacted] consent?*	There are no features and characteristics, other than those enumerated in s. 2.5(2) of the APA, that require [redacted] consent.	No, however the enumerated items in s. 2.5(2) of the APA give [redacted] the right to consider if the awarding of [redacted] miles are of commercial benefit to [redacted] and to consent or withholds its consent to the product on that basis.
A) When introducing a new type of CBBBP: *ii) Are the factors listed in Section 2.2(3) of the APA applicable after the 18-month period referred to in that section?*	The factors listed in s. 2.2(3) of the APA are not applicable after the 18-month period referred to in that section.	No. Section 2.2(3) was not intended to place a time limit on the research that would be carried out to identify products that would be "commercially practicable and mutually beneficial" to launch as CBBBPs, nor to place a time limit on the need for CBBBPs to be "commercially practicable and mutually beneficial".
B) Is there a minimum duration during which [redacted] Broader Bank Products must	There is no minimum duration during which Broader Bank Products	No, however [redacted] is entitled to consent or to withhold its consent on the basis of

Issue	[redacted] **Position**	[redacted] **Position**
be offered in order to qualify as a CBBBP	must be offered in order to qualify as CBBBPs.	the duration of proposed miles and benefits.
C) Can a promotional Broader Bank Product qualify as a CBBBP?	Yes.	CBBBPs can only be issued as such when [redacted] consents under s. 2.5(2). As a general matter, [redacted] will not consent to short-term acquisition based promotions as CBBBPs.
D) Is there a requirement that CBBBPs provide commercial benefits to both parties that outweigh the financial costs associated with them?	There is no such requirement, but each of the products that [redacted] has introduced are commercially beneficial to both parties.	Yes. Neither party to the APA should be able to unilaterally impose on the other a CBBBP that offers no commercial benefit to the latter.
E) In what circumstances is [redacted] entitled to have Miles issued at no additional cost pursuant to s. 6.3(5) of the APA?	[redacted] is entitled to have miles issued pursuant to section 6.3(5) in respect of products that meet the definition of CBBBP and in respect of which [redacted] does not object to the specific features and characteristics of the products listed in s. 2.5(2).	[redacted] is entitled to have miles issued under s. 6.3(5) of the APA when it introduces a new CBBBP in compliance with s. 2.5(2) (meaning with [redacted] consent), and then instructs [redacted] to post miles to [redacted] accounts in connection with that CBBBP.
F) Are the products associated with the 2016 Bundles and 2017 Products, identified in the Product Addendums attached as Schedule B to [redacted] Amended Amended Notice of Arbitration, CBBBPs for which [redacted] is entitled to have miles issued at no additional cost, pursuant to sections 6.3(1)(f) and 6.3(5) of the APA?	The products associated with the 2016 Bundles and the 2017 Products are CBBBPs for which [redacted] is entitled to have miles issued at no additional cost, pursuant to ss. 6.3(1)(f) and 6.3(5) of the APA.	No. [redacted] did not consent to the launch of any of these products as CBBBPs, and as such they are not CBBBPs under the APA.
G) Are the products associated with the 2015 [redacted] CBBBPs under the APA?	Yes.	No. [redacted] did not consent to the launch of the 2015 [redacted] as a CBBBP, and therefore it is not a CBBBP under the APA. [redacted] also seeks payment from [redacted] for the miles that it provided to [redacted] in connection with this campaign.
H) Do the 414,000,000 Miles available under s. 6.3(5) of the APA carry over year-over-year (until the end of the sixth	The 414,000,000 miles available under 6.3(5) of the APA carry over year over year (until the end of the	No. The 414,000,000 miles under s. 6.3(5) are only made available in a given Program Year if there is a CBBBP in existence for that year. However, [redacted] is

Issue	[redacted] Position	[redacted] Position
Program Year) if no CBBBP is in existence for which the miles may be instructed to be posted?	sixth Program Year) even if no CBBBP is in existence for which the miles may be instructed to be posted.	prepared to concede that the 414,000,000 miles for Program Years 2 and 3 (2015 and 2016) will be permitted to carry-over for use by [redacted] in respect of CBBBPs that receive [redacted] consent under the APA going forward.

53. As noted above, I am of the view that these 9 questions can be reduced to 3 discrete issues. For each of these 3 discrete issues, I have summarized the respective positions adopted by [redacted] and [redacted] below.

A. The Scope of [redacted] Section 2.5(2) Consent Right

54. The interpretation of section 2.5(2) of the APA is the main issue in this arbitration. The full section reads as follows:

> **Section 2.5(2):** Subject to Section 2.5(3), the Bank shall not issue a new type of Co-Branded Product without the prior written consent of [redacted] with respect to the following characteristics of such Co-Branded Product: (i) such benefits on the Co-Branded Product that are provided or serviced by [redacted] or any [redacted] Partner (except with respect to benefits provided directly by an [redacted] Partner to the Bank or its Affiliates pursuant to a separate agreement), (ii) except as otherwise specifically set forth in Section 2.10, Section 9.4(2)(q) and Schedule 4.2, the proposed [redacted] Mile Earn Rate with respect to Purchases or other ongoing Qualifying Activities and/or other terms and conditions relating to the awarding of [redacted] Miles applicable to such Co-Branded Product, (iii) any other benefits on the Co-Branded Products (other than those set forth in clauses (i) or (ii)) that would result in a breach by [redacted] of any contract with any of its [redacted] Partners (provided, that [redacted] shall have no consent right in respect of (A) benefits consisting of insurance products; (B) benefits required by Network Rules or (C) benefits required by agreements of Bank or its Affiliates in effect as of April 8, 2013), (iv) in the case of any physical Payment Vehicle, the proposed artistic design, if any, of the new type of Co-Branded Product and (v) the proposed use of [redacted] Licensed Marks for such Co-Branded Product. Subject to Section 2.5(3), [redacted] shall, no later than

> thirty (30) days after its receipt from the Bank of the Bank's notice and other materials contemplated in Section 2.5(1), notify the Bank in writing whether or not it has approved the features of the new Co-Branded Product requiring its approval pursuant to clauses (i)-(v) of the immediately preceding sentence.

55. When reduced to its key operative clauses that are in dispute, section 2.5(2) reads as follows:

> […] the Bank shall not issue a new type of Co-Branded Product without the prior written consent of [redacted] with respect to the following characteristics of such Co-Branded Product: […] (ii) […] the proposed [redacted] Mile Earn Rate with respect to Purchases or other ongoing Qualifying Activities and/or other terms and conditions relating to the awarding of [redacted] Miles applicable to such Co-Branded Product […]

56. Important APA definitions that arise in considering section 2.5(2) are as follows:

> "[redacted] **Mile Earn Rate**" means the number of [redacted] Miles earned in respect of Purchases on a particular type of Co-Branded Card or any other Qualifying Activity on a particular type of Co-Branded Product.
>
> "**Broader Bank Products**" means Bank-Branded financial products and services offered in Canada by the Bank or its Affiliates to its customers other than the Co-Branded Cards, and includes Bank-Branded Charge Cards, debit cards, lines of credit, mortgages, insurance, chequing accounts and demand deposit accounts available from time to time to consumers in Canada, but for greater certainty specifically excludes Alternative Payment Devices.
>
> "**Co-Branded Broader Bank Products**" means Broader Bank Products offered by the Bank or its Affiliates which offer [redacted] Miles in connection with the sign-up, opening, holding or use thereof by customers of the Bank or its Affiliates who are [redacted] Members in accordance with the terms of this Agreement, and whether or not such Broader Bank Products themselves are co-branded with [redacted] Licensed Marks.
>
> "**Co-Branded Products**" means Co-Branded Cards and Co-Branded Broader Bank Products.

> "**Product Addendum**" means an addendum to this Agreement in substantially the form of Schedule B hereto that describes certain features of, and the terms and conditions of the offering of, a particular type of new Co-Branded Product.
>
> "**Purchases**" means charges billed to Co-Branded Card Accounts for the purchase of goods and/or services […], net of credits, adjustments and amounts charged back by the Bank to a Service Establishment.
>
> "**Qualifying Activity**" means each activity, event or circumstance with respect to any Co-Branded Product which entitles the holder or user thereof to be awarded [redacted] Miles in connection therewith (including (a) any sign up, retention, mileage multiplier or other bonus [redacted] Miles awarded by the Bank or [redacted], (b) the incurrence of any Purchases in the case of a Co-Branded Card and (c) the conversion of [redacted] Miles from the proprietary loyalty currency of the Bank or its Affiliates held by Credit Card customers of the Bank and its Affiliates who are transitioning to Co-Branded Cards from the Bank's existing proprietary Credit Cards as allowed pursuant to Schedule 1.1(a)) (but for greater certainty, any outstanding Credit Card account balances being transferred to any such Co-Branded Card from any such existing proprietary Credit Cards shall not be considered as Purchases or a Qualifying Activity).

57. Both [redacted] and [redacted] have advanced a series of cogent and compelling arguments in support of their respective interpretations of s. 2.5(2). With the benefit of the parties' excellent written submissions, I do not propose to exhaustively catalogue all of these arguments, but have instead summarized the main points raised by each party.

i. [redacted] Position

58. [redacted] position starts first with the APA definitions themselves. [redacted] submits that there is nothing in the definition of CBBBP to suggest that it would not capture short-term, promotional products such as those that have been proposed and launched thus far. Looking at the definition of CBBBP, [redacted] submits that they are simply "Broader Bank Products", as defined, to which [redacted] miles are offered "in connection with the **sign-up, opening**, holding or use thereof".[xxx]

59. Generally, [redacted] argues that the following questions are separate inquiries which must be distinguished when considering the scope of [redacted] consent right under s. 2.5(2):[xxxi]

a. Does a particular product satisfy the definition of CBBBP?

b. Have the formal requirements for the introduction of a CBBBP been satisfied, namely the timely delivery of a Product Addendum?

c. Has [redacted] consented under s. 2.5(2) to the particular "characteristics" in respect of which consent is required?

60. Regarding this last point, [redacted] position is that section 2.5(2) provides [redacted] with the right to consent or withhold consent in respect of a limited set of "characteristics" of a proposed [redacted] product. In particular, the [redacted] Mile Earn Rate of a proposed product and "other terms and conditions relating to the awarding of [redacted] Miles". According to [redacted] refusal to consent to the Products at issue as CBBBPs has not been based on these limited characteristics, but is instead grounded in [redacted] desire to prevent [redacted] from accessing the [redacted] Pools.[xxxii]

61. In place of the broad and unfettered interpretation given to s. 2.5(2) by [redacted] submits that the consent provision actually invokes a "proportionality" concept, designed to provide [redacted] with the ability to prevent [redacted] from introducing products on which the number of [redacted] miles offered is "too rich" relative to the applicable Qualifying Activity.[xxxiii]

62. [redacted] submits that if the scope of [redacted] consent under s. 2.5(2) was intended to be as broad and unfettered as [redacted] suggests, then the language of s. 2.5(2) could have been considerably simpler, and there would have been no need to specifically enumerate features and characteristics that require consent. [redacted] argues that s. 2.5(2) could have simply read "the Bank shall not issue a

new type of Co-Branded Product without the prior written consent of [redacted] with respect to the terms and conditions of such Co-Branded Product".[xxxiv]

63. [redacted] further submits that language from other APA provisions, namely the research obligation set out at s. 2.2(3), should not be read into the consent clause at s. 2.5(2). [redacted] argues that if the parties had intended for a product to only qualify as a CBBBP where it is "commercially practicable and mutually beneficial" (the language taken from s. 2.2(3)), then that requirement would have been included as one of the enumerated bases upon which [redacted] could consent or withhold consent under s. 2.5(2). By including such language in s. 2.2(3) and leaving it out from s. 2.5(2), [redacted] asserts that the parties expressly intended that such "vague concepts as subjective views of commercial practicability or mutual benefit" ought to be left out of the scope of [redacted] consent right.[xxxv]

64. In any event, [redacted] argues that all the Products have in fact been commercially practicable **and** beneficial to both parties, though they concede that the Products have perhaps not offered [redacted] as much of a benefit (and in particular, no "stickiness" through ongoing earn) as [redacted] would like.[xxxvi]

65. Apart from these positions based on the language of the APA itself, [redacted] also submits that the limited scope of s. 2.5(2) is supported by looking to the factual matrix surrounding the negotiation of the APA. The key surrounding circumstances highlighted by [redacted] include:

a. [redacted] refusal to provide any form of commitment to launch ongoing-earn Broader Bank Products from its initial RFP Response all the way through to the execution of the final APA, despite [redacted] repeated efforts to secure such a commitment. According to [redacted], since [redacted] failed to secure such a commitment directly, it does not follow that the APA

would provide [redacted] with a consent right to provide it with the means to indirectly force [redacted] to launch ongoing-earn Broader Bank Products.

b. The Products launched thus far have, in large part, been similar to those products identified by [redacted] in Schedule E of its RFP Response as [redacted] "proposed broader bank product and service offering". In other words, it must have been within [redacted] reasonable expectations that [redacted] would intend for the Products to qualify as CBBBPs, because [redacted] made it clear that it intended to launch short-term, promotional products with no ongoing earn. Although [redacted] consistently made its interest in ongoing earn products known, at no point prior to the execution of the APA did [redacted] advise [redacted] that it had no interest in short-term promotional products, or that it would withhold consent to such products under the APA.[xxxvii]

c. The late negotiations leading to s. 6.3(5) (the 414,000,000 miles) and the increased up-front payment and break fee. [redacted] submits that there was a clear *quid pro quo*, in that [redacted] was effectively pre-purchasing the 414,000,000 miles in exchange for the increased up-front payment. [redacted] argues that had the parties intended for the 414,000,000 miles to only be available in respect of ongoing earn products and only when consented to by [redacted] in its broad and unfettered discretion, [redacted] would never have agreed to such a bargain.[xxxviii]

ii. [redacted] Position

66. At its core, [redacted] position is quite simple: any product or promotion that [redacted] wishes to introduce with [redacted] miles attached may only qualify as a CBBBP, and may only therefore access the [redacted] Pools, when:

a. [redacted] satisfies the formal requirements of introducing a CBBBP, namely the timely delivery of a Product Addendum; and

b. [redacted] provides its formal written consent under s. 2.5(2) of the APA.

67. According to [redacted], the scope of its consent right under s. 2.5(2) is complete and unfettered, subject only to the implied duty of good faith. It may consent or withhold consent based on anything having to do with [redacted] Miles.[xxxix]

68. In support of this position, [redacted] breaks down the two operative portions of s. 2.5(2)(ii) as follows:

Operative Language	[redacted] **Interpretation**
[…] the Bank shall not issue a new type of Co-Branded Product without the prior written consent of [redacted] with respect to […] **the proposed [redacted] Mile Earn Rate with respect to Purchases or other ongoing Qualifying Activities** […]	In respect of the Products put forward by [redacted], the "[redacted] Mile Earn Rate" for the ongoing Qualifying Activities that [redacted] seeks is **zero**. As such, [redacted] is entitled to withhold its consent to the Products on this basis: it refuses to consent to a product with an [redacted] Mile Earn Rate of zero on the **ongoing** Qualifying Activities which are of interest to [redacted].[xl]
[…] the Bank shall not issue a new type of Co-Branded Product without the prior written consent of [redacted] with respect to […] **other terms and conditions relating to the awarding of [redacted] Miles applicable to such Co-Branded Product** […]	According to [redacted], this second part of s. 2.5(2)(ii) "could not be any broader". With such language, the parties must have intended for the scope of [redacted] consent right to be broader than the [redacted] Mile Earn Rate referenced in the first part of s. 2.5(2)(ii).[xli]

69. [redacted] relies on two other sections of the APA to support its broad interpretation of the consent provision.

a. First, [redacted] points to the "research" clause at section 2.2(3), which requires the parties to "research and identify opportunities for Broader Bank Products that the Parties mutually agree would be commercially practicable and mutually beneficial to launch as [CBBBPs]". [redacted] argues that this provision is indicative of a concept of

partnership and mutual benefit that pervades the rest of the APA, including s. 2.5(2). As such, it follows for [redacted] that it must have the right to refuse consent under s. 2.5(2) where it is of the view that a proposed product offers "no meaningful benefit to [redacted]".[xlii]

b. Second, [redacted] relies on section 2.2(2) of the APA, which calls for the introduction by [redacted] of "[redacted] linked acquisition incentives" on at least one product within the first 3 months of the Affinity Program. [redacted] submits that this section reveals that the parties contemplated a clear distinction between CBBBPs on the one hand (which require [redacted] consent that would only be forthcoming on ongoing earn products), and "[redacted] linked acquisition incentives" on the other, the latter of which are clearly not CBBBPs. Since the Products put forward thus far have closely resembled the "[redacted] linked acquisition incentives" (insofar as they offer short-term promotional [redacted] miles for sign-up on a [redacted] product), [redacted] argues that the Products are not CBBBPs, but are instead a continuation of the "tests" contemplated by s. 2.2(2).[xliii]

70. [redacted] submits that its proposed interpretation of s. 2.5(2) is also consistent with the surrounding circumstances and factual matrix of the APA's negotiation and execution. Specifically, [redacted] relies on the late negotiations that led to the inclusion of s. 6.3(5) and the pool of 414,000,000 miles. According to [redacted], the drafting changes to s. 6.3(5) between its first introduction to its final form in the APA reveals the following:

a. Originally, s. 6.3(5) contemplated that the 414,000,000 miles would be available in respect of "Broader Bank Products", but the trigger to access those miles required

[redacted] to sign-up 250,000 credit card accounts. From [redacted] perspective, this meant 250,000 **net new** credit card accounts, and on those terms it was prepared to make the 414,000,000 miles available in respect of Broader Bank Products rather than CBBBPs, knowing that [redacted] only had a powerful consent right in respect of the latter.[xliv]

b. The final form of s. 6.3(5), however, saw the trigger reduced from 250,000 to 150,000, and Broader Bank Products replaced with CBBBPs. [redacted] submits that there was a *quid pro quo* in this drafting change. In exchange for a reduced trigger, [redacted] had to be giving something up, and that something was the ability to use the 414,000,000 miles in respect of any and all Broader Bank Products, rather than CBBBPs over which [redacted] held a powerful consent right and which both parties understood were intended to have an ongoing earn component.[xlv]

71. Generally, [redacted] also submits that the interpretation advanced by [redacted] would lead to commercially absurd and unworkable results. [redacted] argues that the "proportionality" concept advanced by [redacted] (and by [redacted] in particular) is too vague and arbitrary to be commercially workable.[xlvi] Moreover, [redacted] submits that on [redacted] interpretation, it would be open to the bank to introduce CBBBPs that would have a significant adverse impact on [redacted]. As one example, [redacted] suggests that [redacted] could introduce a [redacted] proprietary credit card (one that would cannibalize [redacted] credit cards) with an offer of [redacted] Miles upon sign-up, and that [redacted] would be forced to fund such a product from the [redacted] Pools and would have "no ability under the APA to say no, except in respect of the 'number of miles'.[xlvii]

B. Which of the Products in issue are CBBBPs within the meaning of the APA

i. [redacted] Position

72. At the outset of the hearing, [redacted] noted it was not putting in issue any of the Products for which it had failed to deliver a timely Product Addendum. [redacted] (and its relevant witness on this point, [redacted]) take the position that the failure to deliver Product Addenda was a technical oversight on its part. Although it has not put them in issue for the sake of expediency and to focus on the relief it actually seeks in this arbitration, [redacted] maintains, nevertheless, that the early Products for which no Product Addendum was delivered otherwise qualify as CBBBPs.

73. In respect of the Products in issue, [redacted] position is that [redacted] was not entitled to withhold consent under s. 2.5(2), because as noted above, the scope of that consent right is limited and does not include [redacted] desire for long-term, ongoing earn products, nor a requirement that the Products provide any specific level of commercial benefit to [redacted].

74. As such, [redacted] submits that the Products in issue should all be retroactively qualified as CBBBPs, and can therefore be funded from the [redacted] Pools under the APA.

ii. [redacted] Position

75. [redacted] position is quite simple: for all of the Products in issue, [redacted] has not provided its consent under s. 2.5(2) of the APA, and therefore none of the Products in issue are CBBBPs within the meaning of the APA.

76. [redacted] position in this regard flows directly from its proposed interpretation of s. 2.5(2). According to [redacted], it has a gatekeeper power over whether or not a given product earns the classification of CBBBP (and therefore gains access to the [redacted] Pools), separate and apart from whether the parties agree to launch the particular product to the market.

C. Carry-over of the 414,000,000 [redacted] Miles

77. The full text of section 6.3(5) is worth reproducing here:

> **Section 6.3(5)**: If from the Co-Branded Program Launch Date through the end of the first Program Year the Bank originates at least 150,000 new Co-Branded Card Accounts where the Persons opening such accounts did not hold a Pre-Launch [redacted] Co-Branded Card prior to the [redacted] Purchase Date, then [redacted] shall make available 414,000,000 [redacted] Miles, at no cost to the Bank, in each of the second (2nd) through sixth (6th) Program Years which shall be posted to [redacted] Accounts in accordance with Section 2.4 and Section 5.1 at the Bank's instruction in connection with Co-Branded Broader Bank Products made available in accordance with the terms hereof. Any [redacted] Miles made available pursuant to this clause (5) in a Program Year that were not instructed by the Bank to be so posted in a particular Program Year may be carried over for use until the end of the sixth (6th) Program Year. Any of the foregoing [redacted] Miles not instructed by the Bank to be so posted by the end of the sixth Program Year shall no longer be available for posting.

i. [redacted] Position

78. [redacted] submits that the language of s. 6.3(5), which creates the pool of 414,000,000 Miles, speaks for itself: the Miles roll over from Program Year to Program Year, regardless of whether any CBBBP is in existence for a given year.[xlviii]

79. [redacted] further submits there is no evidence of anyone having raised or suggested the "no carry-over" interpretation of s. 6.3(5) throughout the negotiation of the APA. [redacted] points in particular to two internal [redacted] e-mails from the time of the final APA negotiations that led to s. 6.3(5), which arguably show that [redacted] "understood that the miles would roll over".[xlix]

ii. [redacted] Position

80. As noted in the table above, [redacted] position with respect to this issue is that s. 6.3(5) "presumes that there must be at least one [CBBBP] in existence in order for the 414 million miles

to be available for posting".[l] Since [redacted] did not consent to any Products launching as CBBBPs in Program Years 2 and 3 of the APA (2015 and 2016), it follows that the 414,000,000 miles in each of those years were never made available, and therefore there was nothing to roll-over.

81. That said, [redacted] is prepared to concede that the 414,000,000 miles for Program Years 2 and 3 (2015 and 2016) will be permitted to carry-over for use by [redacted] in respect of CBBBPs that receive [redacted] consent under the APA going forward. The only question to be resolved then, is whether the 414,000,000 miles will carry over going forward for a given year even if no CBBBPs are launched with [redacted] consent under s. 2.5(2).

V. APPLICABLE LEGAL PRINCIPLES

82. The parties agree as to the principles of contractual interpretation that apply in this arbitration. These principles were neatly summarized in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205,[li] where the Ontario Court of Appeal stated that agreements should be interpreted:

a. As a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

b. By determining the intention of the parties in accordance with the text of their agreement and based upon the "cardinal presumption" that they have intended what they have written;

c. With regard to objective evidence of the surrounding circumstances or the factual matrix underlying the creation of the agreement, but without reference to the subjective intention of the parties; and

d. In a manner that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

83. It is now well-established that evidence of surrounding circumstances (the factual matrix, including the genesis and business purpose of an agreement) is admissible. Any doubt on that subject was removed by the Supreme Court of Canada's judgment in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.[lii] In relation to the scope of surrounding circumstances evidence, Rothstein J. in *Sattva*, writing for a unanimous court, stated at paras. 57-58 (emphasis added):

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement […]. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract**. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract** […]. While the surrounding circumstances are relied upon in the interpretive process**, courts cannot use them to deviate from the text such that the court effectively creates a new agreement** […]
>
> The nature of **the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract…that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of the contract**. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man".

84. Importantly, as was recently confirmed by Strathy C.J.O. in *Shewchuk v. Blackmont Capital Inc.*,[liii] "evidence of the 'factual matrix' or 'surrounding circumstances' of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive

exercise".[liv] According to Strathy C.J.O., this contrasts with the earlier approach whereby such evidence was only admissible if the contract was found to be ambiguous on its face.

85. As I noted above, the parties also presented considerable evidence in this case that post-dates the execution of the APA. In *Shewchuk,* the Court of Appeal addressed the admissibility and reliability of this type of evidence in the interpretation of a contract. Simply put, Strathy C.J.O. found that evidence of subsequent conduct must be distinguished from evidence of the factual matrix or surrounding circumstances. Evidence of subsequent conduct "should be admitted only if the contract remains ambiguous after considering its text and factual matrix".[lv]

86. Strathy C.J.O. noted that this guarded approach to subsequent conduct evidence is rooted in the inherent potential of such evidence to "undermine certainty in contractual interpretation and override the meaning of a contract's written language".[lvi] In particular, Strathy C.J.O. identified three "dangers" that arise when dealing with evidence of subsequent conduct:

a. First, "the parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time".[lvii]

b. Second, evidence of subsequent conduct may itself be ambiguous, and therefore of little assistance in helping to resolve an ambiguity.[lviii]

c. Third, "over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract".[lix]

87. Even where a contract is found to be ambiguous and subsequent conduct evidence is admissible to help resolve that ambiguity, the Court of Appeal held that such evidence is "relevant only to inferentially establishing [the parties'] intentions at the time they executed their contract. […]it is a kind of circumstantial evidence that 'invokes a retrospectant chain of reasoning'".[lx]

VI. ANALYSIS AND REASONS

A. [redacted] Consent Right over CBBBPs under Section 2.5(2) of the APA

88. The interpretation of section 2.5(2) of the APA is at the heart of this dispute. In my view, the consent power to be exercised by [redacted] is clearly set out in that section and is constrained to two essential components, the first of which is not in issue. The relevant, operative excerpt of section 2.5(2) reads as follows (emphasis mine):

> […] the Bank shall not issue a new type of Co-Branded Product without the prior written consent of [redacted] with respect to the following characteristics of such Co-Branded Product: […] (ii) […] **the proposed [redacted] Mile Earn Rate with respect to Purchases or other ongoing Qualifying Activities and/or other terms and conditions relating to the awarding of [redacted] Miles applicable to such Co-Branded Product** […]

89. With the above legal principles in mind, I turn to the interpretation of section 2.5(2).

i. No support for [redacted] proposed "unfettered" interpretation of s. 2.5(2)

90. I do not accept [redacted] argument that section 2.5(2) provides for a broad and unfettered consent right concerning everything to do with [redacted] Miles. To my mind if the parties had intended for [redacted] to have such a broad and unfettered consent right they could have easily so stated, and they did not.

91. Instead, the plain language of section 2.5(2) contemplates that [redacted] consent shall only be necessary with respect to specifically enumerated characteristics. While these characteristics are open to interpretation (though as discussed below, I do not believe their drafting gives rise any true ambiguity), there is no interpretation of the plain language or objective surrounding circumstances to support the "unfettered" position advanced by [redacted].

ii. No reason to import meaning from s. 2.2(3) into the consent right at s. 2.5(2)

92. Throughout this arbitration, [redacted] has emphasized that it has always sought a true partnership – in the words of [redacted], "one that would involve mutual consultation and decision-making with respect to existing co-branded products and in the development of new co-branded products".[lxi] The evidence also confirms that [redacted] understood [redacted] desire in this regard, and sought to be [redacted] "true partner".

93. That said, I do not accept [redacted] argument that meaning from the "research" provision set out at section 2.2(3) of the APA should be imported into section 2.5(2). In particular, I see no reason to conclude that [redacted] consent right should include the ability to consider whether a proposed product is "commercially practicable" or "mutually beneficial".

94. It simply does not follow that since the parties both intended for the APA to reflect a true, mutually beneficial "partnership", [redacted] specific consent right over proposed Co-Branded Products must therefore include the ability to consent or withhold consent on the basis of its own assessment of mutual benefit or commercial practicability. On the contrary, since the language of mutual benefit and commercial practicability was expressly used by the parties in section 2.2(3), and was not used in section 2.5(2), I must conclude that the parties intended to omit such language from the scope of consent characteristics available to [redacted].

95. Accordingly there is no need to read into section 2.5(2) the research provisions of section 2.2(3). To accept [redacted] position would be to read into s. 2.5(2) wording that would give [redacted] the power to withhold consent to the issuance of any new Co-Branded Product unless it met its requirement that such a product was "commercially practicable and mutually beneficial".

96. I should also note I agree with [redacted] that there has indeed been mutual benefit in the Products [redacted] has offered to date, as confirmed by the evidence of [redacted]. Though the Products have not provided the full scope of benefits desired by [redacted] (namely the "stickiness" that is a hallmark of ongoing-earn products), [redacted] has nevertheless been content to allow the Products to go to market and to invoice [redacted] at the APA's stipulated rate of $0.014 per Mile, something that [redacted] would surely not have done if the Products entirely lacked commercial practicability or mutual benefit.

iii. CBBBPs can include short-term, promotional products with no ongoing-earn

97. [redacted] takes the position that the contractual definition of CBBBP is inextricably linked with its consent right under s. 2.5(2): put simply, a product proposed by [redacted] may not be a CBBBP unless [redacted] consents to that product being a CBBBP under s. 2.5(2).

98. I disagree. In my view, the question of whether a particular product satisfies the **definition** of CBBBP in the APA is a discrete inquiry from whether [redacted] has provided its consent under s. 2.5(2) (and whether that consent was provided or withheld on grounds that are within the scope of s. 2.5(2)). I do not accept [redacted] position that section 2.5(2) effectively provides it with a gatekeeper power to determine whether or not one of [redacted] proposed products may "qualify" as a CBBBP.

99. That said, these two issues are obviously interrelated to some extent: if a proposed product does not meet the contractual definition of CBBBP, then the question of [redacted] consent does not even arise, and [redacted] certainly cannot purport to access the [redacted] Pools in respect of that proposed product. Clarifying the appropriate scope of CBBBPs is therefore part and parcel of the interpretation of s. 2.5(2).

100. As I look carefully at the definition of CBBBP (and other relevant APA definitions and provisions) I see nothing which would preclude short-term, promotional products with no ongoing earn from qualifying as a CBBBP.

101. I agree with [redacted] that the only difference between "Co-Branded Broader Bank Products" and "Broader Bank Products" is the attachment of [redacted] Miles to the former. Clearly CBBBPs speak to the offering of [redacted] Miles on Broader Bank Products "in connection with the **sign-up, opening,** holding or use thereof by customers of the Bank…" (emphasis mine). Such plain language unequivocally includes "promotional" products that offer [redacted] Miles as an acquisition bonus to [redacted] customers.

102. [redacted] position on this issue is based primarily on the evidence surrounding the late negotiations that led to section 6.3(5) of the APA and the 414,000,000 pool of Miles. As I have written, the issue of a Break Fee arose when [redacted] board decided to negotiate solely with [redacted]. Both parties well knew that [redacted] had the right to match any deal entered into between [redacted] and [redacted]. How then could [redacted] be compensated for the time and expense incurred should [redacted] decide to match?

103. I have already described the solution and the circumstances leading to the final wording of section 6.3(5). The final form of s. 6.3(5), as noted, reduced the trigger from 250,000 to 150,000

and the term Broader Bank Products was replaced with CBBBPs. [redacted] argues that in exchange for the reduced trigger [redacted] had to give up its ability to use the 414,000,000 miles in respect of any Broader Bank Product rather than CBBBPs, over which [redacted] believed it had significant consent rights.

104. I do not accept this characterization. I prefer the interpretation put forward by [redacted] that the *quid pro quo* was [redacted] pre-purchase of the 414,000,000 miles by paying the increased up-front fee. I accept [redacted] position that the results of these negotiations and s. 6.3(5) as a whole was intended to be an economically neutral solution for the parties (and [redacted] in particular), and that if the 414,000,000 miles were only to be awardable for ongoing-earn products consented to by [redacted] [redacted] would never have agreed.

105. The suggestion that the ability to use the 414 million miles for promotional products was somehow removed when the trigger threshold was lowered to 150,000 net new accounts is not supported by the evidence. In my view, when one looks at the objective evidence surrounding the s. 6.3(5) negotiations, and the plain language of the APA (namely the definitions of Broader Bank Products and CBBBPs), the reasonable conclusion is that Broader Bank Products was replaced with CBBBPs because the clause would have not made any sense had the replacement not been made: by definition, a Broder Bank Product to which [redacted] Miles are attached is a CBBBP.

106. There does not seem to be any doubt that when the parties were initially discussing 250,000 new accounts as the threshold [redacted] would have had the right to access the 414,000,000 miles for promotional products with no ongoing-earn. In my view, the drafting changes that occurred with respect to s. 6.3(5) did nothing to alter [redacted] ability to access the 414,000,000 miles. Perhaps, in the subjective minds of those at [redacted] involved in this exercise, this drafting change gave them

what they had always wanted – an effective [redacted] commitment to launch ongoing-earn products, something they did not get in the APA – but this was never communicated to [redacted], and any such subjective beliefs are irrelevant in the context of this contractual interpretation.

107. There can be no doubt that throughout the negotiations leading to the APA, [redacted] repeatedly sought a commitment from [redacted] that it would launch ongoing-earn products. I understand that. Equally, however, [redacted] was adamant that it would not make such a commitment and none is contained in the APA. I agree with [redacted] that if I were to accept [redacted] position regarding its consent right it would be tantamount to giving [redacted] something it did not receive in the APA.

108. Moreover, what [redacted] has launched to date is entirely consistent with what the bank proposed in its Response to the RFP. [redacted] made it abundantly clear that it intended to launch short-term, promotional "Broader Bank" products with no ongoing-earn. And, as [redacted] has argued, at no time did [redacted] indicate it was not interested in such products or that it would withhold its consent to such products being launched or refuse to consider such products as satisfying the definition of CBBBP.

iv. Products with [redacted] linked acquisition incentives are not necessarily distinct from CBBBPs

109. In examining the possible scope of CBBBPs, I would also briefly address [redacted] argument that CBBBPs were intended by the parties to be distinct from the "test" products attached to "[redacted]-linked acquisition incentives" described in s. 2.2(2) of the APA. [redacted] relies on this purported distinction to argue that the Products in issue all resemble the January and February Banking Offers (short-term, promotional products that were accepted as satisfying the requirements of s. 2.2(2)), and that the Products are therefore "tests" and not CBBBPs.

110. I am not persuaded by this argument. There is nothing in the plain language or surrounding circumstances of the APA that would preclude a product tied to an "[redacted] linked acquisition incentive" from also qualifying as a CBBBP. In fact, the APA expressly links these two concepts. Section 2.2(2) provides that [redacted] "shall make available [redacted] linked acquisition incentives on one or more non-Credit Card products of the Bank or its Canadian-domiciled Affiliates, which specific products are to be determined in accordance with the terms of this Agreement **and a Product Addendum with respect thereto…"** (emphasis mine).

111. The strict language of the APA therefore required that the products intended to satisfy the requirement of s. 2.2(2) ought to have been launched with a Product Addendum. The evidence of both parties was clear that no Product Addendum was delivered in respect of the January and February Banking Offers, but that [redacted] nevertheless accepted these Products as satisfying [redacted] requirement under s. 2.2(2).

112. [redacted] flexibility on this point notwithstanding, it must be noted that pursuant to the unequivocal language of the APA, a Product Addendum will only exist to describe the features, terms and conditions of a particular type of Co-Branded Product. By requiring a Product Addendum in respect of the s. 2.2(2) non-credit card products, the parties clearly intended that such products attached to [redacted] linked acquisition incentives would also be CBBBPs.

113. Accordingly, there is no reason to conclude that any product which resembles the s. 2.2(2) products attached to [redacted] linked acquisition incentives is not a CBBBP.

v. The scope of [redacted] s. 2.5(2) consent right is clear and unambiguous

114. Keeping in mind the parties' need for direction and guidance, I now turn back to the language of s. 2.5(2) in order to more thoroughly set out what is within the scope of [redacted] consent right.

115. First, however, I pause to note that throughout my interpretation of the APA and s. 2.5(2) in particular, I have given no weight to the considerable post-contractual evidence submitted by both parties in this arbitration. In my view, having regard to the principles described by Strathy C.J.O. in *Shewchuk,* there is no ambiguity in the APA to justify looking beyond the contract's plain language and the factual matrix surrounding its execution. In particular, I have not found it necessary to rely on any of the post-contractual evidence in order to infer the parties' objective intentions at the time of the APA's execution – those objective intentions are indeed manifest on the plain language of the APA and the well-established evidentiary record that forms the factual matrix.

116. I turn then to the first half of the operative subsection (ii) of s. 2.5(2): [redacted] shall not issue a new Co-Branded Product without [redacted] consent with respect to "the proposed [redacted] Mile Earn Rate with respect to Purchases or other ongoing Qualifying Activities […] applicable to such Co-Branded Product".

117. The APA term "Purchases" relates solely to credit card products, and so is not relevant in the context of CBBBPs. This leaves "the proposed [redacted] Mile Earn Rate with respect to … other ongoing Qualifying Activities … applicable to such Co-Branded Product".

118. According to [redacted], the Products at issue all have an [redacted] Mile Earn Rate on **ongoing** qualifying activities of **zero**, and consent under s. 2.5(2) can be withheld on this basis. I do not

agree. The words “applicable to such Co-Branded Product” are important here and must be given meaning.

119. When [redacted] proposes a product, it does not propose an [redacted] Mile Earn Rate for every possible Qualifying Activity; it only proposes an [redacted] Mile Earn Rate on those Qualifying Activities that are **applicable to the proposed Co-Branded Product.** This is consistent with the form of Product Addendum set out in the APA, and with section 2.5(1)(a), which requires [redacted] to specify, when introducing a new Co-Branded Product, the “[redacted] Mile Earn Rate for such Co-Branded Product**, as applicable”** (emphasis mine).

120. In other words, for a particular product with no ongoing earn component, the [redacted] Mile Earn Rate on ongoing Qualifying Activities is not zero, it is simply not applicable, and there is nothing to which [redacted] may consent or withhold consent on that basis.

121. If, on the other hand, [redacted] were to propose a CBBBP with an [redacted] Mile Earn Rate applicable to an ongoing Qualifying Activity – for example, a chequing account that offered [redacted] Miles for recurring bill payments – such a product could not be issued without [redacted] consent to that specific ongoing [redacted] Mile Earn Rate.

122. The second half of the operative subsection (ii) of s. 2.5(2) is admittedly less clear, but it is nevertheless unambiguous in my view: [redacted] shall not issue a new Co-Branded Product without [redacted] consent to the “other terms and conditions relating to the awarding of [redacted] Miles applicable to such Co-Branded Product”.

123. According to [redacted], this is the source of their unfettered consent power over all products that have [redacted] Miles attached. For reasons described above, I do not accept that this clause can be interpreted as broadly as [redacted] suggests.

124. That said, this clause must be given some meaning: it must alter the scope of [redacted] consent right under s. 2.5(2) to be something different than merely relating to the [redacted] Mile Earn Rate on ongoing Qualifying Activities. Importantly, however, this clause cannot extend that which was expressly narrowed in the first clause: "other terms and conditions relating to the awarding of [redacted] Miles" cannot be taken to remove the "ongoing" qualifier and extend [redacted] consent right to the [redacted] Mile Earn Rate on **non-ongoing Qualifying Activities**.

125. [redacted] takes the position that this clause, and s. 2.5(2) as a whole, provides [redacted] with the right to essentially consider the "proportionality" of a proposed product: are the [redacted] Miles on offer proportional to the proposed Qualifying Activity? In this manner, [redacted] argues that [redacted] would be able to withhold consent, for example, to a proposed chequing account that offers 10 million [redacted] Miles for signing up.

126. In my view, while s. 2.5(2) undoubtedly has a proportionality aspect to it, I believe more can be said, and [redacted] consent right is broader than [redacted] would suggest.

127. The two parts of s. 2.5(2)(ii) must be read together. The "**other** terms and conditions relating to the awarding of [redacted] Miles" is an extension, explicitly, of the [redacted] Mile Earn Rate on ongoing Qualifying Activities. Though the drafting leaves something to be desired, I find that the clause unambiguously grants [redacted] the right to consent or withhold consent over those proposed terms and conditions of a CBBBP relating to the **awarding of [redacted] Miles,** one

example of which is the [redacted] Mile Earn Rate on ongoing Qualifying Activities, and one **counter-example** of which is the [redacted] Mile Earn Rate on **non-ongoing** Qualifying Activities.

128. Importantly, the second half of s. 2.5(2)(ii) is not triggered – and no consent is required – in circumstances where [redacted] does not propose to **award** [redacted] **Miles**.

129. For example, if [redacted] proposes a product with a lifespan of three months, but proposes that [redacted] Miles are to be awarded to customers who sign-up for that product only in the first two months, then [redacted] would be entitled to consent or withhold consent to the time-limited term of the awarding of those [redacted] Miles. Conversely, [redacted] consent would not be required in respect of the lifespan of the product itself; for example, if [redacted] proposes a product with a lifespan of only 3 months and offers [redacted] Miles on sign-up, but no other terms and conditions are attached to the awarding of those Miles, then [redacted] consent would not be required under s. 2.5(2).

130. Based on my interpretation of s. 2.5(2), I should also clarify that [redacted] consent right does not include the right to consider the degree of commercial benefit it can expect from a given product. Similarly, I find no basis upon which [redacted] may distinguish between products aimed at business customers as opposed to individual customers when exercising its consent under s. 2.5(2).

B. Products in issue that qualify as CBBBPs and have access to the [redacted] Pools

131. I accept that [redacted] is not motivated, in this arbitration and throughout its dealings under the APA, to prevent [redacted] from accessing the [redacted] Pools. Rather I accept that [redacted] real motivation is to incentivize (and even compel) [redacted] to launch CBBBPs with an ongoing-earn component, in order to generate the "stickiness" that is so important to [redacted] business.

132. That said, regardless of [redacted] motivations, the practical effect of the parties' disagreement as to the interpretation of s. 2.5(2) – and the issue that must be resolved – is that the Products in issue have been denied access to the [redacted] Pools.

133. As I noted above, there are 4 Products in issue. The 2015 [redacted] (Bundles) was put in issue by [redacted], and no Product Addendum was delivered for this Product. In respect of the [redacted] l (Bundles), the [redacted], and the [redacted] (collectively, the "[redacted] in Issue") campaigns, Product Addenda were delivered by [redacted].

134. For the reasons set out above, I have concluded that each of these Products satisfies the definition of a CBBBP within the meaning of the APA. Furthermore, based on my interpretation of the APA, I find that [redacted] exceeded the appropriate scope of its right under s. 2.5(2) when it purported to refuse its consent to the issuance of the [redacted] Products in Issue.

135. In my view, however, [redacted] was correct to only put in issue those Products for which it had delivered a Product Addendum. I accept [redacted] evidence that the failure to deliver Product Addenda on early Products (such as the [redacted]) was a technical oversight, and note that this evidence is consistent with [redacted] submissions, which effectively acknowledge the importance of this "formal requirement" going forward under the APA.[lxii]

136. The parties both seek guidance, direction, and consistency in terms of their relationship under the APA and the treatment of future proposed CBBBPs. To that end, I must emphasize that access to the [redacted] Pools going forward is contingent not just on the appropriate exercise of [redacted] consent under s. 2.5(2), but also on compliance with the other formal requirements of s. 2.5 of the APA, including the timely delivery of a detailed Product Addendum.

137. In the absence of a Product Addendum, and despite whatever other communications may be taking place between the parties, [redacted] is left without the specific, detailed information it needs in order to appropriately exercise its consent right under s. 2.5(2). As such, I find that while the [redacted] meets the contract definition of a CBBBP, it was not introduced by [redacted] in keeping with the requirements of s. 2.5 of the APA, and therefore it does not qualify as a CBBBP for the purpose of accessing the [redacted] Pools.

138. As CBBBPs to which [redacted] was not entitled to withhold consent under s. 2.5(2), the [redacted] Products in Issue qualify for access to the [redacted] Pools. In each case where it has paid for and [redacted] has issued [redacted] Miles in order to launch its product, [redacted] will need to be reimbursed given that it was entitled to draw upon the [redacted] Pools. Conversely, I accept [redacted] argument that [redacted] must pay its invoice for those Miles posted in connection with the [redacted]. As a result, there will obviously have to be a financial reconciliation between the parties.

139. In my view, insufficient evidence (let alone argument) was put forward by the parties in order for me to perform this financial reconciliation. I would encourage the parties – as one of the first steps in their ongoing, collaborative partnership under the APA – to come to an agreement as to the financial reconciliation that must take place in light of my findings. Should the parties find themselves unable to agree, I will remain seized of the issue and will accept further submissions.

C. **Roll-over of the s. 6.3(5) 414,000,000 [redacted] Miles**

140. Based on the plain language of section 6.3(5), I accept [redacted] position that the 414,000,000 [redacted] Miles were intended by the parties to carry over from year to year, even if no CBBBP is in existence for a given year.

141. Because of my conclusions regarding the appropriate scope of s. 2.5(2), this issue is likely to be moot since [redacted] will, in all likelihood, be able to introduce CBBBPs in the coming Program Years, and [redacted] has already conceded that it will permit the roll-over of the 414,000,000 Miles from Program Years 2 and 3.

142. I would therefore only say the following in respect of my interpretation of s. 6.3(5). Once the trigger is satisfied (over which there is no dispute), s. 6.3(5) provides that [redacted] "shall **make available** 414,000,000 [redacted] Miles…in each of the second through sixth Program Years" (emphasis mine).

143. These Miles, having been **made available** by [redacted] in each Program Year, shall then be **posted** by [redacted] to [redacted] customer accounts at [redacted] instruction in connection with CBBBPs. Pausing here, I accept that if there is no CBBBP in existence in a given year, there is nothing in relation to which these Miles can be instructed by [redacted] to be posted.

144. However, the **posting** of these Miles is distinct from the **making available** of these miles, and the roll-over aspect of s. 6.3(5) is based on the latter, not the former: "Any [redacted] Miles **made available pursuant to this clause […] that were not instructed by the Bank to be so posted […] may be carried over for use".** Simply put, the [redacted] Miles are **made available** in Program Years 2 to 6, regardless of whether there are any CBBBPs in relation to which those Miles may be posted to [redacted] customers. The Miles made available will carry over if they were not instructed by [redacted] to be **posted**, and there is no qualification as to the reason(s) why [redacted] would opt to not instruct [redacted] to post those Miles. As such, I conclude that the non-existence of a CBBBP in a given Program Year is a perfectly valid reason for which [redacted] may not instruct [redacted] to post

the Miles that have been made available, and those Miles nevertheless carry over to the ensuing Program Year(s).

VII. CONCLUSION

145. As I stated at the beginning of this Award, the parties to this arbitration seek guidance and direction as to how they can continue their important business relationship. I am hopeful that the reasons I have set out above will serve to provide this guidance and direction.

146. By way of conclusion, however, I will also provide my answers to the nine specific questions put to me by the parties, which follow from the reasons set out above:

a. When introducing a new type of Co-Branded Broader Bank Product:

(i) Are there items, other that the enumerated items in s. 2.5(2) of the APA that require [redacted] consent?

The clear answer is no. The only features and characteristics are those set out in s. 2.5(2), as interpreted in my reasons above. The section does not give [redacted] the right to consider whether the awarding of [redacted] Miles is of commercial benefit to [redacted], nor whether the proposed product provides any opportunity to award Miles on an ongoing basis, and to consent or withhold consent on these bases.

(ii) Are the factors listed in s. 2.2(3) of the APA applicable after the 18-month period referred to in that section?

The answer is no. I do not agree with [redacted] that s. 2.2(3) contemplates that the parties intended for CBBBPs to be commercially practicable and mutually beneficial. Whatever s. 2.2(3) states, it is not to be read into s. 2.5(2) to give that section increased meaning. The section is clear that for 18 months following the Program Launch Date, [redacted] was to cooperate with [redacted] to research and identify commercially practicable and mutually beneficial Broader Bank Products. After the 18-month period the section is no longer applicable. This was the best [redacted] could get in its efforts to have [redacted] commit to such programs.

That being said, despite the absence of a clear contractual obligation to do so, I note with optimism that [redacted] submissions and evidence suggest a continued willingness on its part to develop long-term, ongoing earn CBBBPs.[lxiii]

b. Is there a minimum duration during which [redacted] Broader Bank Products must be offered in order to qualify as a CBBBP?

The simple answer is no for reasons already expressed. [redacted] is not entitled to consent or withhold consent on the basis of the duration of the proposed product, subject to the caveat that [redacted] consent may be required in respect of the proposed awarding of Miles on a time-limited basis (separate and distinct from the proposed lifespan of the product itself, as discussed above). There is no minimum duration during which Broader Bank Products must be offered in order to qualify as CBBBPs.

c. Can a promotional Broader Bank Product qualify as a CBBBP?

The answer is yes for reasons already expressed. I recognize what [redacted] wanted but my role is contract interpretation and I agree with [redacted] that the only interpretation that avoids commercial absurdity is to recognize that CBBBPs were objectively intended to include both "promotional" and ongoing-earn products.

d. Is there a requirement that CBBBPs provide commercial benefits to both parties that outweigh the financial costs associated with them?

There is no such requirement. In any event, nowhere in the evidence do I see even a hint of one party's motivation to impose unilaterally on the other party a CBBBP that offers no commercial benefit to the other. Indeed, while perhaps not possessing the "stickiness" [redacted] seeks, each of the Products thus far introduced is commercially beneficial to both parties. This is acknowledged by [redacted] in the evidence of [redacted], whose evidence in this regard is consistent with that of [redacted]. There can be little doubt that, as [redacted] notes, one-off acquisition focused promotions do not provide [redacted] everything it desires, but they clearly do incentivize and create new [redacted] relationships, growing the [redacted] member base and increasing brand awareness.

e. In what circumstances is [redacted] entitled to have Miles issued at no additional cost pursuant to s. 6.3(5) of the APA?

[redacted] is entitled to have Miles issued at no additional cost pursuant to s. 6.3(5) as long as the products (i) meet the definition of CBBBPs, (ii) satisfy the formal requirements set out in the APA, namely the timely delivery of a Product Addendum, and (iii) in respect of which [redacted] does not object to the specific characteristics enumerated in s. 2.5(2) of the APA. As I have already stated, the [redacted] Products in Issue qualify as CBBBPs and are entitled to access the Miles made available under s. 6.3(5) of the APA.

f. Are the products associated with the 2016 Bundles and 2017 Products, identified in the Product Addendums attached as Schedule B to [redacted] Amended Amended Notice of Arbitration, CBBBPs for which [redacted] is entitled to have miles issued at no additional cost, pursuant to sections 6.3(1)(f) and 6.3(5) of the APA?

For reasons already expressed, these Products are CBBBPs for which [redacted] is entitled to have Miles issued pursuant to ss. 6.3(1)(f) and 6.3(5) of the APA.

g. Are the Products associated with the [redacted] campaign CBBBPs under the APA?

For reasons already expressed, the product known as the [redacted] meets the APA's definition of CBBBP, but since [redacted] did not deliver a Product Addendum in respect of the product, I have found that it is not entitled to access the [redacted] Pools.

h. Do the 414,000,000 miles available under s. 6.3(5) of the APA for each of the second through sixth Program Years carry over year-over-year (until the end of the sixth

Program Year) if no CBBBP is in existence for which the Miles may be instructed to be posted?

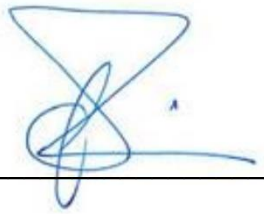
Yes. For reasons expressed above, these Miles carry over year-over-year until the end of the sixth Program Year whether or not a CBBBP is in existence for a given Program Year.

VIII. COSTS

147. I would encourage the parties to agree on the matter of costs. If the parties are unable to agree, I would accept written costs submissions of no more than 10 pages and a costs outline from each party. I would then accept responding costs submissions of no more than 5 pages.

In closing, I would like to thank counsel for the professional and efficient manner in which they have conducted this arbitration.

Dated at Toronto, this 28th day of June, 2017



THE HONOURABLE J. DOUGLAS CUNNINGHAM, Q.C.
ARBITRATOR

Schedule ‘A’ – References

[redacted]