

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:	)	
	)	Chapter 11
	)	
HAWAIIAN TELCOM	)	Case No. 08-13086 (PJW)
COMMUNICATIONS, INC., <u>et al.</u> , <sup>1</sup>	)	
	)	
Debtors.	)	Joint Administration Requested

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**MOTION OF HAWAIIAN TELCOM COMMUNICATIONS, INC., ET AL. FOR ENTRY  
OF INTERIM AND FINAL ORDERS (A) AUTHORIZING THE USE OF CASH  
COLLATERAL, (B) GRANTING ADEQUATE PROTECTION TO PREPETITION  
LENDERS AND (C) SCHEDULING A FINAL HEARING**

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Hawaiian Telcom Communications, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, “Hawaiian Telcom” or the “Debtors”), file this motion (the “Motion”) seeking entry of an interim order, substantially in the form attached hereto as **Exhibit A** (the “Interim Cash Collateral Order”), and a final order (the “Final Cash Collateral Order,” together with the Interim Cash Collateral Order, the “Cash Collateral Orders”) (a) authorizing the Debtors to use Cash Collateral (as defined in the Interim Cash Collateral Order) on an interim basis pending a final hearing on the Motion (the “Final Hearing”), (b) granting adequate protection to the Debtors’ prepetition secured lenders (the “Prepetition Lenders”) with respect to, *inter alia*, such use of Cash Collateral and any diminution in the value of the Prepetition Lenders’ interests in the Prepetition Collateral (as hereinafter defined), (c)

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1 The Debtors, together with the last four digits of each Debtor’s federal tax identification number, are: Hawaiian Telcom Communications, Inc. (0376); Hawaiian Telcom Holdco, Inc. (9868); Hawaiian Telcom, Inc. (9500); Hawaiian Telcom Services Company, Inc. (5722); Hawaiian Telcom IP Service Delivery Investment, LLC (9423); Hawaiian Telcom IP Service Delivery Research, LLC (9685); Hawaiian Telcom IP Video Investment, LLC (9295); and Hawaiian Telcom IP Video Research, LLC (9571). The location of the Debtors’ corporate headquarters and the service address for all Debtors is: 1177 Bishop Street, Honolulu, HI 96813.

prescribing the form and manner of notice and setting the time for the Final Hearing and (d) granting related relief. In support of the Motion, the Debtors respectfully state as follows:

### **Jurisdiction**

1. This Court has jurisdiction over this motion under 28 U.S.C. §§ 157(b)(2)(M) and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue of this proceeding and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105, 361, 362 and 363 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 4001, 6003 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rules 4001-2 and 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Bankruptcy Rules”).

### **Relief Requested**

4. By this Motion, the Debtors seek entry of the Cash Collateral Orders granting the following relief, without limitation:

- (a) authorizing the Debtors to use Cash Collateral pursuant to sections 361 and 363 of the Bankruptcy Code;
- (b) approving the form of adequate protection provided to the Prepetition Lenders pursuant to sections 361, 362, 363 and 364 of the Bankruptcy Code;
- (c) scheduling a Final Hearing on the Motion to consider entry of the Final Cash Collateral Order; and
- (d) granting related relief.

### **Background**

5. On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their

businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. As set forth in the Declaration of Robert F. Reich, Senior Vice President, Chief Financial Officer and Treasurer of Hawaiian Telcom Communications, Inc., in Support of First Day Pleadings (the “Reich Declaration”), for the past 125 years, Hawaiian Telcom (or its predecessors) has served as the incumbent local exchange carrier for the State of Hawaii. As of September 30, 2008, Hawaiian Telcom operated an integrated telecommunications network servicing approximately 524,000 switched access lines, 253,000 long distance lines and 95,000 high-speed internet connections, and provided wireless telecommunications services.

7. Hawaiian Telcom operates in two business segments. The Wireline Services segment provides local telephone service, including voice and data transport, enhanced custom calling features, network access and private lines. In addition, the Wireline Services segment provides high-speed internet, long distance services, customer premise equipment, data solutions, billing and collection and pay telephone services. Hawaiian Telcom offers these services on all of Hawaii’s major islands. The Wireless Services segment consists primarily of wireless services, including the sale of wireless handsets and accessories.

8. Hawaiian Telcom has the resources necessary to become the preferred provider of communications products and services to the people and businesses of Hawaii. These resources include the most extensive and reliable network infrastructure in Hawaii, an experienced workforce and available equipment and facilities. However, the current competitive environment in the telecommunications industry in Hawaii and Hawaiian Telcom’s inability to meet its capital expenditure needs while continuing to service its debt requirements have prevented Hawaiian Telcom from attaining its desired performance levels. Nonetheless, given

Hawaiian Telcom's core strengths, Hawaiian Telcom remains confident it will become the preferred one-stop provider of communications services and products for business and residential customers throughout Hawaii.

9. Hawaiian Telcom's corporate offices are located in Honolulu, Hawaii. Hawaiian Telcom currently employs approximately 1,450 employees throughout the Hawaiian Islands. In 2007, Hawaiian Telcom generated revenues of approximately \$483.7 million. As of September 30, 2008, the book value of Hawaiian Telcom's assets totaled approximately \$1.35 billion and its liabilities totaled approximately \$1.27 billion.

#### **The Debtors' Prepetition Secured Credit Facility**

10. On June 1, 2007, Hawaiian Telcom entered into an amended and restated credit agreement, which provided for a new revolving credit facility in the amount of \$200 million (of which \$90 million is available to Hawaiian Telcom) and a new Tranche C term loan in the amount of \$860 million.<sup>2</sup> As of September 30, 2008, approximately \$89.8 million in debt remained outstanding under the revolving credit facility and \$484.7 million remained outstanding under the Tranche C term loan.

11. Pursuant to the Credit Agreement, liens on substantially all of Hawaiian Telcom's assets (the "Prepetition Collateral"), including the proceeds thereof, secure Hawaiian Telcom Communication, Inc.'s obligations under the Credit Agreement. Hawaiian Telcom Holdco, Inc., Hawaiian Telcom, Inc., Hawaiian Telcom Services Company, Inc., Hawaiian Telcom IP Video Research, LLC, Hawaiian Telcom IP Service Delivery Research, LLC, Hawaiian Telcom IP

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<sup>2</sup> See Amended and Restated Credit Agreement, dated as of June 1, 2007, among Hawaiian Telcom Holdco, Inc., Hawaiian Telcom Communications, Inc., as Borrower, the Lenders Party Thereto and Lehman Commercial Paper Inc., as Administrative Agent and Collateral Agent, Lehman Brothers Inc. and J.P. Morgan Securities Inc. as Joint Lead Arrangers and Joint Bookrunners, JPMorgan Chase Bank, N.A., as Syndication Agent and Cobank ACB and Wachovia Bank, N.A., as Co-Documentation Agents (the "Credit Agreement").

Video Investment, LLC and Hawaiian Telcom IP Service Delivery Investment, LLC guarantee these obligations.<sup>3</sup>

12. As of the Petition Date, each of the Debtors jointly and severally were indebted and liable to the agent for the Prepetition Lenders (the “Prepetition Agent”) on behalf of the Prepetition Lenders, on account of the following:

- \$484.7 million (plus accrued and unpaid interest thereon) on account of the Tranche C term loan;
- \$89.9 million (plus accrued and unpaid interest thereon) on account of the revolving credit facility; and
- \$100,000 on account of outstanding Letters of Credit (as such term is defined in the Credit Agreement).

13. In addition, each of the Debtors were indebted and liable to the Prepetition Agent and the Prepetition Lenders for unpaid fees, expenses (including any attorneys’, accountants’, appraisers’ and financial advisors’ fees that are chargeable or reimburseable under the Credit Agreement and related agreements), make-whole amounts, charges and other obligations incurred in connection with such loans and letters of credit (collectively, the “Prepetition Obligations”).

14. As described in the Reich Declaration, in the normal course of business, the Debtors use cash on hand and cash flow from operations to fund working capital, capital expenditures, research and development efforts and for other general corporate purposes. An inability to use these funds during the chapter 11 cases could cripple the Debtors’ business operations. Indeed, the Debtors must use their cash to, among other things, continue the

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3 See Amended and Restated Guarantee and Collateral Agreement, dated as of June 1, 2007, among Hawaiian Telcom Holdco, Inc., Hawaiian Telcom Communications, Inc., the Subsidiaries of Hawaiian Telcom Communications, Inc. Identified Therein and Lehman Commercial Paper Inc., as Collateral Agent (the “Guarantee and Collateral Agreement” and together with the Credit Agreement, the “Prepetition Financing Documents”).

operation of their businesses in an orderly manner, maintain business relationships with vendors, suppliers and customers, pay employees and satisfy other working capital and operation needs—all of which are necessary to preserve and maintain the Debtors’ going-concern value and, ultimately, effectuate a successful reorganization.

15. The Prepetition Agent and Prepetition Lenders have consented to the Debtors’ use of Cash Collateral in the ordinary course of business pursuant to terms detailed herein and as provided in the Cash Collateral Orders in exchange for the Debtors providing adequate protection against any diminution in value of the Prepetition Lenders’ interests in the Prepetition Collateral. The Debtors have agreed to provide the Prepetition Lenders with various forms of adequate protection, including, without limitation, (a) current cash payment of non-default rate interest, fees and expenses, (b) superpriority administrative claims and (c) adequate protection liens (collectively, the “Adequate Protection Obligations”).<sup>4</sup>

### **Basis for Relief**

#### **I. The Debtors’ Request to Use Cash Collateral and the Proposed Adequate Protection is Appropriate.**

16. The Debtors’ use of property of their estates is governed by section 363 of the Bankruptcy Code, which provides in pertinent part that:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing. 11 U.S.C. § 363(c)(1).

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4 The summary of the Adequate Protection Obligations contained in the Motion is qualified in all respects by reference to the Interim Cash Collateral Order attached hereto as **Exhibit A** and any conflict between the description contained in the Motion and the Interim Cash Collateral Order, shall be resolved in favor of the Interim Cash Collateral Order.

17. Section 363(c)(2)(A) of the Bankruptcy Code permits a debtor in possession to use cash collateral with the consent of the secured party. Section 363(e) of the Bankruptcy Code requires that the debtor adequately protect the secured creditors' interest in property to be used by a debtor against any diminution in value of such interest resulting from the debtor's use of the property during the chapter 11 cases.

18. What constitutes sufficient adequate protection is decided on a case-by-case basis. See In re Columbia Gas Sys., Inc., 1992 WL 79323, at \*2 (Bankr. D. Del. Feb. 18, 1992); see also In re Martin, 761 F.2d 472 (8th Cir. 1985); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); In re Sw.Assocs., 140 B.R. 360 (Bankr. S.D.N.Y. 1992). By adequate protection, the Bankruptcy Code seeks to shield a secured creditor from diminution in the value of its interest in the particular collateral during the period of use. See In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); In re Beker Indus. Corp., 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); In re Hubbard Power & Light, 202 B.R. 680 (Bankr. E.D.N.Y. 1996). Adequate protection can come in various forms, including payment of adequate protection fees, payment of interest, granting of replacement liens and administrative claims.

19. Here, the Debtors propose to provide the Prepetition Lenders with, among other things, three primary forms of adequate protection. First, the Debtors shall pay to the Prepetition Agent on an ongoing basis:

- a. the current cash payment of interest at the non-default rates and at the times provided for in the Credit Agreement on the Prepetition Obligations;
- b. immediately upon entry of this Order, cash payments equal to all accrued and unpaid non-default rate interest, fees, and expenses (including, without limitation, the fees and expenses of legal counsel and other professionals retained by the Prepetition Agent or the Prepetition Lenders) then owing with respect to the

Prepetition Obligations or provided for in the Prepetition Financing Documents; and

- c. from time to time after the Petition Date, the current cash payment of reasonably documented fees and expenses as and when due and payable under the Prepetition Financing Documents, including, without limitation, the reasonably documented fees and expenses of legal counsel and other professionals retained by the Prepetition Agent or the Prepetition Lenders (collectively, the “Adequate Protection Payments”).

All of the amounts to be paid pursuant to the foregoing clauses (a) and (b) shall be paid regardless of whether such amounts accrued prior to or after the Petition Date, whether or not such amounts are included in the Budget, and shall be paid without further motion, fee application, or order of the Court.

20. Second, subject to a carve-out for certain professional fees and administrative expenses (the “Carve-Out”), a superpriority claim against each of the Debtors as provided in section 507(b) of the Bankruptcy Code (the “Superpriority Claim”) to the extent of any diminution in the value of the Prepetition Lenders’ interest in the Prepetition Collateral.

21. Third, the Debtors propose to provide the Prepetition Lenders additional and replacement security interests and liens (the “Adequate Protection Liens”) in and upon all prepetition and postpetition assets and properties (tangible, intangible, real, personal and mixed), whether now existing or newly acquired or arising, and wherever located, including, without limitation, all Collateral (as such term is defined in the Prepetition Financing Documents), all accounts, accounts receivable, inventory, goods, contract rights, instruments, documents, chattel paper, patents, trademarks, copyrights and licenses therefor, intellectual property, general intangibles, payment intangibles, letters of credit, letter-of-credit rights, supporting obligations, machinery and equipment, vehicles, real property (including all facilities), fixtures, leases, all of the issued and outstanding Capital Stock entitled to vote (within the meaning of Treas. Reg.

Section 1.956-2(c)(2)) and all of the issued and outstanding Capital Stock not entitled to vote (within the meaning of Treas. Reg. Section 1.956-2(c)(2)) of each of the Debtors, all of the Capital Stock of all other persons or entities that are not affiliates directly owned by the Debtors, money, investment property, deposit accounts, securities accounts, books and records, all commercial tort claims and all other causes of action (other than, prior to the entry of the Final Cash Collateral Order, Avoidance Actions (as hereinafter defined)), the proceeds of all Avoidance Actions (each solely upon entry of the Final Order), all Cash Collateral, and all cash and non-cash proceeds, rents, products, substitutions, accessions and profits of all of the foregoing.

22. The Debtors believe that the proposed Adequate Protection Obligations for the benefit of the Prepetition Lenders are necessary and appropriate to ensure that the Debtors can continue to use the Cash Collateral. Accordingly, the adequate protection proposed herein and in the Cash Collateral Orders is fair and reasonable and sufficient to satisfy the requirements of sections 363(c)(2) and (e) of the Bankruptcy Code. Moreover, courts in this district have granted similar relief in other recent chapter 11 cases. See, e.g., In re DBSI, Inc., No. 08-12687 (PJW) (Bankr. D. Del. Nov. 26, 2008) (interim order); In re Internet Corp., No. 08-11859 (KG) (Bankr. D. Del. Sept. 19, 2008) (amended Nov. 14, 2008); In re Tropicana Entm't, LLC, No. 08-10856 (KJC) (Bankr. D. Del. May 30, 2008).<sup>5</sup>

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<sup>5</sup> Because of the voluminous nature of the orders cited herein, they are not attached to the Motion. Copies of these orders are available on request of the Debtors' counsel.

**II. Failure to Use the Cash Collateral Within 20 Days of the Petition Date Would Cause Immediate and Irreparable Harm.**

23. Pursuant to Bankruptcy Rule 6003, the Court may grant the relief requested in the Motion within 20 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm.

24. Without use of the Cash Collateral, the Debtors will have no ability to operate their businesses. The Debtors will not be able to pay their vendors and their vendors will likely cease to provide goods and services to the Debtors on credit. The Debtors will not be able to fund their payroll. The Debtors will not be able to pay professionals necessary for the successful reorganization of their businesses. Finally, the Debtors will not be able to service their customers. All of these outcomes will cause immediate and irreparable harm to the Debtors' estates.

25. The Debtors' ability to finance their operations and the availability to the Debtors of sufficient working capital and liquidity through the use of Cash Collateral is vital to the confidence of the Debtors' employees, suppliers, and customers and to the preservation and maintenance of the going-concern value and other values of the Debtors' estates. The Debtors, therefore, seek immediate authority to use the Cash Collateral as set forth in the Motion and in the Interim Cash Collateral Order to prevent immediate and irreparable harm to the Debtors' estates pending the Final Hearing pursuant to Bankruptcy Rule 4001(c).

26. Accordingly, to the extent that the Debtors require the use of Cash Collateral, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003 to support immediate Cash Collateral availability.

### **Provisions under Local Bankruptcy Rule 4001-2**

27. Local Bankruptcy Rule 4001-2 requires a debtor to highlight for the Court's scrutiny certain terms and provisions in a cash collateral order (the "Highlighted Provisions"). The Debtors are not seeking the approval of such Highlighted Provisions on an interim basis. Instead, the Debtors are seeking approval of the Highlighted Provisions in the Final Cash Collateral Order pursuant to Local Bankruptcy Rule 4001-2(c). The following Highlighted Provisions represent important components to the Final Cash Collateral Order without which the Prepetition Lenders are unwilling to consent to the Debtors' use of the Cash Collateral:

- a. the waiver of the Debtors' right to surcharge the collateral under section 506(c) of the Bankruptcy Code, as set forth in paragraph 5 of the Interim Cash Collateral Order;
- b. a grant to the Prepetition Lenders of a lien on the proceeds to the Debtors' avoidance actions arising under 11 U.S.C. §§ 544, 545, 547, 548 and 549 (the "Avoidance Actions"), as set forth in paragraph 9 of the Interim Cash Collateral Order; and
- c. a carve out for the benefit of professionals retained by the Debtors and any official committee appointed in the chapter 11 cases as set forth in paragraph 15 of the Interim Cash Collateral Order.

28. 506(c) Waiver. Subject to entry of the Final Cash Collateral Order and except to the extent of the Carve-Out, as a condition to the use of Cash Collateral, the Prepetition Lenders are requiring that no expenses of administration of the chapter 11 cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Prepetition Collateral or postpetition collateral under section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the Prepetition Agent.

29. Liens on Avoidance Action Proceeds. Subject to entry of the Final Cash Collateral Order, as a condition to the use of Cash Collateral, the Prepetition Lenders are

requiring liens on the proceeds of Avoidance Actions to the extent of the diminution in the value of their collateral.

30. Carve-Out. Further, with the inclusion of the Carve-Out, the Cash Collateral Orders do not directly or indirectly deprive the Debtors' estates or other parties in interest of possible rights and powers by restricting the services for which professionals may be paid in these cases. See In re Ames Dept. Stores, Inc., 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (observing that courts insist on carve-outs for professionals representing parties in interest because "[a]bsent such protection, the collective rights and expectations of all parties-in -interest are sorely prejudiced"). In Ames, the court found such "carve-outs" for professional fees to be not only reasonable, but necessary to ensure that official committees and debtors' estates can retain assistance from counsel. See id. at 41. The Adequate Protection Obligations are expressly subject and subordinated to the Carve-Out, as described above.

### **Request for Final Hearing**

31. Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request that the Court set a date for the Final Hearing that is as soon as practicable, but in no event later than 45 days following the entry of the Interim Cash Collateral Order, and fix the time and date prior to the Final Hearing for parties to file objections to the Motion.

### **Notice**

32. The Debtors have provided notice of this Motion by electronic mail or facsimile and by overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) the entities listed on the Consolidated List of Creditors Holding the 30 Largest Unsecured Claims; (c) counsel for the agent for Debtors' senior secured credit facility; (d) the indenture trustee for each of the Debtors' outstanding bond issuances; (e) counsel to the ad hoc committee

of the Debtors' senior noteholders; and (f) the Hawaii Public Utilities Commission. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

**No Prior Request**

33. No prior motion for the relief requested herein has been made to this or any other court.

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting such other and further relief as the Court deems appropriate.

Dated: December 1, 2008  
Wilmington, Delaware

**KLEHR, HARRISON, HARVEY,  
BRANZBURG & ELLERS LLP**

*/s/ Domenic E. Pacitti*

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