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Proposed Counsel for Debtor and Debtor in Possession

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re  
HAWAIIAN AIRLINES, INC.,  
a Hawaii corporation,  
Debtor.

} **Case No. 03 -**  
} **(Chapter 11)**  
} **MOTION FOR ENTRY OF AN ORDER**  
} **AUTHORIZING THE DEBTOR TO**  
} **REJECT (I) CERTAIN AIRCRAFT LEASES**  
} **AND (II) CONTRACT FOR**  
} **MAINTENANCE OF AIRCRAFT**

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**PURSUANT TO SECTION 365 OF THE  
BANKRUPTCY CODE; EXHIBIT A;  
PROPOSED ORDER**

Date: March 21, 2003  
Time:  
Judge: Hon. Robert J. Faris

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Hawaiian Airlines, Inc., as debtor and debtor in possession (the “Debtor”), by and through its undersigned proposed co-counsel, files this Expedited Motion for Entry of Order Authorizing the Debtor to Reject (I) Certain Aircraft Leases and (II) Contract for Maintenance of Aircraft, Pursuant to Section 365 of the Bankruptcy Code (the “Motion”) as of March 21, 2003 (the “Effective Date”). In support of the Motion, the Debtor respectfully represents as follows:

**I. JURISDICTION**

1. This Court has jurisdiction over the subject matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. § 1409. The instant proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Court possesses the requisite authority to grant the relief requested herein pursuant to section 365 of title 11 of the United States Code.

**II. BACKGROUND**

2. The Debtor is a party to several aircraft leasing arrangements used to finance the acquisition of aircraft for its fleet. As part of the Debtor’s ongoing

restructuring efforts, the Debtor has been analyzing its flight schedules, aircraft types and costs, projected demand for air travel, labor costs and other business factors in conjunction with the use of its entire fleet of aircraft. Through this analysis, the Debtor intends to maximize the fleet's usage at the lowest possible cost.

3. As a part of this process, the Debtor has been analyzing its aircraft leases, engine leases and aircraft maintenance agreements to determine the benefit of such leases and agreements to the Debtor's estate. After an initial review, the Debtor has thus far determined that certain leased aircraft (the "Leased Aircraft") identified on Exhibit A attached hereto are burdensome to the Debtor's estate and that rejecting the leases for the Leased Aircraft (the "Leases") is in the best interest of the Debtor, its estate, its creditors and other parties in interest. The Debtor has also determined that its contract for DC 10 maintenance (the "Maintenance Contract" and together with the Leases, the "Rejected Agreements") with American Airlines, Inc. ("American") is burdensome to the Debtor's estate and that rejecting the Maintenance Contract is in the best interest of the Debtor, its estate, its creditors and other parties in interest.

4. The lessors under the Leases are American and Wells Fargo Bank Northwest National Association as trustee under the trust agreement dated as of

January 16, 2001 for the benefit of BCI 2001-1, LLC, a Delaware limited liability company (“Wells Fargo,” and together with American, the “Contract Parties”).

### **III. RELIEF REQUESTED**

5. The Debtor respectfully requests that this Court: (a) approve the rejections of the Leases and the Maintenance Contract, effective as of the Effective Date; and (b) order that any claims arising out of or related to the rejections described herein be filed with the Court on or before the later of (x) the deadline by which prepetition general unsecured claims must be filed (the “General Bar Date”) or (y) sixty (60) days after the Effective Date.

#### **A. The Debtor has Satisfied the Business Judgment Standard for Rejection of the Rejected Agreements**

6. Section 365(a) of the Bankruptcy Code provides that debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C § 365(a). The decision to assume or reject an executory contract or unexpired lease is a matter within the business judgment of the debtor. *See Durkin v. Bendor Corp. (In re G.I. Industries, Inc.)*, 204 F.3d 1276, 1282 (9<sup>th</sup> Cir. 2000); *National Labor Relations Board v. Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”) *aff’d*, 465 U.S. 513 (1984); *In re Hawaii Dimensions*,

*Inc.*, 47 B.R. 425, 427 (D. Haw. 1985). This standard is satisfied when a debtor determines that rejection will benefit the estate. *In re Bullet Jet Charter, Inc.*, 177 B.R. 593, 601 (Bankr. N.D. Ill. 1995) (under the business judgment rule, “courts should approve a debtor’s decision to reject . . . where [the debtor] demonstrates that rejection will benefit the debtor’s estate or reorganization effort.”) (citation omitted). This “business judgment” is not a strict standard; it merely requires a showing that either assumption or rejection of the lease or contract will benefit the debtor’s estate. *Borman’s, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir. 1983).

7. In applying the business judgment standard, courts defer to a debtor’s decision to reject a lease or contract. *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers)*, 756 F.2d 1043, 1046-7 (4<sup>th</sup> Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986); *In re First Wellington Canyon Associates*, 1989 WL 106838 \*3 (N.D. Ill. Sept. 8, 1989) (“Under this test, the debtor’s business judgment on whether to reject an executory contract must be accorded deference unless shown that the bankrupt’s decision was taken in bad faith or in gross abuse of the bankrupt’s retained discretion.”); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”). If a

debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See, e.g., NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984); *Durkin v. Bendor Corp. (In re G.I. Industries, Inc.)*, 204 F.3d 1276, 1282 (9<sup>th</sup> Cir. 2000); *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993); *In re Southern California Sound Systems, Inc.*, 69 B.R. 893, 896 (Bankr. S.D. Cal. 1987); *Johnson v. Fairco Corporation*, 61 B.R. 317, 320 (Bankr. N.D. Ill. 1986).

8. The Rejected Agreements are burdensome to the Debtor's estate for the following reasons and should be rejected:

- a. The Debtor no longer uses as a part of its fleet, three (3) McDonnell Douglas DC 10-10s and two (2) McDonnell Douglas DC 10-30s in its possession. The Debtor has made the decision to use newer and younger aircraft manufactured by The Boeing Company exclusively in its fleet, as it is less expensive to operate and maintain a younger fleet of aircraft manufactured by a single company. The DC 10s have been grounded in favor of Boeing 767s. Thus, the DC 10s are a liability on the Debtor's estate and confer no benefit on the estate.
- b. The Maintenance Contract with American is for the maintenance of the DC 10 aircraft which the Debtor is rejecting herein. Thus, since the Debtor will be returning each DC 10 to its respective lessor, the

Debtor will not require the maintenance services provided by American. Thus, the Maintenance Contract costs the estate money without conferring a benefit on the estate.

9. Since the Debtor no longer needs the above described aircraft and maintenance services to meet its fleet and operational needs, the Debtor seeks to eliminate the costs associated with performing under the Rejected Agreements. Given the Debtor's reconfiguration of its fleet to exclude the Leased Aircraft and Maintenance Contract, the Rejected Agreements are not sources of potential value for the Debtor's future operations, creditors and interest holders. Accordingly, the Debtor has satisfied the "business judgment" standard in connection with its decision to reject the Rejected Agreements.

10. On the Effective Date, the Leased Aircraft may be located on the Debtor's premises. Each aircraft occupies considerable space and the Debtor's premises are not configured for the extended storage of aircraft. To ensure that the Contract Parties promptly remove the Leased Aircraft from the Debtor's premises, the Debtors request that the Contract Parties be required to retrieve the Leased Aircraft within ten (10) business days of entry of the Order authorizing the Debtor's rejection of the Leases. In the event that the Contract Parties fail to do so, the Debtor expects to charge the Contract Parties prevailing market rates for the

storage of such aircraft and related equipment. The Contract Parties must pay all such charges prior to the Contract Parties' retrieval of the Leased Aircraft.

**B. Request for Retroactive Rejection Date;  
Request for Expedited Consideration**

11. The Debtor requests that the Effective Date of the rejection of the Rejected Agreements be made effective retroactive to the date the Motion was filed (*i.e.*, the Effective Date). As demonstrated below, the Bankruptcy Code, supporting case law and the equities support a retroactive rejection date.

12. Additionally, the Debtor requests expedited consideration of this Motion so that the Contract Parties will have the ability to retake possession of the Leased Aircraft as quickly as possible upon rejection. Moreover, should the Court find that the law or equities do not support a retroactive rejection date, the Debtor requests that the Court authorize the rejection of the Rejected Agreements as of the earliest possible date in order to minimize the amount of the administrative claim that the Contract Parties can attempt to assert against the Debtor.

**i. Authority in Support of Retroactive Rejection Date**

13. The case law discussing the issue of retroactive rejection of executory contracts and unexpired leases supports the Debtor's request to make the effectiveness of a rejection retroactive to the Effective Date. Most notably, the Court of Appeals for the First Circuit held, in *In re Thinking Machines Corp.*, 67

F.3d 1021 (1<sup>st</sup> Cir. 1995), that the bankruptcy court below was within its power to order the retroactive rejection of a nonresidential real property lease. The court in *Thinking Machines* held that a review of the case law revealed that

a single black-letter rule emerges: rejection under section 365(a) does not take effect until judicial approval is secured, but the approving court has the equitable power, in suitable cases, to order a rejection to operate retroactively.

*Thinking Machines*, 67 F3d at 1029. The First Circuit avoided creating a general rule to determine when retroactive rejection is appropriate in the following footnote:

Because no two cases are exactly alike, we eschew any attempt to spell out the range of circumstances that might justify the use of a bankruptcy court's equitable powers in this fashion. The exercise is best handled on a case-by-case basis.

*Id.* at 1029, n. 9.

14. The District Court for the Southern District of New York recently visited the issue in *B.P. Energy Co. v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 2002 WL 31548723 (S.D.N.Y. November 15, 2002). The court in *Bethlehem* cited to the *Thinking Machines* opinion in support of upholding the bankruptcy court's decision to apply a retroactive date to the rejection of an executory contract. The court examined the record and concluded that the bankruptcy court's decision was reasonable "in light of the equities." *Id.* at 6.

15. In *Bethlehem*, the debtor was a party to a long-term gas purchase contract with BP Energy Co. In February 2002, the debtor filed a motion to reject the agreement with BP and sought an effective date retroactive to March 5, 2002 (the opinion does not state when the hearing was held but implies that the hearing was after March 5). The debtor had made other arrangements with another gas supplier and informed BP that the other supplier would begin supplying gas on March 6 and, thus, BP should stop performance as of that date. Despite this information, BP continued to supply gas under the agreement after March 5 and challenged the bankruptcy court's order retroactively rejecting the agreement as of March 5. On review, the court upheld the lower court's decision finding that

BP was placed on advance notice of the proposed effective date. Moreover, even if the Bankruptcy Court had decided that the rejection would be effective on a date subsequent to March 5, 2002, BP has failed to demonstrate that Bethlehem would have owed it any amount after March 5, as it was clear that BP's services after that date did not benefit Bethlehem's estate.

*Id.*

**ii. Application of the Law to the Facts of this Case**

16. The equities support a retroactive rejection date in this case. First, with respect to the Leased Aircraft, the Debtor has not used the Leased Aircraft since prior to the Petition Date. In fact, the Debtor has attempted to renegotiate the leases on the Leased Aircraft for an earlier termination date. Thus, prior to the

Petition Date, the Contract Parties had notice that the planes were no longer needed. In a letter dated the date hereof addressed to the Contract Parties, the Debtor intends to notify the Contract Parties that they can immediately retake possession of the Leased Aircraft. Thus, like BP in the *Bethlehem* case, prior to the proposed Effective Date, the Contract Parties will be on notice that the Debtor will no longer need the Leased Aircraft. Further, on the proposed Effective Date, the Debtor will have notified the Contract Parties that the Debtor is rejecting the leases and that the Contract Parties could immediately retake possession.

17. Moreover, the Contract Parties cannot demonstrate that the Rejected Agreements benefited the Debtor's estate postpetition, since the Debtor has not used Leased Aircraft postpetition. A retroactive rejection date could result in a significant savings to the estate, and thus, potentially result in more money available for creditors.

18. Similarly, on the date hereof the Debtor intends to send a letter to American explaining that the Debtor no longer uses the Leased Aircraft in its fleet and, thus, the services under the Maintenance Contract will no longer be required. Services under the Maintenance Contract have never been performed on a postpetition basis. Therefore, no performance was ever made by American post Effective Date. Furthermore, American can not demonstrate that it provided any

benefit to the estate on a postpetition basis. Under the rationale in the *Bethlehem* and *Thinking Machines* cases, a retroactive rejection date is appropriate.

19. Therefore, application of the law and the equities in this case support a retroactive rejection date for the rejection of the Rejected Agreements.

#### **IV. NOTICE**

20. Notice of this Motion has been given to (a) the Contract Parties or counsel to the Contract Parties; (b) the parties listed on the Twenty Largest Unsecured Creditors List, (c) the United States Trustee; (d) the Internal Revenue Service, and (e) the Securities and Exchange Commission. In light of the nature of the relief requested, the Debtor submits that no further notice is necessary.

21. No previous request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Debtor respectfully requests that the Court enter an order approving the rejection of the Leases as of the Effective Date and granting such other and further relief as this Court may deem just and proper.

Dated: Honolulu, Hawaii, March 21, 2003.

By: Nicholas C. Dreher  
NICHOLAS C. DREHER, ESQ.  
THEODORE D. C. YOUNG, ESQ.  
CADES SCHUTTE  
A Limited Liability Law Company

and

LISA G. BECKERMAN, ESQ.  
DAVID P. SIMONDS, ESQ.  
AKIN GUMP STRAUSS HAUER & FELD LLP

Proposed Counsel for Debtor and Debtor in  
Possession

## **EXHIBIT A**

### **Leased Aircraft to be Rejected**

1. Aircraft Lease dated as of January 18, 2001 of a McDonnell Douglas DC 10-30 Aircraft, Manufacturer's Serial Number 46712, U.S. Registration No. N140AA, between Hawaiian Airlines, Inc. and First Security Bank National Association (now known as Wells Fargo Bank Northwest National Association) as trustee under the Trust Agreement dated as of January 16, 2001 for the benefit of BCI 2001-1, LLC, a Delaware limited liability company.
2. Aircraft Lease dated as of January 18, 2001 of a McDonnell Douglas DC 10-30 Aircraft, Manufacturer's Serial Number 46713, U.S. Registration No. N141AA, between Hawaiian Airlines, Inc. and First Security Bank National Association (now known as Wells Fargo Bank Northwest National Association) as trustee under the Trust Agreement dated as of January 16, 2001 for the benefit of BCI 2001-1, LLC, a Delaware limited liability company.
3. Aircraft Lease Agreement dated as of May 9, 1997 of one (1) DC10-10 Aircraft, Manufacturer's Serial Number 46525, U.S. Registration No. N125AA, between Hawaiian Airlines, Inc. and American Airlines, Inc.
4. Aircraft Lease Agreement dated as of January 3, 1997 of one (1) DC10-10 Aircraft, Manufacturer's Serial Number 46948, U.S. Registration No. N127AA, [formerly Manufacturer's Serial Number 46710, U.S. Registration No. N160AA] between Hawaiian Airlines, Inc. and American Airlines, Inc.
5. Aircraft Lease Agreement dated as of December 12, 1997 of one (1) DC10-10 Aircraft, Manufacturer's Serial Number 46996, U.S. Registration No. N129AA, [formerly Manufacturer's Serial Number 46943, U.S. Registration No. N162AA] between Hawaiian Airlines, Inc. and American Airlines, Inc.

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5. Aircraft Lease Agreement dated as of December 12, 1997 of one (1) DC10-10 Aircraft, Manufacturer's Serial Number 46996, U.S. Registration No. N129AA, [formerly Manufacturer's Serial Number 46943, U.S. Registration No. N162AA] between Hawaiian Airlines, Inc. and American Airlines, Inc.

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF HAWAII**

In re

HAWAIIAN AIRLINES, INC.,  
a Hawaii corporation,

Debtor.

**Case No. 03 -00817**  
(Chapter 11)

**ORDER AUTHORIZING THE DEBTOR  
TO REJECT CERTAIN AIRCRAFT  
LEASES AND MAINTENANCE  
AGREEMENT PURSUANT TO SECTION  
365 OF THE BANKRUPTCY CODE**

Date: March 21, 2003  
Time: 2:30 p.m.  
Judge: Hon. Robert J. Faris

Upon the Expedited Motion<sup>1</sup> of the Debtor for entry of an order authorizing the Debtor to reject miscellaneous aircraft leases pursuant to Section 365 of the Bankruptcy Code as of the Effective Date; it appearing that the relief requested is in the best interests of the Debtor's estate, its creditors and other parties in interest; it appearing that the relief requested is essential to the continued operation of the Debtor's business; it appearing that adequate notice has been given, and no other notice need be given, and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED that:

1. The Motion is granted in its entirety.

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<sup>1</sup> All capitalized terms not defined herein shall be as defined in the Motion.

2. The Debtor is authorized to reject the Leases set forth on Exhibit "A" to the Motion as of the Effective Date.

3. As of the Effective Date, the Debtor shall be deemed to have relinquished and surrendered possession of the Leased Aircraft.

4. As of the Effective Date, the right to take possession of the Leased Aircraft shall be relinquished to the Contract Parties.

5. The Contract Parties are directed to retrieve the Leased Aircraft from the Debtor's premises within ten (10) business days after the entry of this Order. If a Contract Party fails to do so, the Debtor may charge such Contract Party for the storage of the Contract Party's aircraft and related equipment on the Debtor's owned or leased premises at the prevailing market rates, as determined by the Debtor. The Contract Party must pay all such charges prior to retrieving the Leased Aircraft.

6. Any party asserting a claim arising out of or related to the rejection of the Leases shall file a proof of claim on account of such claims against the Debtor or its estate on or before the later of (a) the General Bar Date or (b) sixty (60) days after the Effective Date.

7. All counterparties to any Lease are prohibited from setting off or otherwise utilizing any monies deposited by the Debtors with such counterparty as

a security deposit or pursuant to any other arrangement without further order of the Court.

8. The Debtor is authorized to reject the Maintenance Agreement as of the Effective Date.

9. Notwithstanding the possible applicability of Bankruptcy Rules 6006(d), 7062, 9014 or otherwise, this Order shall take effect immediately upon entry.

10. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

11. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

Dated: Honolulu, Hawaii \_\_\_\_\_, 2003

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UNITED STATES BANKRUPTCY JUDGE

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In re Hawaiian Airlines, Inc., Chapter 11, Case No. 03-\_\_\_\_\_;  
ORDER AUTHORIZING THE DEBTOR TO REJECT CERTAIN AIRCRAFT  
LEASES AND MAINTENANCE AGREEMENT PURSUANT TO SECTION 365  
OF THE BANKRUPTCY CODE