U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
SEP 26 2002
TAWANA C. MARSHALL, CLERK
BY _____
Deputy

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	Chapter 11
	§	
KITTY HAWK, INC., et. al	§	Case No. 400-42069-BJH and
	§	Case Nos. 400-42141 through
Debtors.	§	Case No. 400-42149
	§	
	§	Jointly Administered Under
	§	Case No. 400-42141-BJH
KITTY HAWK INTERNATIONAL, INC.,	§	
	§	
Plaintiff,	§	
	§	
- against -	§	Adversary Proceeding No. 01-4023
	§	
F.X. COUGHLIN CO., D/B/A	§	
PATHFINDER AIR RESOURCES	§	
	§	
Defendant.	§	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure 52, made applicable by Federal Rule of Bankruptcy Procedure 7052, the Court issues its Findings of Fact and Conclusions of Law in connection with Adversary Proceeding No. 01-4023, which was tried to the Court on February 11-12, 2002, May 24, 2002, and July 9-10, 2002. Closing arguments were made on August 29, 2002, after the parties submitted their post-trial proposed findings of fact and conclusions of law.

103

I.

FINDINGS OF FACT

A. NATURE OF THE DISPUTE

1. This is an adversary proceeding to determine the allowed amount of a proof of claim filed by F.X. Coughlin Co. d/b/a Pathfinder Air Resources ("Pathfinder") in the Chapter 11 case of Kitty Hawk International, Inc. ("KHI") and a counterclaim for damages asserted by KHI against Pathfinder.

2. KHI and Pathfinder entered into two air charter contracts, one dated August 17, 1999 (the "August Contract"), and a second dated October 1, 1999 (the "October Contract") (the August Contract and the October Contract are referred to collectively as the "Service Contracts"). *See* KHI Exhibits 17 and 18. The parties agree, and the Service Contracts clearly require, Pathfinder to use or pay for 3,000 Block Hours of flight operations per Contract Year (as defined therein). *See* Joint Pre-Trial Order at Section II(A). However, the Service Contracts were terminated and KHI ceased operations before the end of the first Contract Year of either Service Contract. The parties disagree over whether the Service Contracts required Pathfinder to use or pay for a guaranteed number of Block Hours per calendar month.[1] *See* Joint Pre-Trial Order at Section III(A), ¶ 20; Section IV, ¶ 1.

---

[1] The Service Contracts are "Aircraft, Crew, Maintenance and Insurance" ("ACMI") contracts. *See generally* Test. of John Palo, Feb. 11, 2002 Transcript, pp. 158, line 21 - 159, line 4 (hereinafter, references to trial transcripts will be cited by date, page and line as follows: 2/11/02 Tr. at p. 158:21-159:4). While an ACMI air charter contract can be negotiated to include different terms, in general, a minimum monthly guarantee is a "use it or lose it" proposition for the air charter customer every month. If the customer has guaranteed 300 block hours in a month, the customer has to pay for 300 block hours each month whether it flies one block hour or 300. *See* 5/24/02 Tr. at p. 27:1-18. If the customer flies 150 block hours in one month, it must still pay for the full 300 block hours and cannot recoup the loss by flying more than 300 in later months. Additionally, if the customer uses the aircraft 400 block hours in one month and 200 the next, the customer must still pay for 300 block hours in the second month and may not carry over credit from the previous month. *See* 5/24/02 Tr. at p. 27:1-18. An annual guarantee works differently. When the customer guarantees an annual number of block hours, the customer is not locked into a monthly minimum. If the customer meets the annual target, it

3. KHI contends that the Service Contracts required Pathfinder to use or pay for 3,000 Block Hours per Contract Year and, as a separate and independent requirement, 250 Block Hours per month. *See* Joint Pre-trial Order at Section II (B), pp. 3-7.[2] Conversely, although Pathfinder agrees that it must use or pay for 3,000 Block Hours per Contract Year, it contends that the Service Contracts did not require it to use or pay for any particular number of Block Hours per month. *See* Joint Pre-Trial Order at Section II(B)(1), p. 5. In the alternative, Pathfinder contends that the parties never reached a meeting of the minds as to the existence of 250 Block Hour minimum monthly guarantee and therefore never had an enforceable contract. *See id.* at p. 7.

4. To resolve this dispute, the Court must interpret the Service Contracts. If KHI's interpretation of the Service Contracts is correct, Pathfinder is required to pay Service Fees for minimum monthly Block Hour shortfalls in December 1999-March 2000, as adjusted by any Block Hour Credits to which Pathfinder may be entitled. If Pathfinder's interpretation is correct, it has overpaid Service Fees for Block Hours actually flown and has a claim for a refund of the overpaid Service Fees. Alternatively, if KHI and Pathfinder did not reach a meeting of the minds on the issue of a minimum monthly guarantee, the Court looks to equity to determine the reasonable value of the services performed by KHI and accepted by Pathfinder.

---

is not penalized if in some months it fails to use at least one-twelfth of the annual number. *See* 5/24/02 Tr. at p. 33:24 - p. 34:7. If the customer flies less than one-twelfth of the annual guarantee in some months, it can recoup those block hours in other months with stronger traffic. *See* 5/24/02 Tr. at p. 85:10 - p. 87:5.

[2] Section II of the parties' Joint Pre-trial Order is inadvertently misnumbered with two subsections "B." Accordingly, the Court will also refer to the page and paragraph numbers, where appropriate.

B. PROCEDURAL HISTORY

5. On May 1, 2000 (the "Petition Date"), KHI and several affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Pathfinder subsequently filed Proof of Claim No. 465 in the amount of $2,360,450.05 for "obligations owed" under the Service Contracts (the "Proof of Claim"). KHI objected to the Proof of Claim in its First Omnibus Objection To Proof of Claim. To resolve the objection, the parties agreed that KHI would initiate this adversary proceeding which KHI filed on February 28, 2001. *See* Joint Pretrial Order at Section II (A).

6. After answering the adversary complaint, Pathfinder filed a motion for summary judgment, thereby seeking a determination that the Service Contracts did not require it to use or pay for 250 Block Hours per month. KHI opposed Pathfinder's motion and filed its own motion for summary judgment, thereby seeking a determination that the Service Contracts required Pathfinder to use or pay for 250 Block Hours per month.

7. By letter ruling dated December 14, 2001, the Court held that the Service Contracts were ambiguous with regard to the issue of a minimum monthly guarantee and determined that factual development was necessary to determine the intent of the parties. *See* Dec. 14, 2001 Letter Ruling at p. 4. Consistent with its Order denying the cross-motions for summary judgment, the Court tried this dispute on February 11-12, 2002, May 24, 2002, and July 9-10, 2002.

C. THE LANGUAGE OF THE SERVICE CONTRACTS

8. KHI Exhibits 17 and 18 are the final versions of the Service Contracts. Section 3.1(A) of the Service Contracts sets forth the basic obligations of the parties:

> Kitty Hawk will operate one U.S. registered Boeing 747-200 aircraft . . . to perform the service operations described in Exhibit A . . . during the Service Period stated in Exhibit A . . . for the Base Fees . . . described in Exhibit B.

Exhibit A to the August Contract states that its Service Period is "August 17, 1999 through August 17, 2002, subject to optional early termination under ¶ 3.10(B)," while Exhibit A to the October Contract states that its Service Period is "October 1, 1999 through September 30, 2002, subject to optional early termination under ¶ 3.10(B) and ¶ 3.10(D)." Exhibit A to the August Contract further provides that KHI "will operate the Aircraft hereunder" as follows:

Routing:	YIP [Ypsilanti, MI] – BHX [Birmingham, England] – OST [Ostend, Belgium] – YIP [Ypsilanti, MI]
Scheduled Frequency:	At least four full rotations per week, but not less than 250 Block Hours or more than 350 Block Hours in any month.[3]
Times:	Target arrival and departure times are to be established by [Pathfinder] with reasonable advance notice to and consultation with [KHI], and must be within the reasonable performance capabilities of the Aircraft.

With the exception of a routing change, Exhibit A to the October Contract contains an identical provision.

9. Exhibit B defines the Service Fees that Pathfinder agreed to pay KHI in exchange for the operations KHI agreed to provide in Exhibit A. "Service Fees" are defined as "[c]harges per

[3]KHI contends that this provision of Exhibit A requires Pathfinder to use or pay for 250 Block Hours per month. Pathfinder contends that this provision only defines KHI's obligation to operate the Aircraft. This provision is referred to hereinafter as the "Scheduled Frequency Clause."

Block Hour for Service Operations actually performed by the Aircraft." *See* KHI Exhibits 17 and 18 at Exhibit B. Exhibit B also defines the number of Block Hours Pathfinder must use or pay for in each year of the contract: "Assured Hours: 3,000 Block Hours in each Contract Year." *See id.*

10. Paragraph 3.14(A) of the Service Contracts governs Pathfinder's obligation to pay Service Fees to KHI and provides that Pathfinder "will pay to [KHI] Service Fees in the amounts shown in Exhibit B for all Block Hours of operation of the Aircraft in Service Operations." Paragraph 3.14(B) of the Service Contracts defines "Block Hour" as that period of time commencing when an aircraft first begins to roll under its own power for purposes of flight and continuing until the aircraft reaches its parking position at the end of a flight. Paragraph 3.14(C) of the Service Contracts defines Pathfinder's obligation to pay for at least 3,000 "Assured Hours" in each Contract Year:

> In each year of the Service Period (measured from the effective date or an anniversary to the next anniversary, a "Contract Year") the Base Fee component of the Service Fees (reduced by the Navigation Fee Credit and the Landing Fee Credit in all cases) will not be less than those for annual minimum number of assured Block Hours of operation (the "Assured Hours") shown in Exhibit B, reduced by the number of Block Hours, if any, of Service Operations in that year that were not performed because of maintenance failure, tardiness or unavailability of the flight crew, or any other operational matter within [KHI's] control and further reduced by the number of Block Hours consumed in Service Operations that did not meet the on-time standards of ¶ 3.13A hereof.... Within five business days after the end of each Contract Year [KHI] will reconcile Service Fees paid by [Pathfinder] for the Contract Year with Assured Hours, as so adjusted, for the Contract Year, and will issue a reconciliation invoice for any underpaid Service Fees for such Contract Year or a credit memo for any overpaid Service Fees for such Contract Year and, at the end of the Service Period, will refund to [Pathfinder] any monies received but unearned or subject to credit.

Isolating the essential language, paragraph 3.14(C) provides:

> In each . . . Contract Year the Base Fee component of the Service Fees . . . will not be less than those for annual minimum number of assured Block Hours of operation (the "Assured Hours") shown in Exhibit B.
>
> Within five business days after the end of each Contract Year [KHI] will reconcile Service Fees paid by [Pathfinder] for the Contract Year with Assured Hours, as so adjusted, for the Contract Year, and will issue a reconciliation invoice for any underpaid Service Fees for such Contract Year or a credit memo for any overpaid Service Fees for such Contract Year and, at the end of the Service Period, will refund to [Pathfinder] any monies received but unearned or subject to credit.

11. Paragraph 3.14(E) of the Service Contracts[4] provides that Pathfinder will wire transfer $364,800 to KHI each Monday (except for two Mondays in July) and that, at the end of each month, KHI will reconcile actual Block Hours flown with payments made by Pathfinder, and will issue a reconciliation invoice for underpaid Service Fees, if any, or a credit for overpaid Service Fees, if any, in that month.[5]

D. BACKGROUND OF THE PARTIES

KHI

12. KHI was formerly American International Airlines ("AIA"). Kitty Hawk, Inc. purchased

---

[4]In the October Contract, the paragraph that should have been numbered 3.14(E) was numbered 3.14(B) due to computer formatting error. For purposes of these findings and conclusions, the Court will refer to the second paragraph 3.14(B) of the October Contract as though it had been numbered correctly as paragraph 3.14(E).

[5]As executed, the August Contract did not provide for a monthly credit for overpaid Service Fees. On or about October 21, 1999, KHI agreed to conform the August Contract to the October Contract which contained such a provision. *See* KHI Exhibit 89; 7/9/02 Tr. at p. 261:22 - p. 265:10; Pathfinder Exhibit 23. As modified, paragraph 3.14(E) of the conformed August Contract provides:

> Within five business days after the end of each calendar month during the Service Period, Kitty Hawk will reconcile actual Block Hours of operation of the Aircraft in Service Operations with payments made by Coughlin and will issue a reconciliation invoice for underpaid Service Fees, or a credit for overpaid Service Fees, if any, through the end of such month.

AIA from Kalitta Companies in 1997, integrated it into Kitty Hawk, Inc.'s corporate structure, and changed its name to Kitty Hawk International. *See* Pathfinder Exhibit 170 at pp. 24-25; 5/24/02 Tr. at 10:19 - 11:1 KHI offered international air cargo services from Willow Run Airport in Ypsilanti, Michigan until it ceased operations in late April 2000. *See* Joint Pretrial Order at Section II (A). Before it ceased operations, KHI operated a fleet of wide-bodied aircraft, including seven (7) 747 freighters. *See* Pathfinder Exhibit 170 at p. 15; 5/24/02 Tr. at p. 12:19-21.

F.X. Coughlin Co. d/b/a/ Pathfinder

13. F.X. Coughlin Co. is an integrated logistics company that provides freight management services primarily for international customers across the North Atlantic. *See* 7/10/02 Tr. at p. 497:19 - p. 498:21. F.X. Coughlin operates through several divisions including Leading Edge, Distance Packaging, Coughlin Logistics, and Pathfinder.[6] *See* 7/10/02 Tr. at p. 494:15 - p. 495:12; & p. 497:19 - p. 498:11. While Coughlin Logistics and Pathfinder operate under their own trade names, they are divisions of F.X. Coughlin, not separate legal entities. *See* 7/9/02 Tr. at p. 285:15 - p. 286:1; 7/10/02 Tr. at p. 497:19 - p. 498:11.

14. Coughlin Logistics and Pathfinder regularly coordinate their activities to find the most cost effective and profitable way to move customer freight. Coughlin Logistics decides how freight will be moved. *See* 7/9/02 Tr. at p. 292:17-19. Coughlin Logistics moves freight internationally in one of three ways: (i) by ship, (ii) by scheduled commercial air service, and (iii) by air charter. *See* 7/9/02 Tr. at p. 292:17 - p. 293:3; p. 295: 4-12. In 2000, Coughlin

---

[6]It is the Pathfinder division of F.X. Coughlin that dealt with KHI in connection with this dispute. Any reference in these findings and conclusions to F.X.Coughlin includes all divisions of the company. References to Pathfinder are to the Pathfinder division of F.X. Coughlin.

Logistics moved the equivalent of one-hundred-twenty (120) 747 loads by scheduled commercial air service. *See* 7/9/02 Tr. at 326:4 -11; p. 362:17 - p. 364:20.

15. Pathfinder is the international air charter manager for F.X. Coughlin. *See* 7/10/02 Tr. at p. 494:15-23. Pathfinder's principal office is located in Southfield, Michigan. *See* Joint Pretrial Order at Section II (A), p. 2. Pathfinder also maintains offices at Willow Run Airport in Ypsilanti, Michigan. Ninety percent (90%) of Pathfinder's business comes from Coughlin Logistics. Pathfinder's customers also include Panalpina, Chatman Freeborn, and Speed Handling. *See* 7/9/02 Tr. at p. 286:2-11. If freight volume or customer needs justify it, Coughlin Logistics calls Pathfinder. Pathfinder contracts with cargo airlines such as KHI on behalf of F.X. Coughlin for air charter service. *See* 7/9/02 Tr. at p. 290:5 - p. 291:20; 7/10/02 Tr. at p. 353:25 - p. 355:2. Pathfinder's air charter contracts take one of three forms: (i) ad hoc contracts (a single flight); (ii) short term contracts (more than one flight, but for a term less than a year), and (iii) long-term air contracts (a term of a year or more). *See* 7/9/02 Tr. at p. 288:16 - p. 289:1.

16. Short-term and long-term air charter contracts are priced by the Block Hour. *See, e.g.* KHI Exhibit 17 at ¶ 3.14(B). Pathfinder's short-term and long-term contracts typically include a minimum usage requirement, which may be expressed as a monthly or an annual requirement over the contract period. *See* 7/9/02 Tr. at p. 293:7-22.

17. When Pathfinder is contractually obligated to use an aircraft and lacks sufficient freight to fill it, Coughlin Logistics will divert freight from scheduled commercial air service or even ocean freight to ensure that the aircraft is filled. If additional freight is needed, Pathfinder goes into the market and sells space on the aircraft to ensure that all available space is used.

See 7/9/02 Tr. at p. 293:23 - p. 295:12. Michelle Wilson, Pathfinder's senior operations manager, testified that since January 1999 Pathfinder has never failed to meet a minimum usage requirement under an air charter contract. *See* 7/9/02 Tr. at p. 294:23 - p. 295:3. She further testified that she had worked for F.X. Coughlin for nineteen years in various jobs and was unaware that Pathfinder had ever failed to meet a minimum usage requirement. *See* 7/10/02 Tr. at p. 282:25 - p. 283:20; p. 472:4-10.

E. CIRCUMSTANCES SURROUNDING EXECUTION OF SERVICE CONTRACTS

F.X. Coughlin's Business in 1999

18. While F.X. Coughlin accepts freight from many sources, ninety percent (90%) of its business comes from the automobile industry. *See* 7/9/02 Tr. at p. 286:2-25; 5/24/02 Tr. at p. 15:2-10. F.X. Coughlin is the official international air charter manager for the Ford Motor Company ("Ford") and its Jaguar subsidiary. *See* KHI Exhibit 57; 7/9/02 Tr. at p. 286:12-16. In the spring and summer of 1999, Coughlin Logistics was running an engine project for Ford. Under the engine project, Pathfinder arranged for the air freight shipment of engine blocks from the United States to Ford-Cologne (Germany) and for the return shipment of completed engines back to the United States. *See* 7/9/02 Tr. at p. 297:4-21.

19. Shipping automotive parts is a seasonal business. Traffic is strong in the spring and the fall. Traffic is weak in the winter and midsummer. Ford closes its plants in December. Traffic in January is very light. Ford's Jaguar subsidiary shuts down in July and August. *See* 5/24/02 Tr. at p. 15:11-17; 7/9/02 Tr. at p. 287:3 - p. 288:4.

20. 1999 was the most profitable year to that time in F.X. Coughlin's history. 2000 was even better. *See* 7/10/02 Tr. at p. 496:15 - p. 497:4. 2000 was also an excellent year for F.X.

Coughlin's customers in the automobile industry. *See* 7/9/02 Tr. at p. 275:21 - p. 277:12.

KHI's Business in 1999

21. From 1997 to October 1998, Raymond Lawlor ("Lawlor") was the director of sales and marketing for Atlas Air Cargo ("Atlas"), a competitor of KHI. *See* 5/24/02 Tr. at p. 10:2-23. In October 1998, Lawlor left Atlas and became KHI's Vice-President of International Sales and a member of KHI's senior management. His job was to market KHI's 747 fleet, a role that included the negotiation of air charter contracts on KHI's behalf. *See* 5/24/02 Tr. at p. 10:2 - p. 12:3. Lawlor worked for KHI until October 1999, when he went to Gemini Air Cargo and became Senior Vice-President of Sales and Marketing for Gemini. *See* 5/24/02 Tr. at p. 11:2-15.

22. During the one year period that Lawlor worked for KHI, its financial condition was quite poor. Lawlor testified that "KHI itself was in poor shape . . . . and in disarray." *See* 5/24/02 Tr. at p. 12:9-14. KHI was losing money. *See* 5/24/02 Tr. at p. 12:17-18; 7/9/02 Tr. at p. 36:22 - p. 37:6. Its fleet of 747 freighters was underutilized. In October 1998, three (3) of KHI's seven (7) 747 freighters were not under contract to customers and thus, were generating very little revenue. *See* 5/24/02 Tr. at p. 12:19-25. In KHI's year 2000 business plan dated September 27, 1999, John Palo, KHI's Director of Marketing Administration, wrote: "We have not assumed any B747 Ad-Hoc revenues since our experience has been that with the exception of AMC missions, the demand for one-off B747 charters is almost non-existent." *See* Pathfinder Exhibit 40 at p. 3 (paragraph captioned "747 Fleet").

F. THE CONTRACT NEGOTIATIONS

Lawlor

23. Beginning in August 1998, while still employed by Atlas, Lawlor began making sales calls on Bill Larkin ("Larkin"), Executive Vice-President and Chief Operating Officer of F.X. Coughlin. Lawlor described the sales calls as "essentially chasing Bill Larkin all over the world." *See* 5/24/02 Tr. at p. 19:18 - p. 20:10. After Lawlor joined KHI in October 1998, he continued to actively pursue air charter business on KHI's behalf, including potential business with Pathfinder. *See* 5/24/02 Tr. at p. 18:25 - p. 19:2. Lawlor testified that he was authorized by the President of KHI, Charles Carson ("Carson"), to negotiate with Pathfinder on KHI's behalf and told Larkin that he had that authority. *See* 5/24/02 Tr. at p. 23:25 - p. 24:23.

24. In his efforts to get Pathfinder under long-term service contracts, Lawlor met with Larkin in Detroit, Miami, New York, London, Oslo, Luxemburg, and Basel, Switzerland. Michelle Wilson, then Pathfinder's general manager, confirmed that Lawlor actively pursued Pathfinder's business and also made sales calls to Pathfinder's office in Ypsilanti, Michigan. *See* 7/9/02 Tr. at p. 298:17 - p. 300:18. In his efforts to find Larkin, Lawlor frequently called Wilson at the Ypsilanti office. *See* 7/9/02 Tr. at p. 302:12 - p. 303:4.

25. After seven months of discussions with Larkin, on March 9, 1999, Lawlor made a written proposal to Pathfinder on behalf of KHI. *See* Pathfinder Exhibit 36. The proposal called for a three-year ACMI contract, renewable annually with a 315 Block Hour minimum monthly guarantee. *See* Pathfinder Exhibit 36 at ¶ 6. The proposal explained specifically what that meant: "A minimum of 315 Block Hour per month per Aircraft will be guaranteed and paid,

whether flown or not." *See* Pathfinder Exhibit 36 at p. 2, ¶ 7.

26. Lawlor took Carson with him to a meeting with Larkin on March 15, 1999 at Pathfinder's office in Taylor, Michigan. That was Carson's initial meeting with Larkin. *See* Pathfinder Exhibit 37 (first line); 5/24/02 Tr. at p. 21:12 - p. 22:17. On March 16, 1999, Carson and Lawlor sent another written proposal to Pathfinder regarding a possible long-term air charter contract.[7] *See* Pathfinder Exhibit 37; 5/24/02 Tr. at p. 21:12-20. This proposal called for a two aircraft contract, including one "heavy" and one "medium" B747-200 aircraft, and clearly articulated the requirement of minimum monthly guarantees for both aircraft:

> (6) Minimum Guaranteed Block Hours per month per Aircraft
> (a) "Heavy" Aircraft- 300 Block Hours per month
> (b) "Medium" Aircraft-225 Block Hours per month

See Pathfinder Exhibit 37 at ¶ 6. This proposal also explained how the minimum monthly guarantees would be administered:

> (9) . . . At the end of each calendar month, KHI and Customer will reconcile actual Block Hours flown by Aircraft, considering actual Block Hours as well as the minimum monthly guaranteed hours per Aircraft, and KHI will either issue a final invoice to Customer for block hours flown and not paid or will issue a credit to Customer for block hours invoiced but not flown, provided the minimum monthly guarantees are met.

See Pathfinder Exhibit 37at ¶ 9; *see also* 5/24/02 Tr. at p. 27:1-4.

27. Pathfinder rejected the KHI proposals set forth in Pathfinder Exhibits 36 and 37. *See* 7/10/02 Tr. at p. 508:5-13; 5/24/02 Tr. at p. 27:4-10.

28. Lawlor testified that KHI wanted any air charter contract it might enter into with Pathfinder

---

[7]Lawlor testified that Carson drafted this letter. Both Carson and Lawlor signed the proposal on behalf of KHI. *See* Pathfinder Exhibit 37 at p. 3.

to include a minimum monthly guarantee and that he negotiated for such a provision to be included. *See* 5/24/02 Tr. at p. 27:19-25. However, Lawlor further testified that despite his efforts, Larkin never agreed to a minimum monthly guarantee. *See* 5/24/02 Tr. at p. 27:24 - p. 29:1. Lawlor testified that Larkin specifically told him that he would not commit to a minimum monthly guarantee due to the seasonal nature of F.X. Coughlin's business. *See* 5/24/02 Tr. at p. 29:25 - p. 30:8.

29. Although Lawlor understood the seasonality of F.X.Coughlin's business and Pathfinder's unwillingness to accept a minimum monthly guarantee, KHI needed a steady cash flow to support its operations. *See* 5/24/02 Tr. at p. 32:7-24. Lawlor testified that the tension between those two positions stalled the negotiations until Carson and he, along with Larkin, devised a structure under which Pathfinder would make weekly payments to KHI in an amount that approximated what KHI would receive if the contracts contained a minimum monthly guarantee, but there would only be an annual guarantee of Block Hours. According to Lawlor, under this new structure, KHI would receive the cash flow it needed to support the two aircraft it would make available to Pathfinder, but Pathfinder would not be required to use or lose the Block Hours on a monthly basis. Lawlor testified that Larkin was extremely pleased with this proposal and indicated he would sign a contract on those terms.[8]

---

[8] KHI attempted to impeach Lawlor's testimony with KHI Exhibit 38, an e-mail sent by Lawlor to Carson on April 29, 1999 which states that Larkin and he had reached an agreement that contained a monthly minimum guarantee. The e-mail states: "Congratulations; per Bill Larkin: 'We have a deal'!! As discussed, this is what we have committed to . . . 2/ Monthly block hour guarantee 280; minimum 250, maximum 350 . . . ." However, on redirect Lawlor testified as follows:

> Q: Mr. Lawlor, did anything ever come of Exhibit 38 [the e-mail]? Did anything ever come of the deal that you talked about (inaudible):
>
> A: No, it changed again.
>
> Q: No deal was signed based on the deal that you talked about, Exhibit 38?

See 5/24/02 Tr. at p. 30:9 - p. 33:15.

30. The documentary evidence corroborates Lawlor's testimony that KHI and Pathfinder devised the new structure around early May 1999. For example, a contract draft dated March 25, 1999 clearly articulates a 225 Block Hour minimum monthly guarantee with no mention of an annual guarantee. *See* Pathfinder Exhibit 93 ¶ 3.14(C), Exhibit B. The substance of the new structure – *i.e.*, a weekly cash flow payment and an annual Block Hour guarantee, first appears in a contract draft dated May 2, 1999 sent by KHI to Pathfinder. *See* 5/24/02 Tr. at p. 39:22 - p. 43:22; Pathfinder Exhibit 95 at ¶¶ 3.14(B) *sic.*, 3.14(C), 3.14(D), & Exhibits A and B. The only reference to a monthly number of hours in the May 2, 1999 draft is in Exhibit A, the Scheduled Frequency Clause. The structure that first appears in the May 2, 1999 draft continues through all subsequent contract drafts, including the final versions of the Service Contracts. *See* Pathfinder Exhibits 95, 97, 99, 104, 17 and 18.

31. Lawlor testified that he was KHI's primary negotiator for the Service Contracts and that he remained actively involved in the contract negotiations from beginning to end. *See* 5/24/02 Tr. at p. 16:19 - p. 17:20. His testimony is corroborated by the testimony of Wilson, Larkin, and John Young ("Young"), Pathfinder's attorney during the later phases of the contract negotiation, and by documentary evidence.[9] For example, Young made notes of a telephone conversation he had on July 20, 1999 with Lawlor regarding Paragraphs 3.3, 3.7, 3.14(B),

---

A: No.
See 5/24/02 Tr. at p. 92:18-24.

[9]While KHI disputes Lawlor's contention that he was the primary negotiator of the Service Contracts for KHI, and contends instead that Carson was its primary negotiator, Carson never characterized himself as the primary negotiator of the Service Contracts. *See* 5/24/02 Tr. at p. 17:21 - 18:3. Rather, he testified that he was involved in the negotiations and was ultimately responsible for the results of those negotiations as the President of KHI. *See* 7/9/02 Tr. at p. 41:23 - p. 42:15; & p. 43:22 - p. 44:4. On this record, the Court finds that Lawlor was KHI's principal negotiator.

3.14(C), 3.14(E), and 3.18 of the August Contract. *See* KHI Exhibit 87. Young also made notes during a July 21, 1999 meeting of the parties at Pathfinder's offices at which Lawlor, Carson, and Jim Craig, KHI's general counsel, were present. *See* KHI Exhibit 88; 7/9/02 Tr. at p. 235:10 - p. 237:2.

32. Lawlor testified that once KHI and Pathfinder agreed on the "new structure" – *i.e.*, in his mind, weekly cash flow payments, an annual Block Hour guarantee, and no minimum monthly guarantee, that issue was settled and the parties never revisited it. *See* 5/24/02 Tr. at p. 45:14 - p. 46:17. Again, Lawlor's testimony is corroborated by the documentary evidence and the testimony of other witnesses. Beginning with the May 2, 1999 draft, all contract drafts reflected weekly cash flow payments, an annual guarantee, and made no clear reference to a minimum monthly guarantee. The May 2, 1999 draft contract is distinctly different in this regard from the next earlier draft (March 25, 1999) which had clearly articulated references throughout the contract to a minimum monthly guarantee and no reference to an annual guarantee. *Compare* Pathfinder Exhibit 95 *with* Pathfinder Exhibit 93. Young got involved in the drafting process as Pathfinder's attorney on May 14, 1999. By the time Young got involved, there was no further mention of a minimum monthly guarantee. When asked whether the issue of a monthly guarantee versus an annual guarantee had been discussed at the July 21, 1999 meeting, Young stated that the issue was never discussed in his presence – "[i]t did not take place. At no time from the beginning of my involvement in this case until the termination of the contract was there ever mentioned in my presence such a thing as a 250 hour per month minimum. It was not discussed. It was never on the table." *See* 7/9/02 Tr. at p. 261:2-9.

33. Lawlor testified that the final versions of the two Service Contracts incorporated the "new structure" worked out in the May 2, 1999 draft. Specifically, Lawlor testified that the Service Contracts provided for a weekly cash flow payment, a 3,000 Assured Hours annual guarantee, an annual reconciliation of the 3,000 Assured Hours requirement, and no minimum monthly guarantee. *See* 5/24/02 Tr. at p. 34:10-15. Moreover, Lawlor testified that he did not intend for the Scheduled Frequency Clause of Exhibit A to create a 250 Block Hour minimum monthly guarantee. Instead, he intended and understood the Scheduled Frequency Clause to govern the operations that KHI must be prepared to perform. KHI was obligated to make its Aircraft available for use by Pathfinder at least 250 Block Hours and not more than 350 Block Hours per month. According to Lawlor, that clause did not obligate Pathfinder to use or pay for 250 Block Hours per month. *See* 5/24/02 Tr. at p. 43:8 - p. 45:13; p. 49:16 - p. 50:9.

34. In short, Lawlor testified that KHI wanted a minimum monthly guarantee, he negotiated for such a provision to be included in the Service Contracts, Pathfinder never agreed to include such a provision, and, as a result, he understood that the final version of the Service Contracts did not contain a minimum monthly guarantee. Rather, he intended that the Service Contracts include only an annual guarantee of "Assured Hours."

Larkin

35. Larkin was Pathfinder's primary negotiator. *See* 7/10/02 Tr. at p. 500:5-23; 5/24/02 Tr. at p. 17:7-15; 7/9/02 Tr. at p. 44:13-18.

36. Larkin's testimony regarding the contract negotiations differs from Lawlor's testimony on some details, but is consistent in all material respects. For example, Larkin testified that he

met with Lawlor numerous times in Europe and the United States to discuss the possibility of entering into a long-term air charter agreement, first with Atlas and later with KHI. *See* 7/10 Tr. at p. 501:9 - p. 502:23. Larkin further testified that Lawlor presented him with several proposals and contract drafts, each containing a minimum monthly guarantee and each of which he rejected, *see* 7/10/02 Tr. at p. 509:14-25, because of the seasonality of Pathfinder's business. *See* 7/10/02 Tr. at p. 508:14 - p. 509:13.

37. Larkin also testified that he did not get Young involved in the negotiations until Lawlor brought Larkin a contract draft that did not have a minimum monthly guarantee. *See* 7/10/02 Tr. at p. 512:3-12. Larkin testified that there was no point in spending money on attorneys until there was reasonable possibility of making a deal. *See id.* From Larkin's perspective, there was no reasonable prospect of making a deal until KHI proposed a contract without a minimum monthly guarantee. *See* 7/10/02 Tr. at p. 509:1 - p. 510:8. Larkin's testimony squares with Young's testimony that Young became involved in the negotiations on May 14, 1999, which was twelve (12) days after the May 2, 1999 contract draft (the first draft that did not contain a clearly articulated minimum monthly guarantee) was received. *See* 7/9/02 Tr. at p. 243:15-18. Larkin's testimony is also consistent with Young's testimony that the issue of a minimum monthly guarantee was never discussed during the time he participated in the negotiations and that he and Larkin both believed from the May 2, 1999 contract draft onward that there was only an annual Assured Hours requirement and no monthly minimum. *See* 7/9/02 Tr. at p. 244:17 - p. 245:23.

38. Like Lawlor, Larkin testified that he understood that the final version of the Service Contracts contained a weekly cash flow payment, a 3,000 Assured Hours annual guarantee,

an annual reconciliation of the 3,000 Assured Hours requirement, and no minimum monthly guarantee. *See* 7/10/02 Tr. at p. 510:9-24; & p. 511:20-23; & p. 514:12 - p. 515:4. When asked about the meaning of the Scheduled Frequency Clause of Exhibit A, Larkin testified that he did not understand the provision to impose a 250 Block Hour minimum monthly guarantee on Pathfinder. *See* 7/10/02 Tr. at 515:13 - 516:12.

39. In short, Larkin testified that KHI wanted a minimum monthly guarantee in the Service Contracts, Lawlor negotiated for such a provision to be included in the Service Contracts, Larkin never agreed to include such a provision, and, as a result, Larkin understood that the Service Contracts did not contain a minimum monthly guarantee. Rather, Larkin intended that the Service Contracts include only an annual guarantee of "Assured Hours."

Wilson

40. Wilson, Pathfinder's general manager in 1999, testified that she did not participate in any face-to-face negotiations with KHI, but that she received copies of all contract drafts and was asked by Larkin to review and comment on the drafts, which she did. *See* 7/9/02 Tr. at p. 300:19 - p. 301:22. She testified that she suggested the inclusion of navigation and landing fees in the Block Hour rate and expressed concern about the inclusion of a minimum monthly guarantee in any contract due to the seasonality of F.X. Coughlin's business. *See* 7/9/02 Tr. at p. 301:12-22. Wilson testified that she believed the final version of the Service Contracts reflected her comments in two respects: (i) the navigation and landing fees were built into the Block Hour rate and (ii) the proposed minimum monthly guarantee was removed from the contracts.

Carson

41. Carson was the President of KHI and the person who signed the Service Contracts on KHI's behalf. *See* KHI Exhibits 17 and 18; Joint Pre-Trial Order at Section III (A), ¶ 6. Carson participated in the negotiation of the Service Contracts. *See* Joint Pre-Trial Order at Section III (A), ¶ 7. However, Carson's recollection of the details of the negotiations was poor and his testimony was vague on most details. For example, Carson testified as follows:

> Q: When did negotiations begin on the October 1 contract?
>
> A: I don't remember.
>
> Q: Was it after the -- after Kitty Hawk and F.X. Coughlin had already began flying on the August 17 contract?
>
> A: I'm sure it was.
>
> Q: Do you recall how long the negotiations took on -- for the October 1 contract?
>
> A: No.
>
> Q: Do you recall any issues that arose in the October 1 contract that were different from the issues that arose in the negotiation of the August 17, 1999 contract?
>
> A: I don't remember, no.
>
> Q: You don't remember that there were any or you don't remember what they were?
>
> A: I don't remember if there were any issues that were unique to this contract. I don't remember.
>
> Q: Okay. Did the negotiations for the October 1 contract ever take place face-to-face?
>
> A: I don't remember. There were probably some meetings. Clearly, we had to have been meeting to sign the thing, although I suppose we might have exchanged signatures by

FedEx or something. I -- I honestly don't remember. I would say it's possible, perhaps even probable, but –

Q: You don't remember?

A: -- I don't remember -- I don't remember, yeah.

See 7/9/02 Tr. at p. 44:19 - p. 45:22. Thus, while it is clear that Carson participated in the negotiation of the Service Contracts, probably more so in the last weeks before the August Contract was signed, the Court finds that Lawlor was the primary negotiator for KHI and Carson played an intermittent and subsidiary role.

42. Carson's testimony is critical to KHI's case, as it is the only testimony of someone who participated directly in the negotiations that supports KHI's contention that the Service Contracts contained a minimum monthly guarantee.[10] Carson's testimony is inconsistent with both Lawlor's testimony and Larkin's testimony on this issue.

43. Carson testified that he intended for the Service Contracts to impose a 250 Block Hour minimum monthly guarantee on Pathfinder and believed that they did. *See* 7/9/02 Tr. at p. 50:3-21; 54:7 - 55:2; 55:2 - 56:12. Carson offered two reasons for his belief that the Service Contracts contained a 250 Block Hour minimum monthly guarantee: (i) KHI expected Pathfinder to fly more than 250 Block Hours per month, but needed a revenue stream of at least 250 hours each month to cover the high costs of operating its aircraft and (ii) the Scheduled Frequency Clause of Exhibit A. *See* 7/9/02 Tr. at p. 54:7 - p. 55:24. Carson further testified that he intended for the Scheduled Frequency Clause of Exhibit A to impose a 250 Block Hour minimum monthly guarantee on Pathfinder. *See* 7/9/02 Tr. at p. 53:6 -

[10]While KHI points to certain documentary evidence that establishes that KHI administered the Service Contracts as if there was a minimum monthly guarantee, for the reasons explained hereinafter, that evidence is not binding on Pathfinder. *See infra* at pp. 32 - 38.

54:5.

44. Although he testified to his subjective intent, Carson confirmed that the Scheduled Frequency Clause of Exhibit A was the only provision of the Service Contracts that he relied upon for his belief that the Service Contracts contained a 250 Block Hour minimum monthly guarantee:

> Q: Okay. So I understand, you've told me your intent, and we're -- we're clear on what your intent was. But from the standpoint of the words of the contract, Exhibit A is the only place where it says that there's a 2 -- that there is a 250 hour monthly minimum?
>
> A: Yes.
>
> Q: That's the basis for your statement?
>
> A: Yes, yes.
>
> Q: Okay.
>
> A: Yes.

See Pathfinder Exhibit 126 at p. 166:16 - p. 167:1.

45. Carson admitted that paragraph 3.14 of the Service Contracts, which governs Pathfinder's payment obligations, does not mention a minimum monthly guarantee. *See* Pathfinder Exhibit 126 at p. 141:2-16.

46. Carson testified several times that he thought the 250 Block Hour minimum monthly guarantee was "implied" by the Service Contracts. *See* Pathfinder Exhibit 126 at p. 108:6-13; p. 133:11 - p. 134:3; p. 165:1 - p. 166:4.

47. When asked if he communicated to Larkin that KHI needed a minimum monthly guarantee, Carson testified that he was sure he did, but he could not remember Larkin's response. *See*

7/9/02 Tr. at p. 56:5-21. When asked whether he recalled any moment when Larkin agreed to a minimum monthly guarantee, Carson testified that Larkin agreed by signing the Service Contracts and Exhibit A, which Carson believed implied a minimum monthly guarantee. When pressed again for some specific statement by Larkin agreeing to a minimum monthly guarantee, Carson remembered none:

> Q: Okay. Do you recall any particular time when – do you recall if Bill Larkin ever said to you, Okay, we'll agree to a monthly minimum
>
> A: Oh, I think he did agree to a monthly minimum in Exhibit A.
>
> Q: Okay. So you think the contract implies –
>
> A: I think so, yes.
>
> Q: Okay. But you don't recall a conversation in which he said –
>
> A: No.
>
> Q: – We now see it Kitty Hawk's way?
>
> A: No, no.

See 7/9/02 Tr. at p. 59:12-23.

John Palo

48. John Palo ("Palo") was KHI's Director of Marketing Administration from October 1998 through August 1999. Palo was then promoted to Director of Customer Service where he served until June 2000. *See* 2/11/02 Tr. at p. 155:22 - p. 157:16. While Palo was ultimately responsible for the administration of the Service Contracts, Dawn Sharp ("Sharp") was the customer service representative who administered the Service Contracts on a daily basis. *See* 2/11/02 Tr. at p. 159:25 - p. 161:7. Palo testified that he believed the Service Contracts

imposed a 250 Block Hour minimum monthly guarantee on Pathfinder. Like Carson, the Scheduled Frequency Clause of Exhibit A formed the basis of his belief. *See* 2/9/02 Tr. at p. 170:9-21.

49. However, on cross-examination, Palo admitted that he was not involved in the negotiation of the Service Contracts and had no firsthand knowledge of the intent of the parties at the time the Service Contracts were negotiated or signed. *See* 2/11/02 Tr. at p. 206:14-18; 207:11-15. In fact, Palo had no contact with any Pathfinder representative until late March 2000. *See* 2/11/02 Tr. at p. 209:19-25. Palo also testified that Carson described the Service Contracts to him before he read them, and that he got his first impression of the Service Contracts from Carson's description rather than from reading the documents. *See* 2/11/02 Tr. at p. 207:16 - 25.

Craig

50. Craig, KHI's general counsel, represented KHI throughout the process of documenting the proposed transactions. *See* 5/24/02 Tr. at p. 54:25 - p. 55:15; p. 56:4-10; KHI Exhibit 88; Pathfinder Exhibit 126, p. 41:6-18; 7/9/02 Tr. at p. 235:10 - p. 236:9. Craig prepared the March drafts of the proposed contracts which contained a clearly articulated minimum monthly guarantee. *See* 7/9/02 Tr. at p. 197:18 - p.199:2. Craig also prepared the May 2, 1999 contract draft that converted the Assured Hours requirement from a monthly guarantee to an annual guarantee. Craig also prepared all other drafts of the proposed contract until the June 11, 1999 "Howard and Howard"[11] drafts admitted as Pathfinder Exhibits 97 and 99. *See*

[11] Pathfinder's lawyer, John Young, is a partner at the Howard & Howard law firm in Bloomfield Hills, Michigan. *See* p. 18, ¶ 37 *supra*; 7/9/02 Tr. at p. 222:11-23.

7/9/02 Tr. at p. 197:18 - p.199:2.

51. No one is in a better position to know KHI's intent than Craig. No one is in a better position to corroborate Carson's testimony or to rebut the testimony of Lawlor, Larkin, Wilson, and Young. However, Craig did not testify, in rebuttal or otherwise. The Court finds Craig's silence surprising, particularly given his presence in the courtroom throughout much of the trial. Craig's silence suggests that he was unable to testify in support of KHI's case.

G. THE PRIOR DRAFTS OF THE SERVICE CONTRACTS

52. The August Contract was the seventh draft of the Service Contracts. *See* Pathfinder Exhibits 89, 90, 93, 95, 97 & 99, 104, 17 & 18; KHI Exhibit 79.[12] A review of the prior drafts illustrates how the Service Contracts evolved from a contract in which the entire focus was monthly to a contract in which payments were made weekly, but the Assured Hours requirement was an annual one.

53. Pathfinder Exhibit 89 was the first draft of the Service Contract and was dated March 18, 1999. This draft was exchanged during the negotiations. *See* 5/24/02 Tr. at p. 34:16 - p. 35:10. Exhibit B defined the proposed minimum usage requirement:

> **Assured Hours**: *300 Block Hours in each calendar month* of the Service Period (prorated for partial calendar months, if any, at the beginning and end of the Service Period), subject to modification as provided below.

See Pathfinder Exhibit 89 at Exhibit B (emphasis added). Paragraph 3.14(C) provided:

> *In each calendar month of the Service Period, however, the Service Fees will not be less than those for the minimum number of assured Block Hours of operation (the "Assured Hours") shown in Exhibit B,*

[12]KHI Exhibit 79 is a summary prepared by Young of certain provisions (Exhibit A, Exhibit B, and Paragraph 3.14(C)) of each draft of the Service Contracts.

> reduced by the number of Block Hours, if any, of Service Operations in that month that were not performed because of maintenance failure, tardiness or unavailability of flight crew, or any other operational matter within Kitty Hawk's control. Assured Hours will not be reduced by Block Hours of Service Operations that were not performed for any reason listed in ¶3.13(C). Assured Hours are to be prorated for any partial months at the beginning or end of the Service Period.

See id. at ¶ 3.14(C) (emphasis added). Paragraph 3.14(D) provided for a monthly reconciliation of Block Hours flown, Assured Hours, and payments made:

> Within five business days after the end of each calendar month during the Service Period Kitty Hawk will *reconcile actual Block Hours of operation of the Aircraft in Service Operations and Assured Hours with payments made by Coughlin* and will issue a reconciliation invoice for underpaid Service Fees for such month or credit memo for overpaid Service Fees for such month.

See id. at ¶ 3.14(D) (emphasis added).

54. Pathfinder Exhibit 90 was the March 23, 1999 draft. It was also exchanged during the negotiations. *See* 5/24/02 Tr. at p. 35:22 - p. 36:7. While it reduced the proposed number of guaranteed monthly hours to 225 (from 300), it contained identical provisions to those quoted above.

55. Pathfinder Exhibit 93 was the March 25, 1999 draft. It was also exchanged during the negotiations. *See* 5/24/02 Tr. at p. 37:18 - p.39:10. It proposed 225 hours as the guaranteed monthly minimum and contained identical provisions to those quoted above.

56. Pathfinder Exhibit 95 was the May 2, 1999 draft. It was also exchanged during the negotiations. *See* 5/24/02 Tr. at p. 40:20 - p. 41:12. Significantly, in this draft "Assured Hours" were expressed as an annual requirement, not a monthly requirement:

> **Assured Hours**: *3,360 Block Hours in each Contract Year*, except 3,230 Block Hours in the first Contract Year.

See Pathfinder Exhibit 95 at Exhibit B (emphasis added). Moreover, paragraph 3.14(B) [sic] was modified to provide:

> *In each year of the Service Period (measured from the effective date or an anniversary to the next anniversary, a "Contract Year") the Service Fees will not be less than those for the annual minimum number of assured Block Hours of operation (the "Assured Hours") shown in Exhibit B*, reduced by the number of Block Hours, if any, of Service Operations in that year that were not performed because of maintenance failure, tardiness or unavailability of flight crew, or any other operational matter within Kitty Hawk's control. Assured Hours will not be reduced by Block Hours of Service Operations that were not performed for any reason listed in ¶3.13(C). *Within five business days after the end of each Contract Year Kitty Hawk will reconcile Service Fees paid by Coughlin for the Contract Year with Assured Hours, as so adjusted, for the Contract Year*, and will issue a reconciliation invoice for any underpaid Service Fees for such Contract Year or a credit memo for any overpaid Service Fees for such Contract Year.

See id. at ¶ 3.14(B) [sic] (emphasis added). Paragraph 3.14(D) was also modified to delete the language providing for a monthly reconciliation of payments made to Assured Hours. The only monthly reconciliation was a reconciliation of payments made to actual Block Hours flown:

> Within five business days after the end of each calendar month during the Service Period, Kitty Hawk *will reconcile actual Block Hours of operation of the Aircraft in Service Operations with payments made by Coughlin* and will issue a reconciliation invoice for underpaid Service Fees, if any, through the end of such month.

See id. at ¶ 3.14(D) (emphasis added).

57. Pathfinder Exhibits 97 and 99 were versions (one redlined and one not) of the June 11, 1999 "Howard and Howard" draft prepared by Young and faxed to KHI. *See* 7/9/02 Tr. at p. 251:9-17. While this draft reduced the number of "Assured Hours" in any year to 3,000 and contained a provision for the reduction of "Assured Hours" under certain circumstances, it

otherwise contained identical provisions to those quoted above from the May 2, 1999 draft that KHI's Craig had prepared.

58. Pathfinder Exhibit 104 was the penultimate draft. *See* 7/9/02 Tr. at p. 255:3-21. It was dated July 21, 1999 and was sent by Pathfinder's counsel to KHI. As relevant here, it contained provisions that were identical to the prior draft.[13]

59. KHI Exhibits 17 and 18 (also Pathfinder Exhibits 17 and 18) were the final drafts of the Service Contracts. The relevant provisions of the Service Contracts were quoted in findings 8 – 11, *supra*.

60. As this comparison reveals, before May 2, 1999, all of the contract drafts defined "Assured Hours" as a monthly figure and provided that Service Fees for each calendar month would not be less than those for the monthly number of Assured Hours, as adjusted for performance failures. The May 2, 1999 draft was distinctly different. It defined "Assured Hours" as an annual figure and provided that the Service Fees would be not less than those for the annual number of Assured Hours, as adjusted for performance failures. All subsequent contract drafts, including the final draft, defined "Assured Hours" as an annual figure and provided that the Service Fees would be not less than those for the annual number of Assured Hours, as adjusted for performance failures.

61. Before May 2, 1999, all of the contract drafts provided for a monthly reconciliation of Assured Hours and payments made by Pathfinder. Beginning with the May 2, 1999 draft, all drafts, including the final draft, provided for a monthly reconciliation of only Block Hours

---

[13]However, this draft differed from the prior drafts in that it dealt with two aircraft. It also contained a provision that KHI asks this Court to infer into the Service Contracts in order to resolve this dispute. This provision prorated Assured Hours over the Contract Year if the contract was terminated as to one of the aircraft prior to the end of a Contract Year. *See* Pathfinder Exhibit 104 at Exhibit B. *See supra* at pp. 14-17.

actually flown and payments made by Pathfinder. The provision for a monthly Assured Hours reconciliation was deleted from May 2, 1999 draft and it never reappeared.

H. INDUSTRY CUSTOM

62. The Service Contracts required KHI to make its aircraft available for Pathfinder's use at least four full trans-Atlantic rotations per week, and not less 250 Block Hours per month. That level of usage required KHI to dedicate one 747 to each Service Contract. Because contracts for dedicated aircraft "tie up" the aircraft, they usually provide for a minimum monthly guarantee to assure an adequate return to the airline. *See* 2/12/02 Tr. at p. 299:2-11. From that general principle, KHI extrapolates that the Service Contracts must therefore have had a minimum monthly guarantee. For several reasons, the Court is not persuaded.

63. First, while minimum monthly guarantees are common in ACMI contracts, they are not required. On cross-examination, KHI's expert, Michael Cox ("Cox"), candidly admitted that ACMI agreements are entirely matters of contract and are subject to negotiation. *See* 2/12/02 Tr. at p. 333:16 - p. 334:15. The airline and its customer are free to make any deal they want, including a deal that does not include a minimum monthly guarantee. *See* 2/12/02 Tr. at p. 334:16-20. Cox further admitted that it would be possible for an airline and its customer to negotiate an ACMI contract that set an annual number of assured hours and an annual reconciliation, but that addressed the airline's cash flow needs by providing interim weekly payments. *See* 2/12/02 Tr. at p. 336:8-23.

64. Second, the Service Contracts were not "customary" ACMI contracts. They were heavily negotiated over several months. As noted previously, seven distinct drafts were admitted in evidence. *See* Pathfinder Exhibits 89, 90, 93, 95, 97 & 99, 104, and 17 & 18. The Service

Contracts contained unusual provisions. For example, Carson testified that the inclusion of navigation and landing fees in the "Service Fee" made administration of the contracts complex and cumbersome. *See* 7/9/02 Tr. at p. 60:4-12. Carson further testified that the inclusion of navigation fees and landing fees was unique in his experience and "was the subject of a lot of debate." *See id.* at p. 60:14-25. Lawlor also testified that he had negotiated hundreds of ACMI contracts and that the Service Contracts were unique in his experience. He called them "extremely different than your standard contract." *See* 5/24/02 Tr. at p. 51:3-4. When asked how the August Contract was different, he said that it was "tailored and customized to a specific customer need, which was the traffic flow of this automotive business that Coughlin carried." *See* 5/24/02 Tr. at p. 50:25 - p. 51:11. When asked whether the August Contract was "innovative," he answered "[v]ery much so." *See id.* at p. 50:16-22. He testified that the annualized guarantee was an innovation, the first one he had ever seen. *See id.* at 19-25.

65. Finally, Cox did not participate in the negotiation of the Service Contracts and had no knowledge of this dispute before August 2001. *See* 2/12/02 Tr. at p. 326:16 - p. 327:7. He was engaged to give expert testimony on customs and practices in the airline industry. The thrust of his testimony was that KHI would never have agreed to a contract without a minimum monthly guarantee because that would be contrary to industry practice and because KHI needed the regular revenue stream that a minimum monthly guarantee would produce. In essence, Cox answered a hypothetical question, "Based upon these assumptions, would an airline in KHI's position have agreed to a contract without a minimum monthly guarantee?"

66. Whatever persuasive value such evidence may have is outweighed by Lawlor's testimony that he was KHI's primary negotiator, that he did agree to a contract without a minimum monthly guarantee, and that he had rational business reasons for doing so. Lawlor explained the elements that he factored into his decision:

> Q: Mr. Lawlor, why were you as KHI's negotiator willing to give up a monthly minimum guarantee and settle for an annual assured hours (inaudible) [requirement]?
>
> A: Well, first and foremost, it was – as I stated earlier, at that time, that was the one significant piece of business that was out there. We were flying the airplanes. We had a pattern of flying the airplanes. We were going gangbusters, quite frankly, and there was a dual fold sense of purpose in getting these contracts done. We needed to rehabilitate the image of the company by signing a, you know, premier type of customer rather than go the (inaudible) scale, so to speak, and, you know quite frankly, we needed to sign the business. And, you know, when Charlie had come up with that idea, I mean it was a brillant stroke that got the thing – that got it moving.
>
> Q: Were there competitors trying to get the business?
>
> A: Certainly.
>
> Q: Who were they?
>
> A: Certainly Atlas Air, as I testified earlier. They were really keen on getting this. There was Evergreen International Airlines, there was Tower Air, who ultimately signed – did sign the contract with Cargo. And Polar, Polar Air Cargo.
>
> Q: All were competing for this business?
>
> A: All competing for this one piece of business, and I think – my recollection is in that year there was – this was probably the only major ACMI business that was signed in the industry.

See 5/24/02 Tr. at p. 48:1 - p. 49:7. Lawlor was further asked if KHI had any back-up deals lined up in case the negotiations with Pathfinder failed. He said no:

Q: Mr. Lawlor, you testified that getting Pathfinder's business was important to KHI, is that correct?

A: Yes.

Q: Okay. Mr. Lawlor, what backup deal did KHI have in 1999 in case the contract negotiations with Pathfinder fell through?

A: Well, we had no backup deals, and I was constantly chasing, you know, other business. I mean it wasn't just this. I mean there was other stuff that we thought we could have closed. Nothing closed for anybody else that year, so we had nothing else beside this.

Q: Nothing--nothing lined up?

A: No. Nothing – nothing firm.

See 5/24/02 Tr. at p. 50:10-24.

I. THE ADMINISTRATION OF THE SERVICE CONTRACTS

67. Carson was the motivating force behind KHI's administration of the Service Contracts. Soon after the August Contract was signed, Carson met with Palo and Sharp and explained to them how he believed the Service Contracts should be administered. Palo followed Carson's instructions. *See* 2/11/02 Tr. at p. 208:1-17.

68. The Service Contracts were administered on a daily basis by Wilson at Pathfinder and Sharp at KHI. Sharp was KHI's account manager for the Service Contracts and Palo was her boss. Sharp worked autonomously, but Palo reviewed her reports. *See* 2/11/02 Tr. at p. 208:18 - p. 209:14.

69. During the administration of the Service Contracts, Wilson and Sharp communicated regularly, typically by e-mail, to reconcile Block Hours flown per trip, delays in Service Operations, wire transfers, and pass-through charges. That information was recorded daily

on a computer spread sheet called a "Block Hour Activity Report," which was kept jointly by Wilson and Sharp. *See* Pathfinder Exhibits 118, 119, 120, 121; 7/9/02 Tr. at p. 305:7 - p. 308:4. The information for all Block Hour Activity Reports was taken from the pilot's logs. *See* 7/9/02 Tr. at p. 308:5-18.

70. At the end of December 1999, Pathfinder paid KHI $3,000,000 as a pre-payment for Base Fees that would become due in January 2000. In exchange for the pre-payment, Pathfinder received a $35 per Block Hour price reduction. *See* Joint Pre-Trial Order at Section III (A) ¶ 18.

71. In December 1999, January 2000, and February 2000, Pathfinder's usage of KHI's aircraft declined substantially from the usage levels in September, October, and November 1999 due to the normal seasonal patterns of the automobile industry. *See* Pathfinder Exhibits 8 and 22; 7/9/02 Tr. at p. 287:3-25. As a result of the $3,000,000 pre-payment for January 2000 and the reduced winter time traffic levels, Pathfinder believed that it had a credit built up at KHI and wanted KHI to use the credit before it made more weekly payments. *See* 7/10/02 Tr. at p. 480:6 - p. 481:15; p. 552:18 - p. 553:4. Accordingly, Pathfinder reduced the frequency of its weekly payments in February and March 2000. Specifically, Pathfinder paid $364,800 (one payment) per aircraft in February 2000, and $729,600 (two payments) in March 2000. *See* Pathfinder Exhibit 22.[14]

72. Sometime in late February 2000, Sharp contacted Wilson by telephone and asked why the weekly cash flow payments had slowed. Wilson told Sharp that Pathfinder did not owe KHI

---

[14]Pathfinder's reconciliation accounted for the February and March 2000 payments in February resulting in a payment of $1,094,400 for each aircraft in February and $0 in March, rather than $364,800 in February and $729,600 in March. The numbers are the same when added up. *See* Pathfinder Exhibit 8.

any money. Sharp told Wilson that KHI believed that the Service Contracts had a 250 Block Hour minimum monthly guarantee. *See* 7/9/02 Tr. at p. 321:11-24.

73. Although the Service Contracts called for a monthly reconciliation of actual Block Hours flown with payments made, no reconciliation was performed until February 2000. When KHI completed its first reconciliation, it invoiced Pathfinder for Pathfinder's failure to meet the minimum monthly guarantee.[15] KHI's invoice for Block Hour activity in December 1999 is dated February 25, 2000. *See* Pathfinder Exhibit 45. KHI's invoice for Block Hour activity in January 2000 is also dated February 25, 2000. *See* Pathfinder Exhibit 46. The record contains no invoices for any months before December 1999.

74. Thus, Pathfinder did not receive any invoices for what KHI contended was under-minimum monthly usage until February 28, 2000, a few days after the date shown on the first two invoices. Upon Wilson's receipt of these invoices she contacted Larkin and informed him that KHI and Pathfinder interpreted the Service Contracts differently. *See* 7/9/02 Tr. at p. 323:15 - p. 324:8.

75. The information used to prepare the Block Hour reconciliations was taken in part from the Block Hour Activity Reports maintained jointly by Wilson and Sharp. However, the Block Hour reconciliations were prepared separately by KHI and Pathfinder without any input from the other. *See* 7/9/02 Tr. at p. 162:9-13; p. 314:1 - p. 316:2.

76. KHI prepared its last Block Hour reconciliation on or about April 5, 2000. *See* Pathfinder Exhibit 22. Contemporaneously, Pathfinder prepared its own Block Hour reconciliation for

---

[15]It is undisputed that Pathfinder used more 250 Block Hours per month, as adjusted, in August through November, 1999. *See* Pathfinder Exhibit 22.

the entire contract period. *See* Pathfinder Exhibit 8; 7/9/02 Tr. at p. 314:1-23. These reconciliations establish that KHI and Pathfinder accounted for the Service Contracts differently.

77. KHI's reconciliation assumes the existence of a 250 Block Hour minimum monthly guarantee. KHI used the information taken from the Block Hour Activity Reports to charge Pathfinder for failing to meet the minimum monthly guarantee. *See* Pathfinder Exhibit 22. According to KHI's final reconciliation (prepared on April 5, 2000), Pathfinder owes $3,153,875.00 to KHI for under-minimum usage in December 1999 through March 2000.

78. Pathfinder's reconciliation does not assume the existence of any minimum monthly guarantee. Rather, Pathfinder calculated its obligation to KHI by multiplying actual Block Hours flown by the applicable Block Hour rate and then comparing that number to its previous payments to KHI. Under Pathfinder's reconciliation, it was owed a credit of $2,360,450.05 (the difference between Block Hours actually flown and payments made) as of the end of March 2000. *See* Pathfinder Exhibit 8.

79. Not everyone at KHI agreed that the Service Contracts contained a 250 Block Hour minimum monthly guarantee.[16] As noted previously, Sharp was the account manager for the Service Contracts and was responsible for their day-to-day administration. *See* 7/9/02 Tr. at p. 136:3-12. Carson described her as honest, trustworthy, and dependable. *See* Pathfinder Exhibit 126 at p. 66:10-16. Sharp prepared the April 5, 2000 Block Hour reconciliation that is Pathfinder Exhibit 22. *See* 7/9/02 Tr. at p. 105:3-18. While Pathfinder Exhibit 22

[16]Lawlor clearly did not agree, but he left KHI in October 1999 and played no role in the administration of the Service Contracts. *See* 5/24/02 Tr. at p. 70:7-17.

accurately reflected KHI's official view of the Service Contracts, it did not reflect Sharp's view of the Service Contracts. She testified that she thought the Service Contracts required 3,000 Assured Hours per year, but did not require 250 Block Hours per month. *See* 7/9/02 Tr. at p. 163:5-15. She further testified that she told her superiors that she did not read the Service Contracts to require Pathfinder to use or pay for 250 Block Hours per month but was told that KHI wanted to stick with its interpretation of the Service Contracts. *See* 7/9/02 Tr. at p. 120:24 - 121:12. Finally, Sharp testified that she thought KHI owed Pathfinder more than $1,000,000 at the time the Service Contracts were terminated. *See* 7/9/02 Tr. at p. 159:25 - p. 161:15.

80. Specifically with regard to the April 5, 2000 reconciliation, Pathfinder Exhibit 22, Sharp testified that she prepared the document as though the Service Contracts had a 250 Block Hour minimum monthly guarantee, but she did not believe that to be correct. She did so because she was told to do so, not because she believed it to be true.

> Q: Ms. Sharp, Deposition Exhibit No. 22 assumes that Pathfinder is required to fly 250 hours each month -- or pay for 250 hours each month, doesn't it?
>
> A: Assumes, uh-huh, yes.
>
> Q: It assumes that to be correct?
>
> A: Yes.
>
> Q: Okay. And you prepared Deposition Exhibit No. 22 in this form because you were told to do so?
>
> A: Correct.
>
> Q: You've previously testified that you yourself did not believe that the contract requires 200 -- requires Pathfinder to fly a minimum -- or pay for a minimum of 250 hours each month,

correct?

A: Say that again.

Q: Okay. I'll try again.

A: Sorry.

Q: I'm trying to be clear. You testified you yourself don't believe that the contract requires Pathfinder to pay for at least 250 hours each month?

A: Correct.

Q: In preparing this chart, you were doing your job?

A: Doing my job.

Q: Okay. But you weren't necessarily affirming that you believe this information to be correct?

A: Correct.

Q: That is to say, no, you were not affirming –

A: Yeah, I was doing what I was supposed to be doing according to Kitty Hawk. I don't necessarily think that this is how it should have been tallied up, no.

See 7/9/02 Tr. at p. 162:21 - p. 163:24.

81. The Service Contracts provided that Pathfinder's 3,000 annual Assured Hours would be reduced by Block Hours lost due to certain performance failures deemed to be within KHI's control ("Block Hour Credits"). *See* KHI Exhibits 17 and 18 at ¶¶ 3.14(C), 3.13(A), and 3.13(C); 7/9/02 Tr. at p. 327:20 - p. 328:16. When flight delays or other performance failures occurred and were recorded on the Block Hour Activity Report, Wilson would sometimes contact Sharp and request Block Hour Credits. *See* 7/9/02 Tr. at p. 328:17 - p. 329:10. Whether Pathfinder would request Block Hour Credits depended upon several

factors, including the length of the delay, whether a customer was harmed, and whether any flights were missed. *See* 7/9/02 Tr. at p. 328:6 - 329:16. Block Hour Credits were given throughout the Service Period, although not all requested credits were given. *See* 7/9/02 Tr. at p. 143:11 - p. 144:6. There was extensive e-mail traffic related to the issue of Block Hour Credits during the administration of the Service Contracts. *See, e.g.,* KHI Exhibits 3, 4, 5, 6, 9, 10, 11, 12, 25, 26, 27.

82. KHI contends that this e-mail traffic established that Pathfinder understood that the Service Contracts had a minimum monthly guarantee because some of the later e-mails (after January 1, 2000) mentioned the word "minimum" in relation to particular months. Wilson testified that she did not understand the significance that KHI now attaches to these e-mails at the time she received them. While the parties' dispute might have surfaced sooner (mid-January instead of late February, 2000) if Wilson had understood what KHI was referring to through its use of the word minimum in these e-mails, it does nothing to change the parties' intent at the time the Service Contracts were signed.

83. KHI administered the Service Contracts in a manner consistent with the views of Carson and Palo that the Service Contracts had a 250 Block Hour minimum monthly guarantee. Pathfinder administered the Service Contracts in a manner consistent with its view that the Service Contracts did not require Pathfinder to use or pay for 250 Block Hours per month.

J. THE END OF THE SERVICE CONTRACTS

84. Once Pathfinder realized that KHI was charging it for failing to meet a 250 Block Hour minimum monthly guarantee, this dispute arose. Pathfinder refused to make weekly cash flow payments until it exhausted the monetary credit to which it believed it was entitled.

KHI refused to fly for Pathfinder unless weekly payments resumed. On March 24, 2000, representatives of Pathfinder (Fred Mills ("Mills"), Larkin, and Young) met with representatives of KHI (Carson, Palo, and Pete Sanderlin ("Sanderlin")) to attempt to resolve the dispute. *See* KHI Exhibit 91; 7/9/02 Tr. at p. 206:13 - p. 207:2. Young's notes from the meeting, KHI Exhibit 91, indicate that Carson and Larkin exchanged their differing interpretations of the Service Contracts. Nothing was resolved.

85. On March 29, 2000, Pathfinder terminated the August Contract for cause – *i.e.*, for KHI's failure to meet the ninety percent (90%) on-time performance standards required by paragraph 3.13(D). *See* Pathfinder Exhibits 17 and 31. Contemporaneous correspondence between Young and Larkin indicated that in February 2000, KHI flew 34 legs for Pathfinder of which only seven (7) were on-time. *See* KHI Exhibit 93; 7/9/02 Tr. at p. 279:4-25.

86. On April 6, 2000, Larkin, Mills, Young, Palo, Sanderlin, and Craig met again, unsuccessfully, to attempt to resolve this dispute. *See* KHI Exhibit 94; 7/9/02 Tr. at p. 210:11-23.

87. Soon after the April 6, 2000 meeting, KHI insisted that Pathfinder pay for all flights in advance. As a result, the parties mutually agreed to terminate the October Contract on or about April 10, 2000. Flights that flew before April 10, 2000 were treated as "contract" flights. Flights after April 10, 2000 were treated as "ad-hoc" flights, outside the October Contract. Subject to all offsets and recoupment claims, Pathfinder agrees that it owes KHI $465,075 for contract flights in April 2000. *See* Joint Pretrial Order at Section III (A), ¶ 25.

K. BLOCK HOUR CREDITS

88. Block Hour Credits counted against the Assured Hours requirement that Pathfinder was obligated to meet under Service Contracts. *See* KHI Exhibits 17 and 18 at ¶ 3.14(C); 7/9/02 Tr. at p. 327:20 - p. 328:5. As KHI administered the Service Contracts, Block Hour Credits also reduced the 250 Block Hour minimum monthly guarantee that KHI claims existed. *See* KHI Exhibits 5, 6, 9, 10, and 12. During the course of contract administration, Sharp and Wilson kept a list of Block Hour Credits that Pathfinder had reported but that KHI had not yet approved. The list was updated regularly. Pathfinder Exhibit 13 was the final version. *See* 7/9/02 Tr. at p. 330:6 - p. 332:4. Wilson and Sharp agreed that Pathfinder was entitled to 304.1 of the Block Hour Credits shown on Pathfinder Exhibit 13. *See* 7/9/02 Tr. at p. 334:14-24; p. 144:7 - p. 147:7; p. 151:8-17; p. 164:19 - 165:6.

89. However, Sharp testified that Palo had to approve Block Hour Credits before she was authorized to give them to Pathfinder. *See* 7/9/02 Tr. at p. 172:15-20. Palo did not approve every item on Pathfinder Exhibit 13 and in particular objected to giving Block Hour Credits for A-Checks (a type of regularly scheduled maintenance). *See* 7/9/02 Tr. at p. 198:24 - 200:7.

90. Because Sharp was not authorized to grant Block Hour Credits, Pathfinder must prove its entitlement to them under the Service Contracts. However, in light of other findings of fact and the conclusions of law stated hereinafter, the Court does not need to address Pathfinder's entitlement to Block Hour Credits. *See* Joint Pre-Trial Order at Section III(A), ¶ 24.

L. PASS-THROUGH CHARGES

91. Subject to all offsets and recoupment claims, Pathfinder agrees it owes KHI $291,537.09

in un-reimbursed pass-through charges for the period from January 1 through April 14, 2000.

M. INTENT OF THE PARTIES AT THE TIME OF CONTRACT FORMATION

92. Based upon all of the evidence, the Court finds that the parties intended that the Service Contracts would require Pathfinder to use or pay for 3,000 Assured Hours per Contract Year but would not impose a minimum monthly guarantee. However, the Service Contracts do not expressly address what happens if the Service Contracts are terminated prior to the expiration of a Contract Year.

93. KHI earned Service Fees under the Service Contracts by: (i) flying Block Hours in Service Operations or (ii) getting to the annual reconciliation at the end of a Contract Year, when Pathfinder was required to pay for the difference between actual Block Hours flown and the 3,000 Assured Hours. While Pathfinder was required to prepay KHI $364,800 each Monday during the Service Period (except two Mondays in July), those prepayments were not earned by KHI until it flew the Block Hours necessary to earn the Service Fees or until KHI became entitled to additional Service Fees as a result of the annual reconciliation.

94. Thus, upon termination of the Service Contracts prior to the expiration of a Contract Year – *i.e.*, at the end of the Service Period, KHI was required to refund to Pathfinder any monies it had received but had not earned. *See* KHI Exhibits Exhibits 17 and 18 at ¶ 3.14(C). The Service Period for the August Contract ended on March 29, 2000 and the Service Period for the October Contract ended on April 10, 2000.

N. DAMAGES

95. From the commencement of the August Contract through March 31, 2000, Pathfinder paid KHI $2,360,450.05 more than the Service Fees that KHI had earned for actual Block Hours

flown. Pathfinder overpaid $810,307.55 on the August Contract and $1,550,142.50 on the October Contract. *See* Pathfinder Exhibit 8. Thus, on the Petition Date, Pathfinder had a claim against KHI in the amount of $2,360,450.05.

96. In turn, Pathfinder owes KHI $465,075 for unpaid Service Fees in April 2000 prior to the termination of the October Contract. Moreover, Pathfinder owes KHI $291,537.09 in unpaid pass-through charges. However, Pathfinder is entitled to offset these amounts against the amount owing to it, resulting in a net claim owing to Pathfinder of $1,603,838.96.

97. In addition, under the Service Contracts, the prevailing party is entitled to interest on unpaid amounts at 11% per annum (two percentage points above the then-existing 9% prime rate). *See* Joint Pre-Trial Order at Section III (A), ¶ 28. Thus, Pathfinder is entitled to recover contractual interest from KHI prior to the Petition Date in the amount of $14,500.45.

98. In summary, Pathfinder's claim is calculated as follows:

$2,360,450.05	(Overpaid service fees August 15, 1999-March 31, 2000)
- $465,075.00	(Unpaid Service Fees in April 2000)
- $291,537.09	(Unpaid pass-through charges)
$1,603,837.96	(Total) (before interest)
+ $14,500.45	(Contractual interest to the Petition Date)
$1,618,338.41	(Total claim including interest)

II.

CONCLUSIONS OF LAW

A. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (C).

B. Pathfinder filed the Proof of Claim and KHI objected to that claim, contending that Pathfinder actually owed KHI money under the Service Contracts. While a proof of claim is normally prima facie evidence of the validity of the claim, *see* Fed. R. Bankr. P. 3001(f), once an objection is filed and the objectant presents some evidence of the validity of its objection, the burden shifts back to the claimant to prove the existence of its claim by a preponderance of the evidence. *In re O'Connor*, 153 F.3d 258 (5th Cir. 1998).

C. Here, however, because KHI contended that it was actually owed money by Pathfinder under the Service Contracts, the parties agreed that KHI should initiate this adversary proceeding, sue Pathfinder for damages and, by Agreed Scheduling Order entered on February 5, 2001, that KHI's objection to Pathfinder's claim and KHI's adversary proceeding against Pathfinder would be automatically consolidated and proceed together for trial. Thus, KHI bears the burden of proof on its claim for damages against Pathfinder and must establish its interpretation of the Service Contracts by a preponderance of the evidence before it is entitled to an affirmative recovery. *Gary Boat Club, Inc. v. Oselka*, 188 N.W.2d 127 (Mich. Ct. App. 1971). Similarly, in light of KHI's objection to the Proof of Claim, Pathfinder bears the burden of proving its claim against KHI by a preponderance of the evidence. *O'Connor,* 153 F.3d at 260.

D. A resolution of this dispute turns on the correct interpretation of the Service Contracts. The

Service Contracts are governed by Michigan law. *See* KHI Exhibits 17 and 18 at ¶ 4.3(A). The parties agree that Michigan rules of contract interpretation apply. *See* Joint Pre-Trial Order at Section V, ¶ 1.

E. The goal of contract interpretation is to enforce the intent of the parties at the time of contract formation. *Old Kent Bank v. Sobczak,* 620 N.W.2d 663, 667-68 (Mich. Ct. App. 2000). The Court "must construe every word in the agreement to have been included for a purpose, and we must reject no word as mere surplusage if we can discover its reasonable purpose in light of the whole instrument." *Citizens Ins. Co. of Am. v. Chrysler Ins. Co.,* No. 219332, slip op., 2001 WL 1135298, at *4 (Mich. Ct. App. Sept. 18, 2001) (per curiam) (citations omitted); *accord Associated Truck Lines v. Baer,* 77 N.W.2d 384, 386 (Mich. 1956). If the intent of the parties cannot be ascertained from the face of the contract, the Court may look to extrinsic evidence in addition to the specific words of the contract to ascertain the parties' intent. *Old Kent Bank,* 620 N.W.2d at 667-68.

F. Having previously determined that the Service Contracts were ambiguous with respect to the existence of a 250 Block Hour minimum monthly guarantee, the Court can consider extrinsic evidence in resolving this dispute. Under Michigan law, the Court may consider extrinsic evidence including: (i) the negotiations of the parties and the circumstances surrounding the negotiation and execution of the Service Contracts, (ii) the prior drafts of the Service Contracts, (iii) industry custom; (iv) the dealings between the parties during the administration of the Service Contracts; and (v) whether either party's interpretation of the Service Contracts renders certain provisions of the contracts meaningless. *See City of Wyandotte v. Consol. Rail Corp.,* 262 F.2d 581, 586 (6th Cir. 2001) (applying Michigan

law).

G. The Court will analyze the parties' negotiations and the circumstances surrounding the negotiation and execution of the Service Contracts first. When the negotiations started, KHI clearly contemplated entering into a contract which provided for a minimum monthly guarantee of Assured Hours. However, Lawlor testified that the inclusion of such a provision was a dealbreaker to Pathfinder. Larkin simply would not agree. Thus, according to Lawlor, if KHI wanted to get Pathfinder to agree to a long term service contract, something had to give. Lawlor credited his boss, Carson, for the idea that broke the impasse – a weekly cash flow payment that would approximate the revenue of a minimum monthly guarantee but the contract would only have an annual Assured Hours requirement, so each party would get what it needed. KHI would get the cash flow it needed to support the cost of making the aircraft available to Pathfinder and Pathfinder would get the flexibility it needed due to the seasonality of its business. Pathfinder could use the 3,000 Assured Hours over each year of the contract instead of losing (and paying for) unused hours through a minimum monthly guarantee. Lawlor testified that Carson's idea broke the impasse and the parties struck a deal that was embodied ultimately in the final version of the Service Contracts.

H. Although Larkin was not so sure it had been Carson's idea, he agreed that the idea broke the impasse and enabled the parties to come to an agreement that was embodied ultimately in the Service Contracts.

I. While Carson was never asked about his "breakthrough" idea directly, he indirectly denied it because he denied that the parties had agreed to only an annual Assured Hours requirement. Carson testified that he thought the Service Contracts had both an annual

requirement and a minimum monthly guarantee. He relied exclusively on the language of the Scheduled Frequency Clause of Exhibit A for his interpretation of the Service Contracts. He also testified that he thought the Scheduled Frequency Clause implied an obligation on Pathfinder to use or pay for 250 Block Hours each month.

J. The Court cannot reconcile Carson's testimony with the testimony of Lawlor and Larkin and certain documentary evidence. Giving Carson's testimony the benefit of the doubt, the Court would have to conclude that Lawlor, who was KHI's principal negotiator, understood and agreed with Larkin that there would be no monthly guarantee but that Carson was unaware of this change. Unfortunately, such a conclusion is hard to reconcile with both Lawlor's and Larkin's testimony that Carson participated directly in the "breakthrough negotiations" that led to the "new structure." However, even assuming that Carson did not so participate and was unaware of the "breakthrough negotiations" and the agreed upon "new structure," wouldn't he have questioned the significant language changes that appeared in the next draft of the proposed contracts that his counsel prepared and sent to Pathfinder for comment? *See supra* at pp. 19 - 23. Any misunderstanding should have surfaced then, but did not. The significant language changes that appeared in the May 2, 1999 draft carried through to the final versions of the Service Contracts. *See id.*

K. The inconsistent testimony and documentary evidence presents yet another dilemma for the Court. If Carson did in fact participate in the "breakthrough negotiations" and agreed to the "new structure," then it appears he mislead other colleagues at KHI including Palo and Sharp about the contract terms. Palo testified that Carson told him the Service Contracts imposed a monthly guarantee along with an annual guarantee. Sharp was also told that the Service

Contracts had both a monthly guarantee and an annual guarantee. In fact, KHI administered the Service Contracts as if there was both a monthly guarantee and an annual guarantee. Either Carson participated in the "breakthrough negotiations" and knew about the "new structure" or he did not. If he did, he misled his colleagues at KHI into thinking there was both an annual minimum and a monthly minimum. If he did not, he should have questioned the significant language changes proposed by his counsel when the May 2, 1999 draft was circulated for comment so that any misunderstanding was caught before the final versions of the Service Contracts were signed.

L. Alternatively, KHI suggests that Lawlor's testimony should be disregarded because he now works for Gemini, a competitor of KHI which does business with Pathfinder. In essence, KHI suggests that Lawlor's testimony should be disregarded or discounted because he has an indirect financial interest in future business his current employer may do with Pathfinder. Of course, the Court would also have to discount or disregard Larkin's testimony and certain documentary evidence in order to conclude that both KHI and Pathfinder intended to enter into Service Contracts which contained both a minimum monthly guarantee and an annual Assured Hours requirement. Although the Court finds KHI's argument about Lawlor unpersuasive, even if the Court discounted or disregarded Lawlor's testimony, the significant change in the language of the May 2, 1999 draft of the proposed contract would remain unexplained.

M. While Carson's testimony is some evidence of what he subjectively intended, it is no evidence of what Larkin and Pathfinder intended. Accordingly, the Court gives Carson's testimony no weight with regard to Pathfinder's intent at the time of contract formation.

With respect to KHI's intent, the Court assigns some weight to Carson's testimony but gives greater weight to Lawlor's testimony, as he was KHI's primary negotiator and the primary point of contact with Pathfinder.

N. On balance, the Court concludes that KHI and Pathfinder intended to negotiate a contract that: (i) would have an annual "Assured Hours" requirement and no monthly minimum, and (ii) would address KHI's cash flow needs through a requirement of weekly payments to be credited against actual hours flown and/or annual Assured Hours.

O. At the time the Service Contracts were negotiated and signed, F.X. Coughlin (of which Pathfinder is a division) was in good financial health. In fact, from a profitability standpoint, 1999 and 2000 were the best years ever for F.X. Coughlin. In addition, air cargo freighters were readily available for ad hoc charter at that time. Thus, Pathfinder was under no compulsion to make a deal with KHI for the use of its aircraft. However, Pathfinder recognized that it would get some benefit from having a ready source of aircraft available to it at all times and thus, was prepared to sign air charter contracts with KHI if the terms were otherwise acceptable to it.

P. Conversely, KHI was in poor financial condition at the time the Service Contracts were being negotiated. It had three (3) idle 747 freighters and very few prospects for putting those aircraft to work. Pathfinder's business was about the only business available in the marketplace, and various parties hoped to get that business under contract. KHI needed to put its planes to work. Due to its financial circumstances, KHI had an incentive to make a deal with Pathfinder, even on less than ideal terms.

Q. On this record, the Court concludes that KHI was much more likely to make major

concessions on contract terms than was Pathfinder.

R. The Court will analyze the various drafts of the Service Contracts next. A review of these drafts raises many questions that are unanswered by KHI's interpretation of the Service Contracts. For example, if the final drafts of the Service Contracts contain both a minimum monthly guarantee and an annual guarantee as KHI contends, why did the language in the early drafts, which clearly provided for a monthly guarantee of Assured Hours, get changed to only provide for an annual guarantee? Similarly, if the final drafts of the Service Contracts contain both a minimum monthly guarantee and an annual guarantee as KHI contends, why is the only reference to a monthly number of hours a cryptic reference in the Scheduled Frequency Clause of Exhibit A? If the Service Contracts contain both a monthly minimum and an annual minimum as KHI contends, the May 2, 1999 draft and all subsequent drafts could have simply left the original monthly minimum language from the earlier drafts and supplemented it with language addressing the annual requirements. Of course, if there is really a minimum monthly guarantee in the Service Contracts as KHI contends, no annual guarantee is required – it is superfluous – a 250 hour monthly minimum itself imposes a 3,000 hour annual guarantee.

S. There is only one reasonable inference to be drawn from the various contract drafts and that inference supports Pathfinder's view that the parties intended that the Service Contracts contain only an annual "Assured Hours" requirement.

T. The evidence of industry custom is not to the contrary. As KHI's expert, Cox, testified, ACMI contracts are the subject of negotiation and the parties can negotiate for the inclusion of whatever provisions they deem appropriate. While custom in the industry may be that

long-term ACMI contracts[17] have minimum monthly guarantees, that is not compelling evidence here in light of KHI's deteriorating financial condition and the limited business available to air charter cargo companies like KHI at the time these contracts were negotiated and signed.

U. The evidence regarding the administration of the Service Contracts supports the conclusion that KHI administered the Service Contracts as though they had a 250 Block Hour minimum monthly guarantee and Pathfinder administered them as though they did not.

V. Pathfinder's interpretation of the Scheduled Frequency Clause of Exhibit A does not render that provision meaningless. Exhibit A defines and limits KHI's obligation to make its aircraft available to Pathfinder for use each month.

W. In summary, the evidence of the negotiations, the circumstances surrounding those negotiations, and the evolution of the contract drafts supports the conclusion that the parties intended to enter into contracts with only an annual Assured Hours requirement and no minimum monthly guarantee. The evidence of industry custom supports the conclusion that long-term ACMI contracts usually have minimum monthly guarantees, but parties can agree to include whatever provisions they believe are appropriate. The evidence regarding the administration of the Service Contracts, however, supports the conclusion that there was no meeting of the minds on the issue of a minimum monthly guarantee. On balance, after considering all of the extrinsic evidence, the Court concludes that the parties intended to enter into contracts that required Pathfinder to use or pay for 3,000 Assured Hours per

[17]The October Contract cannot be characterized as a long-term contract. It was terminable by Pathfinder upon 30 days notice without cause.

Contract Year with no minimum monthly guarantee.

X. Thus, if the parties intended to enter into contracts with only an annual Assured Hours requirement (and no minimum monthly guarantee), what happens when the contracts are terminated prior to the end of the first year? The Service Contracts contain no provision specifically addressing early termination.

Y. Under Michigan law "[i]t is a basic rule of construction that a court cannot change the terms of an agreement. Nor can it supply material provisions absent a clear and unambiguous writing." *Muthler v. Ann Arbor Mach.*, 18 F.Supp.2d 722, 726 (E.D. Mich. 1998) (Michigan law) (*quoting Hy King Assoc., Inc. v. Versatech Mfg Indus.*, 826 F.Supp. 231, 239 (E.D.Mich. 1993) (*quoting Purlo v. 3925 Woodward Ave.*, 67 N.W.2d 684 (Mich. 1954))).

Z. The law presumes that business people are fully competent to enter into contracts and obligate themselves to perform in any manner they wish. The courts have no authority to rewrite the terms of a contract because they might feel that it was an unwise agreement for a party to have entered into. *WXON-TV, Inc. v. A.C. Nielsen Co.*, 740 F.Supp. 1261, 1264 (E.D.Mich. 1990); *Michigan Ass'n of Psychotherapy Clinics v. Blue Cross*, 301 N.W.2d 33 (Mich. Ct. App. 1980), *set aside in part on other grounds*, 306 N.W.2d 101 (Mich. 1981), *after remand,* 325 N.W.2d 471 (Mich. 1982).

AA. KHI contends that the Court should look to the proration term from the immediately preceding draft of the Service Contracts and "fill the gap" in the Service Contracts with that term. However, even if it were inclined to "fill the gap," the proration provision from the July 21, 1999 draft is inapplicable here. The July 21, 1999 draft dealt with two aircraft. *See* Pathfinder Exhibit 104. Under the terms of the July 21, 1999 draft, Pathfinder could

terminate the contract as to one of the aircraft upon 30 days written notice for any reason. Upon such a termination, the contract "continued in full force and effect as to the one remaining Aircraft with no more termination options available [sic] either party under this paragraph." *See* Pathfinder Exhibit 104 at ¶ 3.10(B). If the contract was so terminated as to one aircraft, the proration provision applied to determine KHI's entitlement to Service Fees with respect to that aircraft. *See* Pathfinder Exhibit 104 at Exhibit B.

BB. Here, however, the August Contract was terminated for cause; and thus, the proration provision from the July 21 draft is simply inapplicable. Even that draft fails to specifically address what happens if the contract is terminated as to the second plane prior to the expiration of a Contract Year. Thus, while interesting, the July 21 draft of the contract provides the Court with no guidance on what to do here.

CC. Pathfinder contends that no special provision is required to fill a gap because there is no gap in the Service Contracts. According to Pathfinder, since KHI only earned Service Fees by actually flying the aircraft or by getting to the end of a Contract Year when the annual Assured Hours reconciliation was performed, KHI is only entitled to be paid Service Fees for actual Block Hours flown during the Service Period (the period from commencement of the contract until its termination). While Pathfinder recognizes the potential unfairness of a termination of the Service Contracts shortly before the expiration of a Contract Year if a substantial number of the annual "Assured Hours" had not been used, it argues that this potential outcome should have been understood by KHI from the outset and that if KHI wanted a provision in the contract to mitigate against this potential outcome, it should have demanded that one be expressly included. In short, Pathfinder contends that the Court cannot

supply a new proration provision into the Service Contracts merely because KHI argues that proration would be a "fair" result.

DD. The Court agrees. While the Service Contracts do not contain a special provision dealing with the effects of early termination, such a provision is not necessary to give full meaning to the Service Contracts as written. As written, KHI earns Service Fees by actually flying the aircraft or by reaching the end of a Contract Year when it is entitled to be paid for underutilization of the aircraft by Pathfinder. Because the Service Contracts were terminated prior to the expiration of a Contract Year, KHI is only entitled to be paid for actual Block Hours flown before termination. Although such an interpretation of the Service Contracts could be harsh if the contracts were terminated shortly before the end of a Contract Year and Service Fees for a significant shortfall of Assured Hours were about to be earned, the Court cannot find that the parties intended a different result. KHI was well represented during the negotiation and drafting process. The next-to-the-last draft had a proration provision that could have been tailored to address this situation. If KHI had felt it needed this protection in the Service Contracts, it could have bargained for the inclusion of such a provision. No evidence was offered that some sort of proration provision was dropped in the final draft by mistake. It is possible that KHI made the business decision to take the risk of early termination by Pathfinder due to KHI's need to put its aircraft to work. In short – something is better than nothing. By getting the most significant piece of business then available in the marketplace under contract, KHI would at least earn Service Fees for the actual Block Hours flown by Pathfinder. Moreover, if Pathfinder did not terminate the contract early, KHI would get paid for either 3,000 actual Block Hours of flight or Pathfinder would have to pay for the

shortfall in annual Block Hours at the end of a Contract Year.

EE. The Service Contracts required Pathfinder to make "cash flow" payments of $364,800 per week (except for two weeks in July). These payments were not earned upon receipt; they were a pre-payment of Service Fees for actual Block Hours flown and/or annual Assured Hours. KHI did not earn any of this money until it flew the necessary Block Hours or until the annual reconciliation at the end of the Contract Year. The Court cannot transform the cash flow payments into money earned upon receipt without clear, unambiguous contractual language supporting such a construction. There is no such language in the Service Contracts. Thus, the Court concludes that KHI is not entitled to receive the weekly cash flow payments that were withheld by Pathfinder in February, March, and April 2000 because those funds were intended as pre-payments for Service Fees to be earned by KHI during the Service Periods and KHI did not earn those Service Fees before the Service Contracts were terminated.

FF. The Court concludes that KHI and Pathfinder reached a meeting of the minds that there would be no minimum monthly guarantee in the Service Contracts. As a result, and in accordance with finding of fact 96, the Court concludes that Pathfinder had an allowable claim against KHI on the Petition Date in the amount of $2,360,450.05. After application of offsets found due and owing to KHI in finding of fact 97, and the addition of prepetition interest found due and owing to Pathfinder in finding of fact 98, Pathfinder has an allowable claim against KHI in the amount of $1,618,338.41.

GG. Alternatively,[18] for the reasons explained below, the Court concludes that: (i) there was no meeting of the minds on a minimum monthly guarantee, (ii) such a provision was material, (iii) as a result, there was no enforceable contract between KHI and Pathfinder, and (iv) KHI's damages are governed by the equitable doctrine of *quantum meruit*.

HH. Michigan courts apply an objective standard to determine whether there was a meeting of the minds (also referred to as mutual assent) on all essential elements of a contract. As the Michigan Supreme Court stated:

> To determine whether there was mutual assent to a contract, we use an objective test, looking to the expressed words of the parties and their visible acts, and ask whether a reasonable person could have interpreted the words or conduct in the manner that is alleged. Thus, we begin our analysis by looking to all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent.

Rood v. Gen. Dynamics Corp., 507 N.W.2d 591, 598 (Mich. 1993) (internal citations omitted); *accord Goldman v. Century Ins. Co.*, 93 N.W.2d 240, 243 (Mich. 1958) (defining "meeting of the minds" as mutual assent, which "we judge by an objective standard, looking to the expressed words of the parties and their visible acts"); *Banque de Depots v. Nat'l Bank of Detroit*, 491 F.2d 753, 756 (6th Cir. 1974) (applying the *Goldman* standard and concluding that there was an enforceable contract based upon the "'expressed words of the parties and their visible acts.'").

II. With regard to whether a "meeting of minds" occurred, Michigan law establishes five

---

[18] In the event an appellate court determines that the parties did not agree to contracts that contained only an annual Assured Hours requirement, the only other conclusion supported by the record is that there was no meeting of the minds regarding a material term of the Service Contracts. The conclusions of law stated in paragraphs GG - PP would then be the relevant conclusions this Court would make from the record before it. This record does not support the conclusion that Pathfinder agreed to be bound by Service Contracts that contained a monthly minimum guarantee.

essential elements to the formation of a valid and enforceable contract: (i) competent parties; (ii) proper subject matter; (iii) legal consideration; (iv) mutuality of agreement; and (v) mutuality of obligation. *Detroit Trust Co. v. Struggles*, 286 N.W. 844 (Mich. 1939). To establish an enforceable contract in Michigan, a plaintiff must prove that there was a "meeting of the minds" on all material terms – subject matter, price, payment terms, and parties. *Buck v. Staffney*, No. 205181, 1999 WL 33455079 (Mich. Ct. App. Jan. 26, 1999).

JJ. If KHI and Pathfinder failed to agree on the payment terms of the Service Contracts, then the "mutuality of agreement" element is missing. Stated differently, if both KHI and Pathfinder attached materially different meanings to the terms that govern payment obligations in the Service Contracts, and neither party knew or had reason to know of the meaning attached by the other party, there is no enforceable agreement. *Scholz v. Montgomery Ward*, 468 N.W.2d 845 (Mich. 1991) (citing Restatement 2d Contracts § 201 at p. 83).

KK. Applying these principles here, the Court concludes that based upon an objective evaluation of the "expressed words" and "visible acts" of the parties, there was no meeting of the minds on the issue of a 250 Block Hour minimum monthly guarantee. The actual language of the Service Contracts does not clearly express the concept of a minimum monthly guarantee. Pathfinder's witnesses testified that they never agreed to such a provision. Lawlor, KHI's primary negotiator, testified that he yielded on that point to get Pathfinder's signature on the Service Contracts. It was reasonable for Pathfinder to rely upon Lawlor's expressed words and acts. The evidence regarding the administration of the Service Contracts strongly supports the conclusion that Pathfinder and KHI never agreed on the existence of a minimum monthly guarantee.

LL. A minimum monthly guarantee is a payment term and is "material." *Zurcher v. Herveat,* 605 N.W.2d 329 (Mich. Ct. App. 1999) (essential terms for a binding contract for the sale of land are identification of the property, parties and consideration); *Buck v. Staffney,* No. 205181, 1999 WL 33455079 (Mich. Ct. App. Jan 26, 1999)

MM. In the absence of a meeting of the minds, KHI's damages are governed by the equitable doctrine of *quantum meruit,* under which KHI is entitled to the reasonable value of the benefit that it conferred on Pathfinder to prevent unjust enrichment, but not the detriment that it incurred by conferring the benefit. *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987); *First Inv. Co. v. Andersen*, 621 P.2d 683, 687 (Utah 1980); *see also Giordano v. Alan Markovitcz*, 531 N.W.2d 815 (Mich. Ct. App. 1994) (plaintiff entitled to recover financial contributions made if no contract is found to have existed between the parties).

NN. The agreed upon Block Hour rate is evidence of the reasonable value of the services provided. *Ordon v. Johnson,* 77 N.W.2d 377 (Mich. 1956) (the terms of an unenforceable contract are admissible to show the value placed upon services by the parties to the contract where recovery is sought in *quantum meruit*); *Plunkett & Cooney, P.C. v. Capital Bancorp Ltd.*, 536 N.W.2d 886 (Mich. Ct. App. 1995) (fixed-fee arrangement in attorney fee dispute provides the agreed-upon value of services, and most of the factors that may be considered in determining the *quantum meruit* value of services are inherently incorporated into the contract price). KHI has presented no evidence that the services accepted by Pathfinder are worth more than the agreed upon Block Hour rates. While KHI contends that the testimony of one of its witnesses, John Palo, supports its contention that the benefit to Pathfinder was $2,850,000.00, *see* 2/11/02 Tr. at p. 166:16-20, the Court disagrees. Palo's testimony is

simply not on point. Palo was testifying with respect to a proposed business plan for the year 2000 which he prepared for KHI. As part of that plan, Palo prepared a revenue analysis, which broke down KHI's revenue projections for each aircraft on a customer-by-customer basis. From that analysis, KHI was able to build a budget and forecast its cash flow. *See* 2/11/02 Tr. at pp. 162:14 - 166:20. The amounts ascribed to each contract were premised upon the terms of the contract, and the earnings that each contract was expected to provide. Palo testified that $2,850,000.00 was a fair estimate of the value of the two Pathfinder aircraft to KHI on a cash flow basis. This is not evidence of the value of the benefit conferred upon Pathfinder. Thus, the only relevant evidence in the record is the price Pathfinder agreed to pay per Block Hour flown by KHI under the Service Contracts. Pathfinder has overpaid that amount by $2,360,472.05.

OO. The Court rejects KHI's contention that even if there was no meeting of the minds it is still entitled to be paid for 250 Block Hours per month at the contract rate on the theory that Pathfinder was "benefitted" by the availability of its KHI's aircraft. The argument assumes the truth of what KHI has failed to prove, the existence of a contract. If there was no meeting of the minds, KHI had no obligation to make its aircraft available to Pathfinder and Pathfinder had no obligation to use KHI's aircraft. Pathfinder did not "accept" any benefit merely because KHI's 747s were available to be used. Other aircraft owned by other airlines were also available to Pathfinder for use.

PP. Under its alternative conclusion that there was no meeting of the minds, Pathfinder would have overpaid KHI for the benefit it received - *i.e.*, actual hours flown - and KHI would owe Pathfinder $1,603,837.96 (which consists of the $2,360,472.05 overpayment by Pathfinder

to KHI for Block Hours actually flown, less the amounts owed by Pathfinder to KHI for contract flights in April 2000 and pass-through charges). However, because there would be no contract under this alternative conclusion, Pathfinder would not be entitled to recover prepetition interest. Thus, under these circumstances, Pathfinder would have an allowable claim against KHI of $1,603,837.96.

QQ. Any Finding of Fact that should more appropriately be characterized as a Conclusion of Law shall be considered a Conclusion of Law herein. Similarly, any Conclusion of Law that should more appropriately be characterized as a Finding of Fact shall be considered a Finding of Fact herein.

III.

CONCLUSION

Pathfinder's claim against KHI shall be allowed in the amount of $1,618,338.41. In determining the amount of Pathfinder's allowable claim, KHI has received credit for all amounts that were owing to it by Pathfinder. Pathfinder's allowed unsecured claim will be treated in accordance with the now confirmed plan of reorganization for KHI and its affiliates.

A Judgment consistent with these Findings of Fact and Conclusions of Law will be separately entered.

Signed this 26 day of September, 2002.

Barbara Houser

BARBARA J. HOUSER
UNITED STATES BANKRUPTCY JUDGE