**Witness Statement of Sir Stelios Haji-Ioannou**
**16 March 2010**
**Filed on behalf of the Claimant**
**Exhibits: "SHI-1" to "SHI-34"**

**CLAIM NO. HC 08 C02329**

**IN THE HIGH COURT OF JUSTICE**

**CHANCERY DIVISION**

**BETWEEN:**

**EASYGROUP IP LICENSING LIMITED**

Claimant

**- and -**

**EASYJET AIRLINE COMPANY LIMITED**

Defendant

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# WITNESS STATEMENT OF SIR STELIOS HAJI-IOANNOU

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**Contents**

I, **SIR STELIOS HAJI-IOANNOU**, of 10 Sydney Place, London, SW7 3NL WILL SAY as follows:

## I Introduction

1. I am the Chairman of the Claimant ("easyGroup"), which owns and manages the portfolio of "easy" brands. easyGroup and I in my personal capacity are parties to the easyJet Brand Licence dated 5 November 2000, along with easyJet plc and easyGroup (UK) Limited ("the Brand Licence"). I am authorised by easyGroup to make this statement. I was born in Greece and am a resident of Monaco. I have a degree in economics from the London School of Economics and an MSc in Shipping, Trade and Finance from Cass Business School. In 2006 I received a knighthood for services to entrepreneurship. In this statement I refer to easyJet plc and the Defendant in this action, which is its operating company, as "easyJet" collectively.

2. This case concerns the interpretation of Brand Licence, in particular specific provisions which were intended to apply restrictions to the extent of use of the brand permitted under the Licence. The main issue involves distinguishing between what is core and what is ancillary and conducive. I explain in this statement the launch of easyJet and the distinctive business model under which it operated. I also set out how I came to develop further the "easy" brand as an umbrella brand to apply to other businesses, in order to explain why it was then necessary to ensure in the Brand Licence that competition between the respective "easy" companies was controlled when easyJet partially floated on the London Stock Exchange.

3. Below is a screen shot from the current easyJet website which shows some of the various activities which are in dispute in this case (this screen shot is also at Exhibit "SHI-1"):


## II The easyJet model

4. In 1995 I launched easyJet, with the vision of creating a low-cost, no frills airline, inspired by the success of Southwest Airlines, a US based airline which was one of the first (if not the first) airline to adopt a low-cost strategy. easyJet Airline Company Limited was incorporated on 17 March 1995. The company started with no planes of its

own and no air operator's certificate. It leased aircraft from another company and branded them easyJet. The first routes were from Luton airport to Edinburgh and Glasgow airports in November 1995. Later in 1996 the company started its first international flights.

5. easyJet's innovative business model to reduce cost and increase efficiency was essentially as follows:

- only fly point-to-point (avoiding the complications and inefficiencies inherent in passenger transfers or "connections" which are routine in the traditional "hub and spoke" airline model) on carefully selected short haul routes;
- cut out the frills that other airlines bundled into the price of tickets (and either not offer that service at all or charge a separate price to passengers who wanted to pay for the service);
- eliminate business class and maximise the seats per aircraft;
- maximise the occupancy (known in the industry as "the load factor") of every flight using more aggressive "yield management" techniques for pricing whereby you attract the marginal passenger to fill the empty seat at a very low fare;
- cut out the middleman by selling direct to the consumer (initially only by phone and later by the internet);
- each aircraft flew more kilometres per day than the equivalent aircraft in a "hub and spoke" airline. This was mainly achieved by speeding up the turnaround time for an aircraft on the ground by getting passengers to help clear rubbish and by getting passengers to the gate and onto the plane quickly by having no assigned seating. What I refer to as "to sweat the assets".

***a) Cutting out the frills***

6. Before I launched easyJet, competition between airlines in Europe was based more on what additional extras one could offer over the other (such as a cooked breakfast on a

morning flight) than on ticket price. I decided that easyJet would compete by offering a good core service but without the extras normally included in the ticket price. In this regard, I took it further than the Southwest Airlines model which had been my inspiration, and offered no free refreshments on board (other than tap water on request). Southwest was nicknamed the "peanuts airline", as although as part of its low-cost model it did not provide free meals, it still provided many beverages and packets of peanuts for free.

7. It is necessary for safety reasons to have flight attendants on board the aircrafts. Also, although with short flights some passengers may be happy to have no refreshments, or may bring their own, some would also wish to be able to purchase some refreshments. Therefore I decided to offer basic refreshments on board and charge a reasonable price for them. We offered a commission to the cabin crew for selling these refreshments which was seen as supplementing their basic pay.

***b) Types of ancillary revenue***

8. There are basically two categories of ancillary revenue, which was apparent from the early days of easyJet and still apply today (although significantly more goods and services are now offered under both categories):

- Aircraft-related ancillaries, such as food and beverages from the trolley and baggage charges and
- Journey-related ancillaries, such as car hire at the destination airport.

9. This way of dividing ancillary revenue into different categories is common in the industry. By way of example, I exhibit at "SHI-2" the latest report on ancillary revenue by IdeaWorks dated 2009 entitled "The Guide to Ancillary Revenue and a la Carte Pricing". IdeaWorks is a consultancy who work for a number of airlines and other companies (as listed on the penultimate page of the guide). IdeaWorks use a definition of ancillary revenue as:

> "*revenue beyond the sale of tickets that is generated by direct sales to passengers, or indirectly as part of the travel experience*" (see page 15).

10. They then go on to break this down into 3 categories: à la carte features (which equates to aircraft related ancillaries); commission based products (which largely correlates to journey related activities); and frequent flier programs (which I do not deal with as easyJet is currently not engaged in a frequent flier program).

11. In the early days of easyJet, prior to the initial public offering ("IPO") in 2000 the ancillaries offered were limited. The aircraft-related ancillary revenue came from sales from the limited trolley and charges for excess weight baggage. The journey-related ancillaries amounted to payments resulting from click-throughs on the website to car rental companies and train and bus providers serving Luton airport. Below, and at Exhibit "SHI-3", I show a screen shot from the web archive, showing the travel services section of easyJet's website from around November 2000.

### *c) Dangers of going too far*

12. Although it may be attractive to management of low-cost airlines to unbundle the services offered to passengers further (to create more aircraft-related ancillary revenue), or to offer more and more journey-related ancillaries (whether they are supplied by the airline itself or by a third party), there is a risk of going too far and alienating customers.

13. If a potential passenger is bombarded with offers for products and services they are not interested in when trying to book a ticket, they may give up or be reluctant to go through the process the next time. Similarly, in relation to aircraft related ancillaries, customers would be alienated if, for example, they were charged for the use of toilet facilities. The free provision of toilet facilities has always been provided by airlines operating larger jets. Although an ancillary service, it would not be viewed as reasonable to charge for this by customers. A passenger can bring his own sandwiches on board, but can not choose an alternative toilet midflight. The notion of charging for the use of a toilet on board a flight has been suggested by Ryanair, who proposed to do exactly that. I exhibit at "SHI-4" press articles showing Ryanair's proposal to charge for the use of its toilets. In my opinion, however, it is one of those ancillary services that it would be unacceptable to charge for.

## III Expanding the "easy" brand

14. I soon realised that the easyJet model was something which the public appreciated and I was pleased with how well the brand had been received. It appeared to me that the "easy" prefix was well placed to be used in relation to different areas, where the brand values of easyJet could be replicated. I also appreciated at an early stage that the "easy" brand was ideally suited to licensing and that future "easy" businesses did not need to involve the large capital expenditure in fixed assets that easyJet had required.

15. The upside of starting with an airline from which to build the brand is that they can be great brand builders, achieving much quicker and wider recognition than new ventures in most other industries. I believe it is something to do with defying gravity and taking people to exciting places. De facto you have to trust an airline with your life and hence you are more likely to remember its name. This is how small rich nation states create a global profile that is disproportionate to their size or position on the world stage by investing in their flag carrier airline, for example the brand recognition built by Singapore Airlines and Qatar Airways is disproportionate to their countries' size or global influence.

16. The downside of attempting to build a brand using an airline is that airlines can attract bad publicity. They are frequently unprofitable and prone to bankruptcy which becomes very high profile because the customers are left literally stranded in far flung places with no means of getting home. Airlines can attract negative publicity relating to their services (delays or cancellations often caused by factors beyond their control such as bad weather, personnel strikes even by third parties such as air traffic controllers, lost luggage and on rare occasions accidents) and can even be tarnished by the corruption scandals, or allegations, which occur from time to time, primarily in relation to the military side of the aerospace industry. In relation to this latter point, there have been widespread reports of companies such as BAE (who supply military equipment including aircraft and used to be part of the Airbus consortium) having been involved in unacceptable sales practices. I exhibit at "SHI-5" newspaper articles relating to this. The military and civilian aerospace industries are closely related (in some cases are part of the same group) and personnel move between the different sides. Allegations have been made that these types of unsavoury activities also take place in the civilian market. I attach as exhibit "SHI-6" a report from 2003 in the Economist relating to the criminal investigation arising from the bankruptcy of Sabena. Sabena was the classic case in my view of an airline that grew its fleet of aircraft beyond the scope of its original home market (Belgium) and went bust in a spectacular way.

17. I was keen to capitalise on the upside of having an airline to build the "easy" brand profile, but was conscious of the potential downsides which I took into account when I later floated part of the airline. I did not really fully appreciate at the time of the IPO

quite how strong the forces on airlines to expand and diversify might be, but it was clear to me that airlines were subject to such forces and that there would need to be terms in the Brand Licence to counter them. At the time of IPO I would have been happy to see the newly independent easyJet get to about 3-4 times its then current fleet which would have put it at par in terms of fleet with the flag carrier of a medium size European nation. I wanted a company that under professional managements would stay solidly profitable rather than risk overexpansion. I did not imagine that the board would push for a fleet of aircraft that carries twice as many passengers as BA within Europe.

18. My first use of "easy" after easyJet was in relation to easyInternetcafé, the first outlet of which was initially called easyEverything and opened in London opposite Victoria station in June 1999.

19. In early 2000 I launched easyRentacar (now renamed easyCar), a car rental service originally focused on renting out Mercedes A Class cars to consumers. The idea for easyCar came from considering what other services could easily be sold over the internet.

20. A significant part of the substantial name recognition that the "easy" brand achieved prior to following the IPO was attributable to the easyInternetcafés and easyCar – not least because their branded assts were visible on the high street. By 2000 easyInternetcafés probably had twice the number of customers that easyJet had per year (approximately 10 million compared to 5 million). Indeed in 2000, the BBC used the easyInternetcafé in Victoria as the background to a discussion on the "new internet economy" and the budget. At exhibit "SHI-7" are various press clippings concerning the internet café and car rental businesses from around 1999 – 2001. The internet cafés were an example of a business of a small financial scale which punched well above its weight in terms of media attention, as it was innovative and captured the public imagination, even though it later became technically obsolete by increase in home internet access and internet enabled handheld devices.

21. At Exhibit "SHI-8" there is the text of an easyJet press release dated 15 June 2001 relating to easyJet's push to fly to Paris Orly airport. Ray Webster, the then CEO stated:

> “*The French population have been denied access to domestic low-cost airline services for too long. The success of other "easy" companies in Paris - easyRentacar and easyEverything - has proved that French consumers are as attracted by the idea of value-for-money services as anywhere else in Europe*.”

22. Around the time of the IPO, the other easy businesses assisted by virtue of their own marketing in attracting more passengers to the airline without those marketing costs appearing in the airline accounts. In particular the internet cafés provided a place for people who in those days may not have had internet access at home to book their flights or at the very least it provided the high street presence and brand recognition that a smallish airline based in Luton could do with. The message was very consistent that to get on an easyJet flight you needed to book online and not via a travel agent who would have sold you a ticket on a different airline. Hence I dubbed easyJet, the “Web's favourite airline!”.

23. Since the IPO I have launched a number of “easy” brands which can be seen on the easy.com website, shown below (and at Exhibit “SHI-9”). Many of them are online ventures which have no fixed assets of their own, or where they do use fixed assets these are owned by their respective sub-licensees. For example, easyHotel has 12 hotels operating and several under construction, all of which are owned or rented by the sub-licensees of easyHotel. I enclose at Exhibit “SHI-10” pictures of various of the easyHotel properties.

the portal site for all **easyGroup** companies

today's date: Monday, 15. March 2010

brand manual | brand values | about us | Stelios | new ideas | brand thieves | jobs | news archive | free email

more value for less!

**easyGroup**
Stelios' private holding company that creates new ventures & owns the easy brand

easyJet.com
easyInternetcafé
easyCar.com
easyValue.com
easyMoney.com
easyCinema.com
easyBus.co.uk
easyHotel.com
easy4men.com
easyJobs.com
easyPizza.com
easyMusic.com
easyCruise.com
easyMobile.com
easyWatch.com
easyVan.com
easyOffice.co.uk

## About Us

The easyGroup is the private investment vehicle of Stelios, the serial entrepreneur. The easyGroup is the owner of the easy brand and licenses it to all of the easy branded businesses, including easyJet plc, the airline Stelios started in 1995 and in which he remains the largest single shareholder.

The easyGroup profits by either selling shares in the businesses or by licensing or franchising the brand to reputable partners. The easy brand currently operates more than a dozen industries mainly in travel, leisure, telecoms and personal finance.

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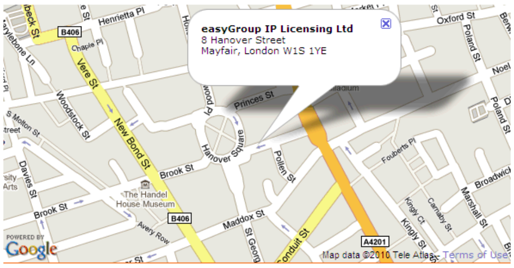
**Press enquiries**
Journalists should contact: journalist@easyGroup.co.uk




**Brand History**

| | |
|---|---|
| 2009 | easyOffice expands with new London centres in Camden and Hanover Street and also Glasgow |
| 2009 | easyPizza now delivers to over 95% of Central London |
| 2008 | easyCruise launches newest vessel, easyCruise Life for cruise holidays in Greece and Turkey |
| 2008 | easyInternetcafe.com launches worldwide listings and reviews service for Internet cafés everywhere |
| 2007 | The first easyOffice location opens in Kensington High Street |
| 2007 | easyOffice.co.uk launches offering over 4,000 serviced offices for rent worldwide |
| 2007 | easyVan launches, offering low cost van hire throughout the UK |
| 2006 | Queen's birthday honours list announces that Stelios will receive a knighthood for services to entrepreneurship |
| 2006 | easyHotel.com announces a major expansion plan with 38 new hotels to open in the Middle East and North Africa |
| 2006 | easyCruise.com announces the itinerary for their second vessel easyCruiseTwo which will sail from Amsterdam to Brussels |
| 2006 | easyMoney.com launches additional comparison services for credit cards, loans, current and savings accounts |
| 2006 | easyPizza.com expands with 9 new franchised outlets on the UK South Coast |
| 2005 | easyMobile.com offers sim cards and airtime online in Holland and Germany |
| 2005 | easyCruiseOne sails to the Caribbean for the winter itinerary in Barbados and 5 other islands |
| 2005 | the first franchised easyHotel opens in Basel, Switzerland |
| 2005 | SKY TV starts broadcasting the docusoap based on easyCruiseOne |
| 2005 | the first actual easyHotel property is expected to open in London. |
| 2005 | SKY TV is expected to start broadcasting the docusoap based on easyCruiseOne. |
| 2005 | easyWatch.com is expected to start selling watches online. |
| 2005 | easyCruiseOne is expected to perform the maiden voyage in the French and Italian Rivieras. |
| 2005 | easyMoney.com is expected to start offering motor insurance in the UK. |
| 2005 | easyJet reaches 100 aircraft in the fleet. |
| 2005 | easyMobile.com offers sim cards and airtime online in the UK and Holland sparking a price war. |
| 2005 | easyCinema.com offers DVD rentals online in the UK. |
| 2005 | easyCruise.com starts accepting online bookings for the summer of 2005. |
| 2004 | easyMusic.com goes live offering downloads of music tracks from 25p. |
| 2004 | easyPizza.com delivers the first pizzas to homes in the UK. |
| 2004 | easyJobs.com website goes live offering a more efficient marketplace for job seekers in the UK. |
| 2004 | easyCar.com offers car rental on a worldwide basis. |
| 2004 | easy4men men's toiletries range goes on sale in 1,000 Boots pharmacy stores in the UK. |
| 2004 | easyHotel.com starts offering great value hotel rooms in more than 20,000 hotels worldwide |
| 2004 | easyBus.co.uk starts operating routes from London |
| 2003 | easyCinema.com opens for business |
| 2002 | easyJet PLC orders 120 AIRBUS A319 with a further 120 under option |
| 2001 | easyJet PLC acquires go airlines nearly doubling in size |
| 2001 | easyMoney.com offers the first on line credit cards |
| 2001 | easyValue.com, the shopping comparison site goes live |
| 2001 | easy.com, the global portal site for all easyGroup businesses goes live |
| 2000 | easyInternetcafé enters the Guinness Book of Records as the largest internet café in Times Sq New York |
| 2000 | Stelios enters the Guinness Book of Records as the youngest ever scheduled airline chairman when he started easyJet aged 28 |
| 2000 | easyJet PLC is partially floated on the London Stock Exchange |
| 2000 | easyGroup enters into a formal brand license with easyJet PLC crystalising the concept of brand extension |
| 2000 | easyCar rents first Mercedes A Class cars to consumers |
| 1999 | Marketing Magazine lists the launch of easyJet as one of the great marketing moments of the 20th century |
| 1999 | the first easyInternetcafé opens in London with queues stretching round the block |
| 1999 | the TV docusoap on easyJet is first broadcast on Britain's ITV to an audience of 9m viewers |
| 1998 | as the airline becomes a "brand" Stelios starts to work on brand extension and founds the easyGroup |
| 1998 | easyJet is elevated by the media as the arch rival of BA and credited with sparking a price war |
| 1998 | BA launches go airlines in response to easyJet – Stelios is on their first flight |
| 1998 | easyJet acquires a Swiss airline and becomes Geneva's defacto home carrier |
| 1997 | first order for 12 brand new Boeing 737 aircraft placed by easyJet |
| 1997 | the website easyJet.com goes live |
| 1996 | easyJet opens international routes to Amsterdam, Nice and Barcelona |
| 1995 | Stelios creates easyJet and starts flights between Luton and Scotland |

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## IV The IPO

24. In probably late 1999 I started to consider an IPO of easyJet in order to raise further capital. I decided to keep the other "easy" businesses private and to retain the brand, having appreciated its future potential and believing that the management of the brand across the "easy" companies would be better coordinated centrally, in order to ensure that the brand was used consistently across the companies and to enforce the rights effectively against infringers. I therefore centralised the ownership of the intellectual property by transferring all trade marks etc to easyGroup and factored in safeguards in the Brand Licence to easyJet in order to protect the other "easy" businesses and the brand. The Brand Licence was entered into in advance of the IPO as part of the restructuring for the IPO. In preparation for the restructuring easyJet plc was set up and the necessary documentation was produced, including in particular the listing particulars and prospectus.

25. Another businessman may have chosen to structure the companies and their assets in a different way. I wanted to ensure that the "easy" brand was protected so that it could be licensed and used in other fields, whilst also enabling easyJet to excel in its business. This informed the decisions made at the time, in particular how the Brand Licence was structured.

26. Prior to the IPO, on 28 October 2000, one week before the Brand Licence was entered into, the newly formed easyJet plc board met to consider and approve various documents relating to the IPO. I exhibit copies of the redacted minutes of various easyJet plc board meetings at "SHI-11" and easyJet Airline Company Limited board meetings at "SHI-12". At this meeting (pages 9-22 of Exhibit "SHI-11") the directors considered the fact that the draft brand licence proposed that 75% of easyJet's revenue must be derived from its core activity. Paragraph 15(e) of these board minutes state:

> "*whilst the licence required the* [easyJet] *Group to focus on its core area of activity and only extend its business to the extent it was "ancillary and conducive" to its core activity and such businesses could not account for more*

*than 25 per cent. of the easyJet Group's business, the Directors considered this degree of focus on the Group's core activity to be a key part of the Group's strategy; the licence permitted the Group to carry out ancillary and conducive activities if its key competitors carried out those activities; in addition Stelios Haji-Ioannou had agreed not to compete with the Group in its core area of activity; this is a new agreement and is clearly seen to be protecting future value for the Group*".

27. The IPO Prospectus disclosed the existence of the Brand Licence and the material content of the Brand Licence in full. I exhibit at "SHI-13" a full copy of the IPO Prospectus. On pages 27 and 28 of the Prospectus there is a section on Intellectual Property as part of the "Business of easyJet", which summarises the Brand Licence. It states that:

"*under the licence, easyJet is permitted to use the easyJet brand in connection with its business as an airline with a core activity of passenger transport in fixed wing aircraft and is also permitted to carry out ancillary and conducive additional activities to the extent that they account for not more than 25 per cent of easyJet's aggregate revenues*".

28. In the "Risk Factors" section of the Prospectus (Part V, page 60), the fifth risk factor that is listed is "*easyJet does not own its name and branding*". This again summaries the Brand Licence that had been put in place and discloses that easyJet can not change the "easy" get-up of the other licensees. It also says that a failure by easyGroup properly to police use of the brand may have a significant adverse effect on easyJet. Here a summary of the 75:25 Rule is restated once more:

"*easyJet is restricted to carrying on business as an airline with a core activity of passenger transport in fixed wing aircraft and can only provide services ancillary and conducive to that business if a number of its peer group does so first and the aggregate revenue from such ancillary and conducive activities does not exceed 25 per cent of easyJet's aggregate annual revenue. If easyJet expands outside this business it will lose the rights to use the easyJet trade* *marks, branding and domain names. The terms of the licence from easyGroup IP Licensing may therefore in the future restrict its ability to develop its business as it wishes. It is, however, the Board's strategy to focus easyJet on its core activity and currently almost all of its revenue is generated from its core activity*".

29. This risk factor goes on to say that:

> "*under the terms of the brand licence it is open to other "easy" companies in their ancillary and conducive activities to compete with easyJet in its core area of activity using the "easy" brand. They can do this only if such activity is ancillary and conducive to their own core activity (for instance a tour operator)*".

30. The sixth risk factor listed in the IPO Prospectus is "*easyJet could suffer from the extension of the "easy" brand*". It is stated in this section that extension of the "easy" brand is likely to increase the profile of the brand and increase attention by infringers. It also appreciates, as I do, that the greater the profile of a given licensee, the more damaging the effect of failures or accidents associated with that licensee on other "easy" licensees are.

31. These risk factors no doubt had a negative downward pressure on the price per share of the IPO.

32. The terms of the Relationship Agreement are set out on pages 130-131 of the IPO Prospectus and the key terms of the Brand Licence are set out at pages 136-138.

33. The IPO Prospectus mentions on page 43 that less than 1% of the airline's total revenue was produced by ancillary activities. As I mention above at paragraph 11, these were limited at the time to sales of food and drink from the aircraft trolley and excess bag charges and a small amount of journey-related ancillary revenue (from the car hire, bus and train sites). The IPO Prospectus states that:

> "*easyJet's revenue is almost entirely derived from the sale of seats to passengers, with one per cent being contributed by ancillary and concessionaire revenue, such as fees earned on concessionaire's sales of snacks and drinks to passengers.*"

34. In November 2000 easyJet raised over £200 million by issuing to institutional investors new shares and listing them on the London Stock Exchange. The amount of new shares which were sold amounted to 25% of the enlarged share capital. Together with my immediate family I retained 75% of easyJet's shares. Currently, together with my immediate family, I indirectly hold approximately 38% of the shares in easyJet plc. The dilution of my and my family's shareholding has arisen partly as a result of selling a portion of the shares, but primarily as a result of our percentage shareholding being diluted by capital increases such as easyJet's purchase of Go in 2002 and the exercise of employee stock options.

## V The Brand Licence

35. Given my decision to keep the other "easy" businesses private and to retain the ability to license the brand in other fields, it was important to build in suitable protection for these other businesses in the Brand Licence. It is worth noting that my first venture to raise outside equity capital was in fact the internet cafés which raised £20m from Apax (a venture capital firm) and Hewlett Packard (the computer company) in March 2000. They were naturally concerned to ensure that the licence given to easyJet for the purposes of the IPO narrowly defined its core activity. Hence we came up with the words "passenger transport in fixed wing aircraft". This concern was all the greater given the relative size of the capital employed in easyJet compared with the other companies, which meant that I was keen to ensure that easyJet would be constrained in relation to the extent it could compete head-to-head with the other "easy" companies outside its field of activity.

36. The Brand Licence contains provisions regarding use of the brand and what needs prior written consent from easyGroup. These sorts of provisions I understand are usual in

brand licences. This case primarily concerns the provisions which were included specifically in order to protect the other "easy" businesses and the ability to license further the brand.

37. I will address the following provisions:

- Core Activity
- The 75:25 rule
- The Peer Group test
- The reference to easyJet not becoming a conglomerate
- My personal undertaking (i.e. a non compete provision)

***a) Core Activity***

38. The Core Activity is defined in Schedule 4 of the Brand Licence as "passenger transport in fixed wing aircraft". This was what easyJet did and the idea was to ensure that they focussed on what they were good at. This would also enable easyGroup to license other businesses in other fields.

39. From paragraph 10 of the Defence, it seems that easyJet may be trying to suggest that its Core Activity is more than "passenger transport in fixed wing aircraft" and instead is "the business of an airline providing passenger transport in fixed wing aircraft". This interpretation is at odds with the rest of the agreement and is at odds with easyJet's published understanding, even after this litigation commenced. At Exhibit "SHI-14" I attach an easyJet press release from 2008 after the case had commenced, headed "easyJet - Further Information on the Brand Licence". In the first paragraph, the 75:25 rule is explained as follows:

> "the 75:25 rule provides that no less that 75% of the aggregate of easyJet's revenue, together with the total income of sub-licensees, is to be derived from easyJet's <u>Core Activity of transporting passengers in aeroplanes</u>, rather than from activities ancillary and conducive to that Core Activity." (emphasis added)

40. When combined with the 75:25 Rule, the definition of Core Activity limits the extent to which the easyJet brand can be applied to non-core activities.

41. The airline is permitted to carry out non-core activities, but these are limited to activities which are ancillary and conducive to its Core Activity.

### *b) The 75:25 Rule*

42. This provision is central to the case. It is set out on page 5 of the Brand Licence and states as follows:

> "*The 75:25 Rule*
>
> *means that during any consecutive 12 month period no less than 75% of*
>
> *(a) the total consolidated turnover of the Licensee Group; added to*
>
> *(b) the total income (net of trade discounts and value added tax and other sales taxes but otherwise without any deductions) of all of the Licensee's sub-licensees who are not members of the Licensee Group deriving from goods or services exploiting any of the X Rights and Z Rights*
>
> *derives from the Core Activity rather than from activities ancillary and conducive thereto. For the purposes of this definition, turnover shall be computed in accordance with the Companies Act 1985 and with United Kingdom Generally Accepted Accounting Practice*"

43. The 75:25 Rule serves to ensure that easyJet would devote the majority of its focus to its Core Activity. It was accepted that it could carry out ancillary and conducive activities, but these were limited to 25% of turnover.

44. The clause was designed to capture sub-licensee income, as it was appreciated that certain activities, although branded easyJet, may be carried out by other entities. Although easyJet would only take a commission in relation to such activities and hence my understanding is that UK GAAP would stipulate that only the commission appears

in the Profit and Loss account, it is the full extent of the use of the brand which matters in relation to the need to protect other current and future "easy" companies. This is why subsection (b) is present.

45. Subsection (b) of the 75:25 Rule provides that the total income of sub-licensees must be added to easyJet's consolidated turnover for calculating compliance with the 75:25 Rule. The reference to "income" is qualified in subsection (b) as being "*net of trade discounts and value added tax and other sales taxes but otherwise without any deductions*". This accords with the concern to capture all monies generated by those using the branding.

46. It was particularly important to easyGroup, as the owner and manager of all the "easy" brands to ensure that easyJet's use of the "easy" brand was devoted to its Core Activity. In this respect the amount of money which is recorded in easyJet's Profit and Loss account is less relevant than the amount to which the brand is exposed. If a passenger purchases an egg sandwich or a coffee from the easyJet trolley and the sandwich makes them ill, or the coffee is cold, the easyJet and "easy" brands are damaged and the passenger does not discount that damage in his head to take account of the fact that not all the money he handed over to the easyJet cabin crew member is reported in the easyJet Profit and Loss account. Similarly, if someone purchases the travel insurance easyJet offers on its website and has a claim which is rejected, the easyJet brand (and the "easy" brand) is jeopardised. Or if a hotel is booked under the easyJet or easyJetHotels brand, if it turns out to be a flea-pit in an unpleasant part of the city contrary to what was stated on the website, the fact that the easyJet brand was used to entice the customer to book the hotel means that it is put at risk for the full amount of the payment – not some share of a commission paid.

***c) The Peer Group test***

47. The Peer Group test is set out in Schedule 4 of the Brand Licence, where it states that:

> "*Subject to the 75:25 Rule the Licensee may engage in any activity ancillary and conducive to its Core Activity provided that when initiated by the Licensee such*

*activity is conducted by a number of competitors in the Licensee's peer group. In the context of the Licensee's business as at the Commencement Date the relevant peer group is agreed to be the EU flag carriers (i.e. owned or previously owned by an EU state) and Western European or North American low cost airlines ("the Peer Group")*"

48. This provision assists in ensuring that ancillary activities carried out by easyJet were of the nature that the public would expect an airline to engage in. This serves to protect the "easy" brand and to limit unnecessary competition with other "easy" companies.

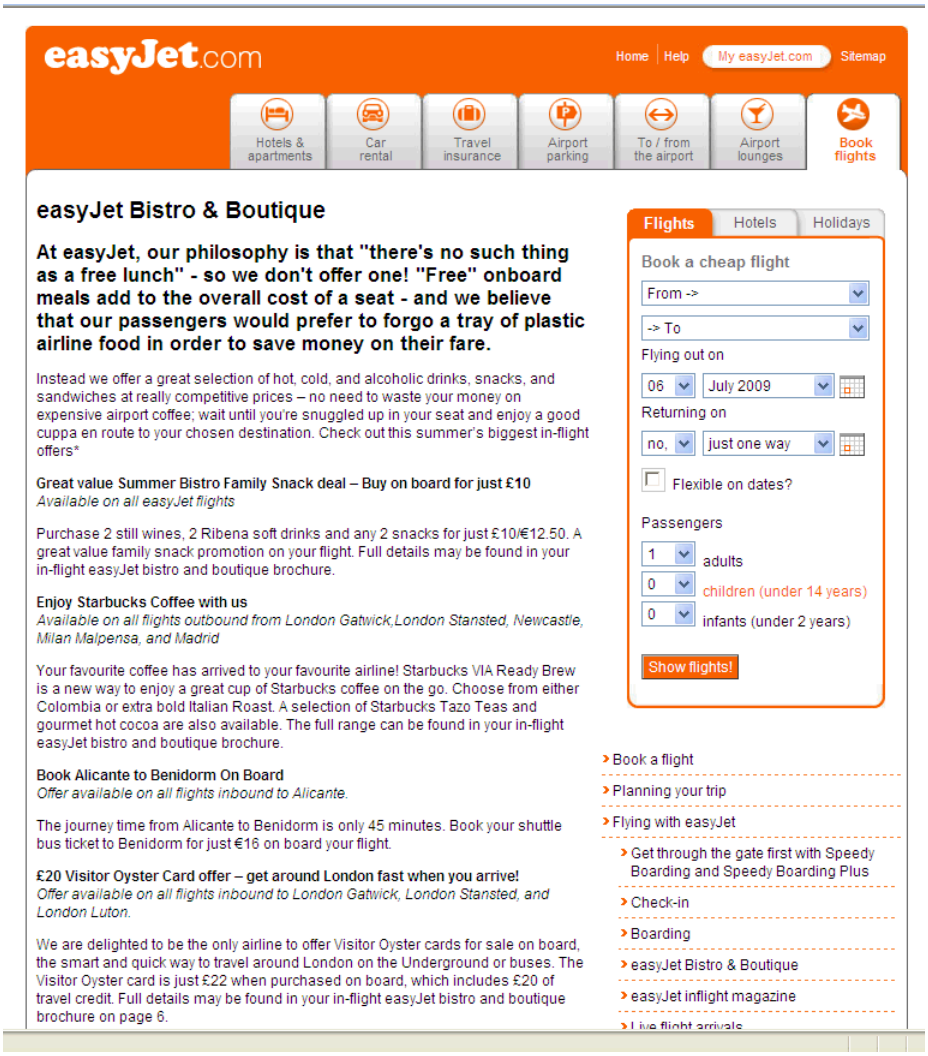
49. The Peer Group test does not conflict with the provision in paragraph (d) of Schedule 4 which states that "nothing in this definition should be construed to constrain the innovation or flexibility of the Licensee in pursuing its Core Activity". This sentence relates to innovation in relation to the Core Activity, as opposed to introducing a new ancillary activity, such as wedding ceremonies on board. On board weddings was actually proposed by easyJet last year and only dropped when Luton Registry Office explained that it would not be possible to obtain a licence. easyJet had by that stage already confirmed to the General Register Office for Scotland that they were ready to proceed to obtain a licence, having been given indications that it was likely to be possible. I enclose at Exhibit "SHI-15" newspaper articles reporting on the wedding on board proposals.

50. The company is free to innovate in relation to its Core Activity without constraint - such as using faster or more environmentally friendly fixed wing aircraft to transport passengers or even as an extreme example, eliminating the seats themselves and having standing room only tickets for passengers on the aircraft (as suggested by Ryanair but reported as not allowed by the safety regulators).

51. In addition to the onboard weddings example, easyJet has demonstrated its disregard of the Peer Group test on other occasions. Its easyJetText service, which is designed to send text messages to passengers giving them information about their flight along with vouchers of promotions for shops in August 2007, is an example. According to the easyJet website, a basic service is free on some routes (these subscribers receive

advertisements instead of paying). Otherwise, the service is paid for by the subscriber. Although other airlines started similar services soon after, it appears easyJet was the only airline to have such a service at this time. Incidentally, although a small matter for me as a traveller, I have a recent experience which demonstrates that the mad rush to expand ancillaries can damage the brand. I recently purchased a flight with easyJet from Nice, France to London Gatwick to travel on the 9th of March and decided to try the service which is branded easyJetText. I paid £5.99 for the service on the website. I am still unclear as to what I was buying, even having subsequently printed out and read the terms and conditions which were emailed to me. I received a text message at 6.57am local time informing me that the check-in desk would open at 8.45am and close at 10.05am and received the second text message at 10.55am somewhat unhelpfully informing me that boarding for my flight would close at 10.20am. I was using a UK mobile phone in France which may account for the delay in the second text, but I would imagine that this would commonly be the case. I also note that the service does not inform the user of actual delays in the aircraft departure time. On the return leg of my journey, I had to change my flight to a later one also with easyJet due to some business meetings in London. The easyJetText service was obviously oblivious to the change and still sent the texts for the old flights, still with a time delay. If I were not connected with easyJet I would have felt ripped off to the tune of £5.99. This service is a small example in my view of the drive to grow ancillary revenues leading to the introduction of services which are not really worthwhile and will damage the reputation of the easyJet brand.

52. At the beginning of July 2009 easyJet announced that it was the first and only airline to sell Visitor Oyster cards on board at a joint press launch at City Hall, attended by Andy Harrison and the mayor of London, Boris Johnson. I show below, and exhibit at "SHI-16", a screen shot of easyJet's website which states at the bottom that easyJet is the only airline offering the Visitor Oyster cards and other reports dealing with the launch. Much was made of this new service being the first of its kind, but no approach had been made to easyGroup to check where the airline stood in relation to the Peer Group test.




53. In fact easyJet did not approach easyGroup to discuss the application of the Peer Group test in respect of any of the three issues discussed above (marriages, easyJetText and Visitor Oyster cards) and I believe this is indicative of the fact that this provision is disregarded by easyJet.

***d) Conglomerate***

54. Recital G states:

> "*this Brand Licence is intended to prevent the licensee becoming a conglomerate.*"

55. This is mentioned in order to put into context some of the other restrictions in the Brand Licence, such as the 75:25 Rule. It also reflects the fact that I believe that few companies can be successful conglomerates.

***e) My personal undertaking (non- compete)***

56. Clause 10 provides as follows:

> "***10. <u>UNDERTAKING BY STELIOS</u>***
>
> *10.1 Stelios undertakes that, subject to clauses 10.2 and 10.3, he shall not (by himself or through any corporate vehicle) engage in the Licensee's Core Activity until three years after*
>
> *(a) he ceases to control 5% of the issued share capital of the Licensee and either*
>
> *(b) he ceases to control more than 50% of the issued share capital of the Licensor, or*
>
> *(c) this Brand Licence is terminated*
>
> *save that when the reason for termination is insolvency the three year period shall not apply.*
>
> *10.2 It is understood and accepted by the Licensee that Stelios may start a company (not under the easy brand) for chartering by any individual or company of an entire plane (not for selling seats directly or indirectly to members of the public not for operating regular scheduled services).*
>
> *10.3 Nothing in this clause 10 shall prevent Stelios from holding up to 5% of the issued share capital in a public company.*
>
> *10.4 Stelios shall not have any obligations or restrictions pursuant to this Brand Licence save as provided in this clause. The Licensee shall not have any obligations or liabilities to Stelios pursuant to this Brand Licence.*"

57. This was considered necessary for the IPO, to reassure investors that I would not set up a competing passenger airline using fixed wing aircraft. The fact that I had agreed to this restriction was mentioned in the Board Minutes at which the IPO prospectus was approved (page 12 of Exhibit "SHI-11") where it was stated: "*Stelios Haji-Ioannou has*

*agreed not to compete with the* [easyJet] *Group in its core area of activity; this is a new agreement and is clearly seen to be protecting future value for the Group*".

58. My willingness to enter into this restrictive covenant was referred to at least 4 times in the IPO Prospectus in the following terms (see pages 28, 61, 131 and 137 of the Prospectus at Exhibit "SHI-13"):

> "*Stelios Haji-Ioannou has agreed not to be involved in another airline business with a core activity of passenger transport in fixed wing aircraft from the date of the licence until the expiry of the period ending three years after the later of (a) his ceasing to hold at least five per cent of the share capital of the Company; and (b) his ceasing to have control of easyGroup IP Licensing or, if earlier, the termination of the brand licence. If the brand licence terminates for insolvency the tree year period shall not apply. This covenant will not prevent Stelios Haji-Ioannou from being involved in private jet charter or the holding of five per cent in a publicly quoted airline company provided he has no management role. For this purpose the chartering of private jets means the chartering of entire jets to an individual or company but not selling seats directly or indirectly to members of the public and not operating regular scheduled services. The Directors believe this does not compete with easyJet's core business.*"

59. This clause is not directly in issue in this litigation. I refer to it because I understand easyJet is arguing that all the activities it carries out (which are listed in the 75:25 Rule issue schedule) with the exception of the easyJet credit card (which has recently been cancelled) and third party advertising, fall within the definition of Core Activity. If that were the case, I would be prevented from engaging in any business involving, for example, accommodation or car hire. In fact, I would have been in breach of the agreement as soon as it was signed, as at the time I had already launched easyRentacar (now renamed easyCar). However, no complaint has been made by easyJet in relation to my involvement with easyCar or my other businesses which overlap with easyJet's ancillary activities.

60. My understanding of my personal undertaking is that it restricts my ability to launch another passenger airline using fixed wing aircraft. It does not prevent me from launching a tour operator business, to which charter flights may be an ancillary activity. In fact this example is used in the IPO Prospectus in the context of other potential licensees of the "easy" brand and I refer to it at paragraph 29 above. Nor does it prevent me from launching a helicopter service or a hot air balloon service. I may also be involved in the licensing by easyGroup of easyCargo using fixed wing aircraft for the transport of air freight. In my mind, this shows how narrow the scope of the restriction actually is and it is why I felt comfortable giving it.

61. In fact, I am unlikely to want to invest my own capital to set up another passenger airline, or even be engaged in the day to day running of a passenger airline. My interest now lies more in licensing the "easy" brands through easyGroup. Indeed, as mentioned above, under the brand licence, even now easyGroup would be able to license "easyTravel" to a travel company.

62. Despite my concerns regarding damage which has occurred to the easyJet and easy brands by recent practices, it remains a hugely valuable brand. In the event that the current licence terminated, easyGroup would be able to license the "easyJet" brand after three years to another major airline or even to a new carrier. I would expect there to be considerable interest in the event that the brand became available to re-license. Although any new or existing carrier using the easyJet brand in future would not expect to attract the full customer base, the brand is strong enough to attract a substantial proportion of the current customer base (around 45 million passengers per year), particularly given that the easyJet.com and easyJet.co.uk domain names would at that stage be available to the new venture.. Alternatively I may consider licensing the brand to one of the large on-line travel companies such as Expedia, or the owners of Travelocity and Lastminute.com, or one of the major tour operators such as TUI, Kuoni or Thomas Cook.

63. The Brand Licence provides that the goodwill which has accrued to the "easyJet" brand is owned by easyGroup (clause 3.2). The termination provisions (clause 11) provide a relatively short (90 day) period for the cessation of use of the easyJet brand. During this

period the prohibition on co-branding without easyGroup's written consent would apply to any attempt by easyJet to transition to a new brand. These provisions assist in ensuring that the goodwill of the brand is retained by easyGroup and cannot migrate to another brand not owned by the easyGroup. In the course of the dispute we have felt the need to serve 6 Cure Notices, of which at least 3 are currently outstanding.

64. I have not yet explored easyGroup's options on termination to any great degree as I remain hopeful that this case will result in easyJet complying with the Brand Licence and avoiding termination.

## VI More recent developments leading to this dispute

65. This dispute arises out of the consequences of the rapid expansion of easyJet's fleet of aircraft, which has led to a huge push towards increasing ancillary revenue because of the size of the fleet. This risks damaging the brand and impacts the ability of the other "easy" businesses to compete in their areas of activity and dramatically limits easyGroup's ability to license further the brand.

66. Around late 2007 I started to raise questions of easyJet as to its total ancillary income but did not receive straight answers. I therefore sought to invoke the provision in the Brand Licence which provides for easyJet's auditors to provide a report certifying that the 75:25 Rule has been complied with. This attempt to find out the true position was thwarted when the parties failed to agree on the form of instruction to be given to the accountants and at that stage it became apparent to me that easyGroup's interpretation of the Brand Licence was at odds with that which easyJet was maintaining. It was in the aftermath of this that I decided to commence this case, in order to obtain clarity as to the meaning of the Brand Licence, in particular concerning the treatment of ancillary activities.

67. I have often wondered why it became necessary for me to commence these proceedings and why the matter could not be resolved. I have also been surprised by the extremely hard line which easyJet's management have taken in relation to the meaning of Core

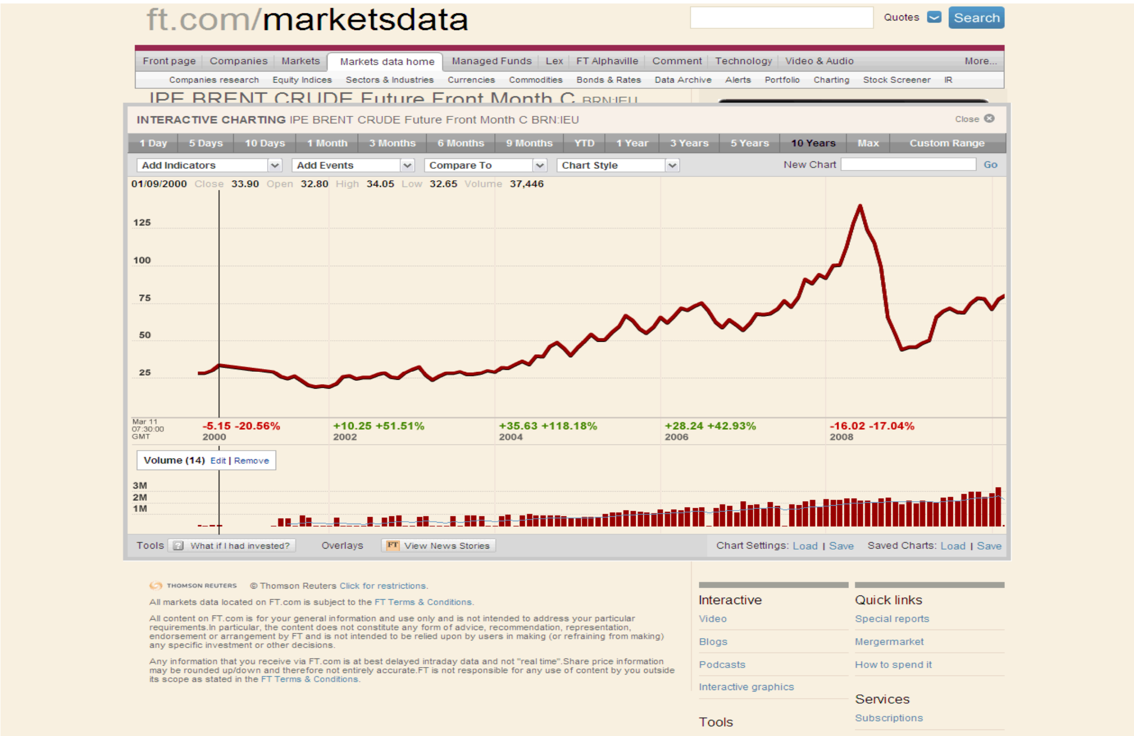
Activity – proposing that it includes almost all the activities which they have previously described (in common with the rest of the industry) as ancillary. It seems to me that easyJet is maintaining this extreme interpretation as a result of its drive to grow ancillary revenues to a point which under any reasonable construction of the Brand Licence it is either already or soon will be in breach of the 75:25 Rule. This extreme position has been difficult for me to understand, particularly given the fact that breach of the Brand Licence puts the company at risk of losing its right to use the brand.

***a) Increase in the size of the fleet***

68. I have concluded, rightly or wrongly, that in around 2006 the then current management set out on a deliberate path which would inevitably lead to the 75:25 Rule being breached, because this was the only way to justify and pay for too high a number of aircraft. I will not debate now what is the profit maximising number of aircraft in the fleet of easyJet but the business case for purchasing more can only have been based on the assumption that passengers will keep paying more and more for ancillaries. easyJet continue to forecast growth in their ancillary revenues. I enclose as Exhibit "SHI-17" a report from ABN-AMRO dated 14 November 2006 in which the forecasted revenue projections from 2005-2008 (page 7) show a marked growth of ancillary revenue. Also, at Exhibit "SHI-18" is a copy of easyJet's 2006 Preliminary Results presentation from the same day. At page 34 as part of Andy Harrison's (easyJet's CEO) review of the business, he addresses ancillary revenue growth of over 34% per seat and emphasises the continued opportunity for expansion. This ancillary revenue drive by low-cost carriers was commented on in Financial Times' Lex column in May 2005 as follows:

> "*These* [ancillary] *services will take a varied form. Although Ryanair's experiment with charging passengers for in-flight entertainment proved ill-fated, it may start making them pay for former freebies such as checking in luggage, as well as for the more standard extras such as car hire. Unkind observers have in the past likened British Airways to a pension fund with an airline tagged on to it. The low-cost carriers, in contrast, may come to look like profitable supermarkets with (almost) free flights attached*".

69. At Exhibit “SHI-19” is a circular dated November 2006 which was put to a shareholder’s vote relating to the purchase of 52 new aircraft from Airbus in addition to the first order with Airbus placed in 2002 for 120 aircraft. Around the time of the IPO the crude oil price was around $25 per barrel. When the second agreement with Airbus to purchase 52 further aircraft was signed, the oil price was around $60 per barrel. Since then the crude oil price has hit record highs (of $145 per barrel in July 2008) and although it has largely recovered to around $70-80 per barrel, the industry then faced the biggest economic downturn in recent history. It is worth noting that in the year ending 30 September 2009 30% of easyJet's revenues were spent on fuel. The chart from ft.com, below (also at Exhibit “SHI-20”) demonstrates how the oil price has increased since easyJet was launched.




70. At the time of the 2006 Airbus order ABN AMRO, the house broker, had forecast easyJet's profits for 2008 of around £237 million. In fact, easyJet’s profits for that year were less than half that amount. In 2009 easyJet achieved even lower profits of £43m, in effect a breakeven financial performance and only about a fifth of the profits projected in 2006 to justify placing the second order with Airbus. Most airlines are having difficulty in the current climate and most have sought to renegotiate their aircraft supply

agreements. At Exhibit "SHI-21" is a Goldman Sachs research note of 21 July 2009 on the Airline industry. At page 13 of that research note they comment as follows:

> "*However, all growth capex, however sensible it appeared at the time, now looks like a flight of fancy in our view, given how long revenues will take to get back to 2007 levels in real terms.*
>
> "*Almost all flag carriers have announced deferrals or cuts to their capex plans since the beginning of this recession*."

71. easyJet did not seek to renegotiate its contract with Airbus.

72. I had my reservations at the time of the 2006 Airbus agreement and in retrospect perhaps I should have spoken out, although I doubt whether it would have made any difference. Throughout 2008 in the face of high oil prices and with the onset of the current economic crisis I stood up to the proposal to increase the size of the aircraft on order from Airbus from the A319 to the A320 and suggested that we should renegotiate the Airbus contract to defer deliveries, saying that then was not the time to be increasing capacity. Andy Harrison responded to me that if I did not like it I could sell my shares.

73. A larger fleet, regardless of its impact on profits, almost inevitably means that executive remuneration increases, as remuneration packages are all too commonly linked to the size of the company (i.e. turnover rather than profits). The larger the company becomes, the more difficult it is to run, which justifies a larger salary, regardless of the underlying profit or increase in shareholder value. High executive remuneration itself can attract negative publicity. I exhibit at "SHI-22" various newspapers articles reporting the fact that investors were angered by Andy Harrison's remuneration of £2.7m, which included his basic salary, bonus and retention bonus.

74. There are now only two manufacturers of civilian fixed wing, larger jets: Boeing of the US and Airbus, a subsidiary of the European Aeronautic Defence and Space Company N.V. (EADS). These two companies have been very persuasive in selling their planes to the airline industry, which has resulted in both companies being profitable. Their

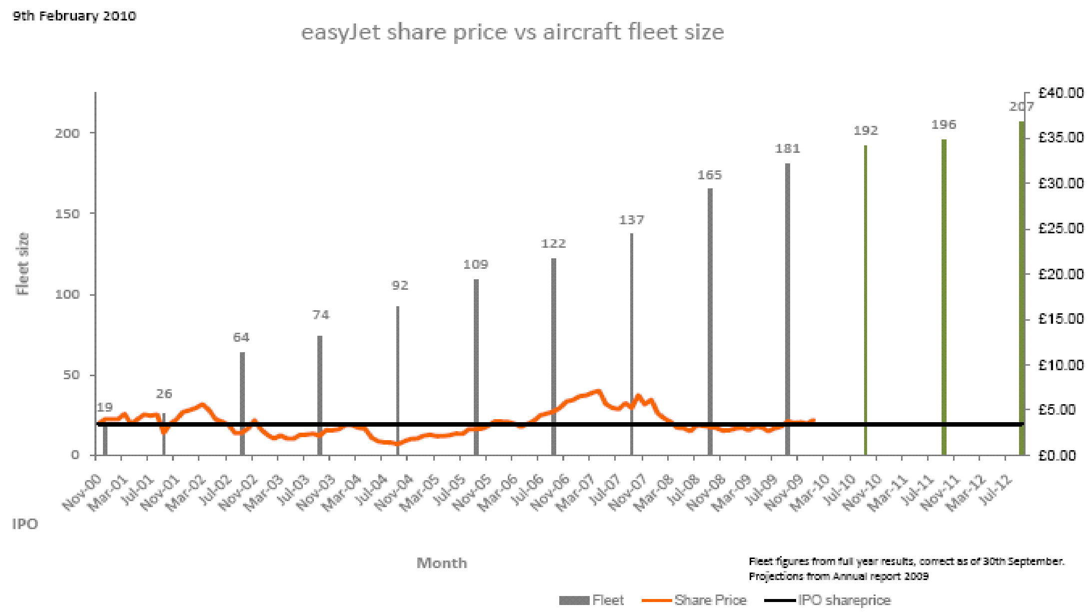
2008 annual report show that each company produced profits of $2 billion or over. This is in stark contrast to most of their customers. IATA calculated that the airline industry's net loss for the same year was $16.8 billion.

75. I cannot be sure what the reason is for easyJet's management inexplicable optimism that the company should continue to push for fleet growth in spite of poor economic returns and market changes. What I do know is what the results of this strategy have been and what it is likely to lead to.

***b) Effect on shareholder value***

76. Despite the huge increase in the number of aircraft that easyJet have acquired over the past decade since the Brand Licence and the huge capital that has been deployed to do so, the share price has not risen to any significant degree. Since the IPO, no dividend has been paid to shareholders. I believe only 24 companies in the FTSE 350 have historically not paid a dividend. Instead easyJet has used its retained earnings to purchase more aircraft. In its last financial year easyJet had revenue of £2667 million and returned a pre-tax profit of £43.7 millions i.e. only 1.6% profit. This contrasts with the position in the first year following the IPO when easyJet had revenue of £357m and a profit of £40 million i.e. an 11.2% profit. It also shows the pressure on easyJet to squeeze whatever revenue it can from its customers, regardless of the potential adverse impact which this can have on the way customers relate to the "easy" and easyJet" brands. What I would call gouging the customer with useless services like the text service I described above is a typical short term response to pressure to find that extra 1.6%.

77. Below and at Exhibit "SHI-23" is a graph comparing the easyJet share price with the number of aircraft. When you consider the cost of each aircraft, (Airbus' current published "list" price is $74.4m for an A319 and $81.4 for an A320), even given the discounts for bulk purchasing, and taking into account adjustments for inflation, it demonstrates that buying too many aircraft compared to the available passengers is a high risk strategy.




78. This is a graphical representation of how a company that has deployed of the order of 10 times more capital in the space of 10 years has created zero incremental shareholder value. Without disclosing any confidential information the cost of 200 aircraft is in the region of $[redacted] billion.

### *c) The push for more ancillary revenue*

79. More aircraft means more flights to existing routes and new routes. In order to attract new customers to fill the new capacity, seat prices are inevitably discounted. Each new aircraft needs to find new passengers. This is done by discounting ticket price with the effect that the sale of tickets becomes a loss leader. This leads to a push to obtain more ancillary revenue either from further unbundling of the ticket price, so that the customer pays extra for ancillary services he or she chooses to use, or offering more journey-related ancillaries or promoting existing ancillaries more aggressively.

80. There is no sign of easyJet easing up on its push for ancillary revenue. At Exhibit "SHI-24" are copies of recently published analysts reports from UBS, RBS and Societe Generale. At page 9 of the Societe General document, easyJet's yearly figures are set out; historical figures for 2008 and 2009 and estimated for 2010 and 2011. This shows a year on year growth of ancillary revenue per seat as follows: 2008: 83.6%, 2009:

38.2%, 2010(e): 8.5%, 2011(e): 7%. I note that this contrasts even with Ryanair, whose ancillary revenue per passenger revenue is shown as increasing in 2009 but estimated as decreasing in 2010 and showing marginal growth in 2011 and 2012. Similarly UBS reports an ongoing growth of ancillary revenues of circa 10% per annum and RBS on page 6 of its report shows year on year ancillary growth projections.

81. This gives rise to two problems from easyGroup's perspective. Excessive pricing and promotion of ancillaries can damage the brand and at some stage, this push for ancillary revenue will have caused, or will cause, easyJet to breach the terms of the 75:25 Rule.

***d) Damage to the brand***

82. Although an airline is a good brand builder, it carries more risks than many other industries. easyJet has built a good reputation as a low-cost airline but this reputation can be damaged. My personal image remains closely associated with easyJet as I was its founder and helped build its profile, along with my other easy businesses in the early days. When easyJet was featured on a "docu-soap" on ITV following the experiences of customers and staff, I was featured in the programme along with the crew. I accept that this may make me particularly sensitive to damage to the brand because it will impact me personally.

83. easyJet's good reputation is at risk of being undermined by charging for ancillaries which customers expect to be included for free and for charging what the customers perceive as being excessive amounts of money for ancillaries. The risk of brand damage was recognised by easyJet when they moved to charging for the first checked in bag. At Exhibit "SHI-25" I enclose easyJet's business case supporting charging for the first bag. This mentions at section 4 that this could lead to an increase risk of brand perception erosion and at section 7 recognises that charging for first checked-in bag could give rise to bad press and brand damage.

84. One example of the method of sale of ancillaries being damaging to the brand relates to easyJet's method of selling checked-in baggage and travel insurance, which was used prior to the end of January this year, which was in breach of the Directive on Unfair

Commercial Practices. I understand that the Directive which came into force on 27 December 2007 set out airlines' obligations regarding the provision of an all-inclusive ticket price and misleading information. I also understand that the Air Services Regulation came into force on 1 November 2008, which provides clear rules on the final all-inclusive ticket price and stated that it must include taxes, airport and other charges and must draw a distinction between unavoidable and optional charges. The Regulation also provides that optional extras in the booking process must be presented on an *opt-in* basis. The Brand Licence contains a clear provision that easyJet must comply with applicable legislation (clause 6.1.9).

85. On 14 May 2009 the EU Commission published results showing that easyJet was still not complying with these pieces of legislation because baggage charges and travel insurance were presented on an opt-out basis (in fact travel insurance had to be opted out of twice by the customer). In June 2009 easyGroup's lawyers told easyJet's lawyers that the continued use of opt-out in relation to these ancillary services was in breach of the Brand Licence and easyJet responded that it had provided the EU Commission with a commitment that it would comply as part of an imminent upgrade to its website. easyJet later confirmed that this upgrade would be completed by 31 October 2009. However the website upgrade left the opt-out in place – and I can only assume that this was because it brought in more revenue than complying with the law. The then current management was happy to put ancillary revenues above the reputation of the brand and complying with the Brand Licence.

86. In November 2009 easyGroup served a 90 day cure notice under the Brand Licence. It was only on 28 January (the cure period expired on 31 January 2010) that easyJet amended its booking process to comply with the opt-in provision of the European Legislation.

## VII Treatment of easyJet's non-Core Activities

87. easyJet accounts for the sale of flight seats as "passenger revenue". All other revenue is accounted for as "ancillary revenue". Therefore, all the items listed in the 75:25 Rule Issue Schedule are accounted for by easyJet as "ancillary revenue". The only difference

between what goes on to easyJet's accounts and what counts for the purpose of the 75:25 Rule is in relation to commission revenues. easyJet account for the commission they receive, but from a commercial perspective a brand licensor is going to be concerned about the total amount of spend derived from the exploitation of the brand.

88. easyJet's statutory accounts in relation to its treatment of passenger revenue versus ancillary revenue accords with the treatment and published accounts of other airlines. In addition, the press, the general public and industry analysts are united in one respect – that they all refer to the items listed in the 75:25 Rule Issue Schedule as "ancillaries".

89. As I explain above, ancillaries are divided into two main categories: aircraft related (sometimes called "a la carte features") and journey related (usually commission earning activities, but for which the full amount paid counts under the 75:25 Rule).

90. I will address 3 specific types of ancillary revenue in this statement: baggage charges, aircraft trolley and other in-flight offers, and accommodation.

***a) Baggage Charges***

91. Baggage Charges are addressed at section 1 of the 75:25 Rule Issue Schedule. This category includes checked-in baggage, excess baggage, charges made for sporting equipment and other baggage charges.

*(i) Excess Baggage*

92. Since its launch easyJet has charged a fee for carrying excess weight baggage. Initially this charge was £2.90 per kg over 25kg. The amount of the charge has varied over the years and I reduced it to £1 per kg over 25kg in 1999 as the higher charges were causing arguments at check-in and negative feedback to me personally. Currently the excess baggage charge is £10 per kg over 20kg.

93. Although for the purposes of this action easyJet have purported to categorise all baggage charges (including excess baggage charges) as "Core Activity", they (along

with other airlines) have always accounted for excess baggage charges as ancillary revenue. I exhibit at "SHI-26" a letter to Robert Palmer at easyJet from Ross Lane of KPMG Audit plc dated 1 March 2002, which states "*I understand the main sources of ancillary revenue to be as follows: change fees; credit card booking fees, commission on in-flight sales; web-site click through's, excess baggage revenue*". (emphasis added)

94. In addition, I understand that easyJet have accepted that the reference in the IPO to "ancillary and concessionaire revenue" included revenue relating to charges for baggage of excess weight.

*(ii) All checked-in baggage*

95. Until September 2006 there was no charge for checking-in baggage up to the permitted weight allowance. This meant that even if a passenger checked in several bags, provided the total weight was under the permitted weight limit (after which excess baggage charges would apply) there would be no charge.

96. In September 2006 a charge was introduced for checking in a second bag, which applied even if the combined weight of the two bags was below the normal weight allowance.

97. On 24/25 April 2007 the Board agreed that a charge of £2 would be introduced for the first checked-in bag after the summer season and it was introduced in October 2007. I considered this charge was pitched at a reasonable level and I believed that a significant proportion of the public already wrongly thought that we charged for bags as Ryanair had since 16 March 2006. My consent to a charge for checked-in bags (which I understand easyJet is claiming in these proceedings amounts to easyGroup endorsing the charges) did not mean that I (or easyGroup) was waiving the application of the 75:25 Rule to this form of ancillary revenue. Similarly, when previously the normal weight allowance was reduced or the excess weight charge was increased, I and easyGroup were not waiving rights under the 75:25 Rule.

98. Charging for checked-in baggage - which was effectively changing the permitted weight allowance from 20kg to 0kg - was designed to increase total revenue, rather than merely unbundle what was then included in the ticket price. At the 25/26 September 2007 board meeting (at page 185 of "SHI-11") Diederik Karsten, a non-executive director, commented that the forecasted budget indicated that the "*first bag charge revenue target accounted for almost all the profit growth*".

99. Later, in a board meeting on 20/21 February 2008 (at page 192 of Exhibit "SHI-11"), non-executive director Sir David Michels likened the bag charge to the hotel practice of moving from an all inclusive room and breakfast charge to a room charge without breakfast and increasing the charge for breakfast. Andy Harrison expressed the view that the bag charge could be increased a little further and may have to be if the extra fuel costs could not be recovered through other methods. John Browett, another non-executive director, then pointed out that customers may only continue to accept the increase until they considered it had got excessive, at which point they may stop flying with easyJet. He felt that Ryanair's check-in fee on top of their bag charging was excessive. I concurred with this sentiment and stated that customers would not accept increases if they considered that the bag charge was significantly more than the cost of handling those bags.

100. The fact that the first checked-in bag charge creates a revenue uplift as opposed to merely unbundling the previous ticket price is also apparent from section 1 of easyJet's business case exhibited at "SHI-25".

101. The charge for checking-in a bag for an easyJet flight is now £18 per flight (£36 for a round trip), although there is a 50% discount on that charge if it is pre-booked on the internet.

*(iii) How baggage charges are dealt with in the accounts*

102. The checked-in baggage charge is accounted for in easyJet's statutory account as "Ancillary" revenue. I exhibit at "SHI-27" example extracts from easyJet's Annual

Reports and Accounts to demonstrate that easyJet treat checked-in baggage as ancillary revenue. For example, these extracts show the following (underlining added):

- easyJet's Interim Results for the six months to 31 March 2008 state: "*Ancillary revenue has continued to contribute significantly to the performance of the business, increasing by 82.9% to £141.2 million. After excluding a small incremental benefit from the acquired GB Airways business the key driver of this increase has been the introduction of the checked bag charge*." page 37 of Exhibit "SHI-27")

- easyJet's Q1 2009 Interim Management Statement states: "*Good ancillary performance due to: ... increased checked bag charge: average charge of £2 October & November 2007, £4 December 2007 vs £6 in Q1 2009*." (page 47 of Exhibit "SHI-27")

- easyJet Interim Results 6 May 2009 page 11: Passenger and Ancillary Revenues – "*Change in ancillary revenue per seat, includes baggage and sporting goods, increased by 82.4% vs 2008*." (page 53 of Exhibit "SHI-27")

- easyJet Q3 2009 Interim Management Statement 29 July 2009 – "*improved passenger and ancillary revenues. Good ancillary performance due to increased first bag charge £5 to £8*". (page 56 of Exhibit "SHI-27")

103. As far as I am aware, easyJet's accounting policy relating to checked-in baggage accords with that adopted by other airlines. Ryanair, Flybe and Aer Lingus, all of whom charge for checked-in baggage, also describe the revenue this generates as "ancillary". At Exhibit "SHI-28" are extracts from other airlines' annual reports, accounts and other documents, which demonstrate that they treat the activities in the 75:25 Rule Issue Schedule as ancillary. For example, the Annual Report and Accounts of Flybe 2007/2008, states that checked-in baggage is "ancillary revenue"; the Ryanair Holdings plc Financial Statement 2007 states that "ancillary revenues" comprise "non-flight scheduled" revenue, which includes "excess baggage charges"; and the Annual Report

of Aer Lingus 2008 states that "baggage and excess baggage charges" are "ancillary revenue" (see pages 21, 23 and 17 of Exhibit "SHI-28").

104. The disclosure in this action contains many documents demonstrating that each of the activities in the 75:25 Rule Issue Schedule are treated as ancillary by easyJet and the industry generally. A selection of these is at Exhibit "SHI-29". For example, in relation to baggage see pages 51-59, 119-122 and 135.

*(iv) Impact of checked-in baggage charges*

105. The introduction of checked-in baggage charge may have caused a shift in easyJet's customer profile. The business man on a day trip, who carries only hand luggage, avoids the checked-in baggage charge that a family going on a week's holiday to Malaga cannot avoid. In this way, the family is effectively subsidising the business person's travel.

*(v) easyJet's argument as to why baggage charges are Core Activity*

106. In its pleaded case in the 75:25 Rule Issue Schedule easyJet state, as part of its justification for claiming that baggage charges are its Core Activity, that the provision of flights is the raison d'être for the baggage charges. They also state that transporting baggage is a facility that is offered "interrelatedly" with the provision of flights. I do not recall "raison d'être" or "interrelatedly" being used in the context of Board discussions in relation to baggage charges – or indeed in relation to any other ancillary revenue. I agree that normally the bag would not be carried unless the passenger had chosen to fly with easyJet – regardless of its weight and the charge applied in relation to it. One could equally say that the "raison d'être" of a third party advertisement appearing on the back of the airplane seat is to be seen by passengers. If there were no passengers, there would be no advertising on board; but easyJet consider the display of third party advertising as "ancillary and conducive" because it is "offered and available supplementarily in connection with the provision of the flights". easyJet's interpretation of Core versus Ancillary and Conducive in the 75:25 Rule Issue Schedule bears no relation to how the matters are treated in reality.

### ***b) Aircraft Trolley (and other in-flight offers)***

107. This is dealt with in section 7 of the 75:25 Rule Issue Schedule.

#### *(i) Treatment of in-flight sales prior to the IPO*

108. At the time of the IPO sales from the trolley were limited and it was explained that these formed part of the ancillary revenue which accounted for less than 1% of the total revenue. At that time easyJet had an arrangement with one of the several companies that effectively operate as airline kitchens outsourcing the supply of food and drink for the trolley. easyJet received a commission for the goods sold on board. Therefore, at the time of the IPO easyJet only accounted for the commission it received from operating the trolley.

109. The range of goods and services sold onboard easyJet flights has since grown to include a wider range of refreshments, gifts, duty free, scratchcards and oyster cards. These goods are sold by reference to the easyJet Bistro & Boutique brochure, which is available in the seat pockets on the back of the chairs. The trolley is, of course, operated by easyJet crew in easyJet livery/ uniform.

#### *(ii) Treatment of in-flight sales since the IPO*

110. easyJet continue to refer to the commission they receive from in-flight sales as ancillary revenue. I refer to the letter to Robert Palmer at easyJet from Ross Lane of KPMG Audit plc dated 1 March 2002 referred to at paragraph 93 above (and at Exhibit "SHI-26"), which also mentions that commission from in-flight sales are ancillary revenue.

111. This is reflected in easyJet's accounts (see Exhibit "SHI-27") where there are numerous references to the revenue received from in-flight services (i.e. trolley and other onboard sales) being ancillary revenue. For example (underlining added):

- in the 2005 Annual Report and Accounts it refers to "*profit share from in-flight sales of food, beverages, and boutique items*" as being ancillary revenue. (page 18 of Exhibit "SHI-27")

- in easyJet's Interim Report for 2008, under the heading "Ancillary Revenue", it states "*in November the provision of - in-flight services changed from Alpha to Gate Gourmet and after the expected transition period performance is improving. This will be significantly enhanced once electronic point of sale capability is introduced later in the year*." (page 40 of Exhibit "SHI-27")

- easyJet's Annual Report and Accounts for 2008 state: "*a key element of revenue enhancement is the continued development of easyJet's ancillary revenue stream* [...] *A significant step in the development of in-flight revenues was the transfer of service provision to Gate Gourmet at the end of last year. Subsequently, revenues have improved and the next stage of development, the introduction of electronic point of sale equipment onboard, will further enhance the in-flight revenue stream*". (page 43 of Exhibit "SHI-27")

- easyJet's Q1 2009 Interim Management Statement states: "*Good ancillary performance due to: ... improved in-flight offering*." (page 47 of Exhibit "SHI-27")

112. easyJet plc board minutes also demonstrate that the easyJet board have always treated in-flight revenue as being "ancillary". Similarly, the board minutes of easyJet Airline Company Ltd demonstrate the same. Below are sections from the redacted minutes from easyJet's disclosure relating to the following board meetings (again, underlining added):

a) At the plc board meeting on 23 April 2004 Mike Cooper said that "*the underperformance in ancillary revenue resulted from in-flight revenue and accommodation partner (Octopus) revenue not meeting plan*". (page 60 of Exhibit "SHI-11").

b) At the plc board meeting on 22 September 2004 the minutes state that "*MC outlined the proposed initiatives in the two major areas of ancillary revenue that could be managed – <u>in-flight</u> and partner revenue*". (page 79 of Exhibit "SHI-11").

c) The minutes of the plc board meeting on 24/25 April 2007 it states that "*ancillary revenue … is being affected by … problems with <u>in-flight</u> supplier*". (page 168 of Exhibit "SHI-11").

d) The Airline board minutes for the meeting on 13 January 2004 states "*the Ancillary revenue's performance (£4.04million against plan of £4.73 million) had been impacted by the underperformance with partners (in particular Octopus) and <u>in flight revenue</u>*". (page 9 of Exhibit "SHI-12").

e) The Airline board minutes of the meeting on 13 April 2004 also state that "*the ancillary revenue performance was adversely affected by <u>in-flight</u> and partner performance*". (page 20 of Exhibit "SHI-12").

f) Again, in the minutes of the Airline board meeting on 7 December 2004 it is recorded that "*the ancillary revenue <u>in-flight</u> revenue included a retrospective accounting adjustment*". (page 23 of Exhibit "SHI-12").

113. Other airlines also treat in-flight revenue, which includes revenue from items sold on the aircraft trolley and in-flight services, as "ancillary". For example, the Annual Report and Accounts of Flybe 2007/2008, states that onboard catering and duty-free are "ancillary revenue"; the Ryanair Corporate Strategy document states that "in-flight sale of beverages, food and merchandise" are "ancillary services"; and the Annual Report of Aer Lingus 2008 states that "sales on board" are "ancillary revenue" (see pages 21, 2 and 23 of Exhibit "SHI-28").

114. Other examples of references to the trolley and other in-flight services being treated as ancillary by easyJet are at Exhibit "SHI-29". For example at pages 2, 7-8, 13, 60 and 134-135.

### *(iii) Potential for brand damage and why total payment counts*

115. easyJet's promotion and expansion of this ancillary activity is manifesting itself through price increases of the products sold onboard flight. This is occurring to such an extent that passengers are starting to resent the large charges placed on basic items and it is creating bad press. In relation to drinks, passengers can no longer bring their own from home due to security issues and therefore have no choice but to purchase drinks either on the aircraft or in the airport after security. The increase in charges for aircraft trolley items and in-flight services is damaging both the easyJet and easy brands. I exhibit at "SHI-30" a copy of an article published in the Daily Mail on 23 December 2008 entitled "The budget airlines that really cost if you're hungry", which criticises easyJet (amongst others) for its in-flight prices. I also exhibit at page 3 of the same exhibit a copy of an article that was published in the Telegraph on 18 September 2009 entitled "Ryanair has highest charges for in-flight food and drink", which highlights the criticism and damage that can occur if easyJet's in-flight charges continue to rise to an equivalent level, it also characterises the charges as "ancillary revenue".

116. The fact that excessive prices for refreshments or other on board goods or services can cause damage to the "easy" brand is a reason why the whole of the amount paid for the product must be accounted for in the 75:25 Rule. Similarly, if a passenger receives an out-of-date sandwich or a cold coffee, they will complain to easyJet, not to Gate Gourmet or whoever stocked the trolley or did not fix the water boiler on board.

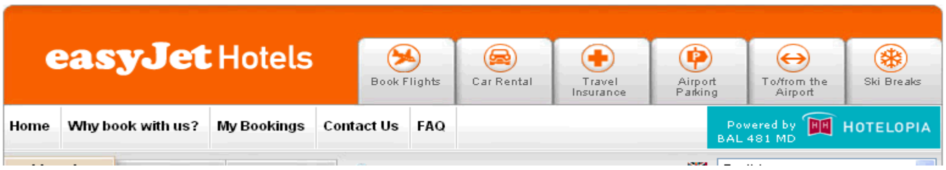
117. easyJet's pleaded case in the 75:25 Rule Issue Schedule repeats the same "raison d'être" and "interrelatedly" language that I have commented on above, and my position is the same.

### ***c) Accommodation***

118. Accommodation is addressed in section 5 of the 75:25 Rule Issue Schedule. Offering accommodation is an activity which easyJet has commenced since the IPO.

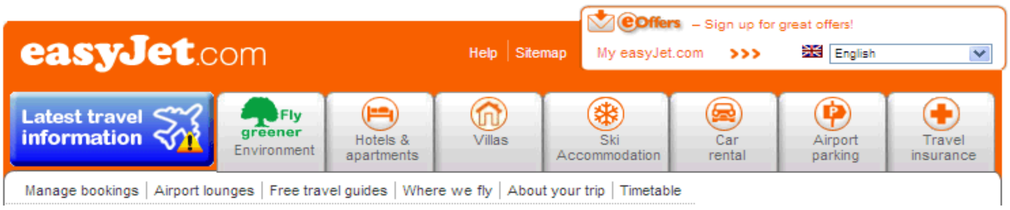
*(i) Sold under the easyJet brand*

119. When these proceedings were commenced, easyJet offered accommodation under the brand easyJetHotels.




120. Although consent to use of this mark had been given by easyGroup, we began to appreciate that that had been a mistake, as it increased confusion with easyHotel. easyGroup therefore gave six months notice of termination of consent and although easyJet dispute easyGroup's ability to terminate consent, it has now moved away from the combined word.

121. However it is apparent from the heading of the home page of the easyJet.com website, which has not changed, that hotels and apartments are offered under the easyJet brand.




122. Similarly, when a consumer clicks onto the hotel and accommodation site (which resolves to hotels.easyjet.com), it is clear that the hotels are offered under the easyJet brand. On this website page reference is made to LateRooms, but the easyJet brand is clearly displayed and the page makes extensive use of the easyJet orange colouring. I note that it is stated to be "powered by LateRooms". To my mind this does not detract from the fact that this is an easyJet website offering hotel accommodation.

123. Annexed to the Statement of Case is a print off from an easyJet booking which was carried out shortly before issuing proceedings (annex 9). At page 10 it shows a booking

for a hotel. The slide show does not show this very clearly but the total cost of £188.56 for the hotel is clear. It is also clear that the amount is added to the total which is paid in full at the end of the booking.

124. At page 38 of Annex 9 to the Statement of Case there is a print out of the email which was received to confirm the hotel booking, which clearly shows the booking under the easyJet.com brand.

125. easyJet's evidence draws a distinction between accommodation bought as a package with a flight (which is thorough a partnership with Hotelopia) and accommodation bought by clicking on the hotels and accommodation tab on the easyJet home page (where the hotel is then provided via a partnership with LateRooms). Accommodation bought at the same time as a flight is paid to easyJet in full at the time of booking the flight and the hotel, whereas it appears that accommodation booked on the stand alone accommodation site without a flight is paid for upon checking out of the accommodation.

*(ii) Accommodation treated as ancillary revenue*

126. easyJet has always referred to the revenue generated from offering accommodation to its customers as "ancillary", and has always treated it as such for accounting purposes. At exhibit "SHI-31" are documents including press releases and articles in which the Head of Ancillary Revenue of easyJet and the Head of Advertising and Ancillary Revenue of Ryanair, comment on various activities, including accommodation. On page 1 of the exhibit, easyJet's Head of Ancillary Revenue, Bill McKimm comments on the introduction of TripAdvisor ratings to the easyJetHotels web page.

127. easyJet's Accounts and Management Statements also demonstrate that it treats accommodation as "ancillary". At Exhibit "SHI-27" are a series of extracts from easyJet's accounts and statements stating that accommodation is ancillary, from which the below quotations are taken (emphasis added):

a) easyJet Annual Report and Accounts from 2005 states "*Ancillary revenue includes credit card fees, excess baggage charges, sporting equipment fees, infant fees, change fees and rescue fees, profit share from in-flight sales of food, beverages, and boutique items, commissions received from products and services sold such as hotel bookings, car hire bookings and travel insurance, less chargeback*s." (page 18 of Exhibit "SHI-27")

b) easyJet Interim Report for the 6 months to March 2007 states: "*Ancillary revenues continued to grow with partner revenues through products such as insurance, car hire and hotels leading the way, as well as innovations such as our speedy boarding product which allows customers to be among the first to board the aircraft for a small fee (between £2.50 and £7.50 per flight)*." (page 27 of Exhibit "SHI-27")

c) easyJet'sQ1 2009 Interim Management Statement states: *"Good ancillary performance due to: ... enhancements to easyJet.com driving car hire and accommodation conversion rates*." (page 47 of Exhibit "SHI-27")

d) easyJet Interim Results 6 May 2009 – "*Drive ancillary revenues through improved execution and innovation – Continual improvement to easyJet.com drives conversion on car hire and hotels*." (page 54 of Exhibit "SHI-27")

128. In the same way as the other ancillary activities I refer to above (baggage and trolley) there are numerous references in the board minutes which refer to revenue from accommodation as ancillary.

129. In addition to easyJet, other airlines also treat accommodation as "ancillary". For example, the Annual Report of Aer Lingus 2008 states that "hotel commissions" are "ancillary revenue"; and the Preliminary Results for FY 2008 of Sky Europe, includes "hotel bookings" within "ancillary revenue" (see pages 23 and 27 of Exhibit "SHI-28").

130. Other examples of references to accommodation being treated as ancillary by easyJet are at Exhibit "SHI-29". For example at pages 27-38, 48-50, 86, 119-133 and 134-135.

131. At Exhibit "SHI-32" is an article from air-scoop.com entitled "Bird's Eye View – SWOT Analysis of easyJet" from July 2007. This article tracks the history of easyJet, summarises its strategy and business model and sets out strengths, weaknesses, opportunities and threats to easyJet. In the section dealing with the features of easyJet's business model the article states that:

"*Ancillary sources of Revenue are:*

*a) Credit card fees;*

*b) Excess and extra baggage charges;*

*c) Speedy boarding fees;*

*d) Sporting equipment fees;*

*e) Ticket changes charge;*

*f) Infant fees;*

*g) EasyJet lounge fees;*

*h) Profit share from in-flight sale of food, beverages, and boutique items;*

*i) Commission received from products and services sold for e.g. hotel bookings, car hiring, travel insurance, credit card etc.*"

132. If offering accommodation to passengers was a core activity as claimed by easyJet in the 75:25 Rule Issue Schedule, I would have been in breach of my personal undertaking not to engage in core activities when I launched easyHotel in 2004.

*(iii) What amount counts for the 75:25 Rule?*

133. easyJet argues that as it merely provides a booking service only the commission payable for the booking service should count. However, the brand is put at risk to the full amount that the customer pays. The brand that the customer is booking under is easyJet and the brand they receive their hotel details on is headed easyJet. If the hotel turns out to be a dive contrary to how it was described on the easyJet website, or if the hotel has no record of the booking due to an administrative error and it is fully booked for the night and you have just arrived in the early hours of the morning, the easyJet brand will

suffer and the other "easy" brands and companies, such as easyHotel, will be impacted in the estimations of that consumer.

134. This risk of brand damage may be particularly acute where the different ancillary services are booked together as one complete trip and paid as one transaction on line. The fact that the passenger has booked his flight, car and hotel together with easyJet may lead him to think that easyJet, like any other package operator, is responsible for all the elements. When his flight is delayed he may expect easyJet to let the car hire company or the hotel know that he will be late or even delayed by a day or more due to weather or other disruptions.

135. The potential damage done to the brand does not necessarily reflect the end contractual relationship. I note that in a document supplied by easyJet called "Bordereau", which is a list of the airlines major complaints and is dated 19 August 2008, there is an entry detailing a claim under the Package Tour Regulations, made by a customer of a hotel booked through the easyJet.com website – I exhibit the relevant page of the Bordereau at "SHI-33". Indeed, in general in the holiday industry, travel agents or booking agents are held responsible for the accommodation that they arrange for their customers. This was very clearly demonstrated by the Corfu carbon monoxide poisoning incident, involving Thomas Cook in 2008, in which two young British children died in a hotel room in the Greek island of Corfu. Staff from Thomas Cook (the tour operator) were accused of negligence in the manslaughter case that followed. The tragic incident caused damage to the Thomas Cook brand and I exhibit a selection of press reports relating to this matter "SHI-34".

136. If easyJet are attempting to draw a distinction between accommodation and accommodation booking facilities in this Brand Licence case it is a wholly unjustifiable distinction that bears no relationship to the exposure of the easyJet brand.

*(iv) Provision to non-easyJet customers*

137. easyJet's hotel offering on hotels.easyjet.com is in fact a white-label service to which they have applied the easyJet brand. This means that hotels which are not at easyJet

destinations are offered, such as hotels in New York and Sydney (where easyJet does not fly) and there is no requirement for the customer to have booked an easyJet flight in order to book accommodation even if it is at a destination of an easyJet flight.

138. The offering of accommodation at locations to which easyJet does not fly or to people who are not flying on easyJet flights is not ancillary and conducive to its Core Activity and is therefore, unlicensed. Allowing easyJet to become a general on-line travel agency was never the intention of the Brand Licence and the notion of licensed activities needing to be ancillary and conducive together with the introduction of the 75:25 Rule were intended to prevent this happening.

***d) Other ancillary activities***

139. Many of the documents I have exhibited in support of the fact that baggage charges, in-flight services and accommodation are properly considered as ancillary and conducive activities under the Brand Licence also make reference to and support the other activities which are listed in the 75:25 Rule Issue Schedule as being ancillary. The rationale and thinking behind why the activities I have addressed in this statement are properly treated as ancillary applies to the remaining activities and there are many documents in the disclosure in this action supporting this (see Exhibit "SHI-29"). easyGroup's position regarding all the activities in issue are set out in the 75:25 Rule Issue Schedule.

## VIII Other issues in dispute

140. It is not just the application of the 75:25 Rule that management of easyJet appear to be ignoring. They also appear to pay no heed to the provisions of the Peer Group test when deciding what new activities to undertake (as I explain above) and are failing to comply properly with the provisions of the Brand Licence concerning use of the brand.

141. The then current management launched a new ski service, co-branding with a company called DirectSki, without first asking for consent, which is required under clause 6.1.6

of the Brand Licence. This led to easyGroup serving a cure notice. As mentioned above, easyGroup also had to serve a cure notice in order to get easyJet to comply with the regulations concerning opt-out of ancillaries. We have also served cure notices to terminate easyGroup's previous consent to the use of easyJetHotel and Europecar4easyJet. easyJet take issue with this termination, but have now ceased use of these two brands.

***a) Report on compliance with the 75:25 Rule***

142. Clause 6.1.17 of the Brand Licence provides that upon completion of the annual accounts easyJet's auditors should provide easyGroup with a report certifying that the 75:25 Rule has been complied with. easyJet has never done this and until relatively recently, easyGroup has not pressed for it. This was because I was familiar with easyJet's profit and loss account and for many years knew that they were a long way off the 25% ceiling for ancillary revenue.

143. When I started to become concerned about the increase in ancillaries I started asking for figures. When these were not forthcoming, I asked for an auditor's certificate. This was around the end of 2007. easyGroup and easyJet spent several months trying to agree the terms of instruction to PwC to enable them to carry out the audit. We failed to agree what was Core and what was Ancillary and Conducive activity. That led to this case being commenced.

144. easyGroup still does not know where easyJet stands in relation to the 75:25 Rule. On 17 November 2009, following completion of the annual accounts of easyJet, easyGroup's lawyers wrote to easyJet's lawyers asking for a report from the auditors in accordance with clause 6.1.17. We asked that the audit be carried out according to easyGroup's interpretation of what is Core and what is Ancillary and Conducive, pointing out that easyJet could also have the report carried out on their understanding in addition. easyJet refused to comply, wishing instead to wait for judgment and made what appeared to be a thinly veiled threat to make an announcement to the stock exchange if easyGroup escalated the dispute by insisting on provision of the report. We responded that a report of the nature we had requested would put the parties on a more equal footing. At the

moment only easyJet knows where it really stands with respect to the rule. We also pointed out that it may assist in focussing the parties attention onto the more important issues at trial. easyJet responded that "given the importance of this issue to the litigation, our client is considering the matter further". We served a Cure Notice in January, to which easyJet responded with various excuses as to why it should not have to trouble itself with the report until after Judgment. The fact that easyJet has been so reluctant to provide the actual figures does nothing to discourage my belief that they are now in breach of the 75:25 Rule. Yesterday, easyJet finally indicated via its solicitors that it would agree to the audit being carried out on the dual basis, but suggest that this is dependent on the sub licensee audits being completed. It remains to be seen whether it will be possible to proceed with the audit in a satisfactory manner.

145. The sub-licensee audits referred to above are those instigated by easyGroup. In order to attempt to find out what the true position is, easyGroup has spent its own money instructing its auditors to audit some of the sub-licensees of easyJet, namely Europcar, Mondial, Hotelopia, LateRooms, HostelWorld, Interhome, Erna Low, Directski, CitiFinancial and Gate Gourmet (which we are entitled to do under clause 9.3.6 of the Brand Licence). This has been met with a distinct lack of cooperation by easyJet, including refusing to permit us to audit Gate Gourmet on the basis that they are not a sub-licensee, despite the fact I understand the agreement easyJet has with Gate Gourmet refers to easyJet granting them a sub-licence. easyJet has been forced to serve a Cure Notice in relation to various of the audits and as at the date of this statement a number of them are still outstanding.

## IX easyJet's current position

146. Notwithstanding the concerns I have about the "over trading" in ancillaries, which is driven by a small division of the commercial department at head office, I remain hugely proud of this brand and of the 7000 people who make it fly every day. Given my personal association with the brand in the mind of the average person in the street, I get constant feedback and the vast majority of it is very positive. I still fly easyJet myself as a customer very often. Our crew are very professional and I am proud of our safety

record, something which one should never take for granted. Without wishing to tempt fate, I kept using a phrase when talking to the operational people of the airline from day one: "if you think safety is expensive, try an accident". I hope this will guide their actions forever.

147. As I have explained, easyGroup does not have the necessary figures to ascertain exactly where easyJet stands in relation to the 75:25 rule, but on a conservative estimate based on publicly available information it appears that in 2008 the core activity amounted to around 80% of the relevant amount. By the summer of 2009 ancillaries had increased to a point at which easyJet was probably in breach of the 75:25 Rule and would now appear to have crossed the line by a couple of percentage points, if not more.

148. The Court's ruling on what activities count as ancillary and conducive is essential to ensure that the parties are able to proceed in compliance with the Brand Licence.

I believe that the facts stated in this witness statement are true

Signed ...........................................................

**SIR STELIOS HAJI-IOANNOU**
Dated: 16 March 2010