

JAN 12 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

AVIATION INDUSTRY
REPORTING SYSTEM, INC.;
CONTINENTAL AIRLINES,
INC.; and, NORTHWEST
AIRLINES, INC.,

Plaintiffs/
Counter-Defendants

v.

COMMONWEALTH OF THE
NORTHERN MARIANA
ISLANDS TRAVEL AGENCY,
INC.,

Defendant/
Counter-Plaintiff

v.

BANK OF GUAM,

Counter-Claim
Defendant

Civil No. 03-0039

ORDER:

1. GRANTING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT; and,
2. DENYING CNMI TRAVEL'S
MOTION FOR SUMMARY
JUDGMENT

1 THIS MATTER came before the court on January 7, 2005, for hearing of
2 several pre-trial motions. Plaintiffs appeared by and through their attorney,
3 Eric S. Smith; defendant CNMI Travel appeared by and through its attorneys,
4 Mark B. Hanson and Bruce Berline; and, counter-claim defendant Bank of
5 Guam appeared by and through its attorney, David G. Banes, who did not
6 argue.
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9 This order addresses only plaintiffs' and defendant CNMI Travel's cross-
10 motions for summary judgment. The other pre-trial motions were addressed in
11 separate written orders.
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14 Summary judgment "shall be rendered forthwith if the pleadings,
15 depositions, answers to interrogatories, and admissions on file, together with the
16 affidavits, if any, show that there is no genuine issue as to any material fact and
17 that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.
18 56(c).
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21 The court, having considered all evidence submitted in support of and
22 opposition to the respective motions for summary judgment, makes the
23 following findings of fact and conclusions of law.
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1 3. Using the BSP, an Industry Settlement Plan ("ISP") was created for
2 travel agents in Micronesia. The ISP controls the relationship between the
3 airline carriers and ticket agents of Guam and the Commonwealth of the
4 Northern Mariana Islands ("CNMI"). *See* Exh. 3, Murdoch Depo. at p. 35. The
5 BSP and ISP require the selection of a clearing bank to receive remittances from
6 a travel agent to settle the monies due to airlines from ticket sales, to report
7 receipt of the agent's remittances, and to perform some functions of a data
8 processing center. For the area of Micronesia that includes Guam and the
9 CNMI, the ISP requires each agent to establish a direct debit account, which can
10 be directly debited by the clearing bank. *See* Exh. 15, Deposition of Dina
11 Aguon (Aguon Depo.) at p. 40, l. 19 - 23; and, Exh. 16, Murdoch Depo. at p. 55-
12 55.
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14 4. On October 19, 2000, CNMI Travel and AIRS entered into an AIRS
15 Agent Agreement ("Agreement"), the contract used by AIRS and participating
16 travel agents in Guam and the CNMI. The purpose of the AIRS Agent
17 Agreement was to facilitate the sale and issuance of travel documents for
18 passenger air transportation by CNMI Travel on behalf of plaintiff air carriers.
19 *See* Exh. 6, §§ 1.1 and 1.3 at p. 2.
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1 5. The Agreement sets forth the obligations of the parties with respect to
2 the reporting and settlement of amounts due from the sale of airline tickets,
3 pursuant to the rules and procedures established by AIRS and contained in the
4 AIRS Agent Manual, which was incorporated into the agreement. *See* Exh. 6, §
5 1.1 at p. 2; and, Exh. 18, CNMI Travel's First Amended Answer and Counter-
6 claim against Plaintiffs at ¶ 13.
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9 6. CNMI Travel was appointed as an agent by the subscribing plaintiff
10 airlines, Continental and Northwest. Under the Agreement, plaintiffs furnished
11 CNMI Travel with their carrier identification plates, which are used in issuing
12 traffic documents. Once AIRS was notified by the air carriers of CNMI
13 Travel's appointment as an agent, AIRS supplied CNMI Travel with traffic
14 documents, which allowed CNMI Travel to issue passenger airline tickets on
15 behalf of Continental and Northwest Airlines. *See* Exh. 6, § 1.2 at p. 2; and, § 2.
16 The subscribing airlines issue carrier identification plates to the agents. These
17 plates remain the property of the airlines. *See* Exh. 92, Aguon Depo. at p. 44, l.
18 15 - 22. The plates can be removed from the agent at any time by the carriers.
19 *See* Exh. 2, at Bates p. 162; and Exh. 93, Aguon Depo., p. 45, l.14 - 20.
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1 7. Under the AIRS Agent Agreement, upon the sale of any traffic
2 document, CNMI Travel was to collect money from the passengers, deduct the
3 commissions to which it was entitled, and place the carriers' money in trust for
4 later remittance to AIRS:
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7 4.2 Carrier's Money Held in Trust:

8 The proceeds of the sale of Traffic Documents issued
9 by the Agent on behalf of an appointing Carrier, less
10 applicable commissions, are and remain the property of
11 the Carrier and are to be held in trust by the Agent for
12 the Carrier until fully accounted for and remitted to
13 the Carrier at the time of settlement. The Agent will
14 be fully responsible to the Carrier for all sales made on
15 the Carrier's behalf. The Agent agrees that it has no
16 right, title or interest in any portion of the proceeds
17 from the sale of any Traffic Document which it fails to
18 collect.

19 See Exh. 6 at p. 3, AIRS Agent Agreement § 4.

20 8. CNMI Travel established an account with Bank of Guam for deposit
21 of the proceeds from its sale of traffic documents. The Agreement required
22 CNMI Travel to submit to AIRS, on a regular basis, sales transmittals, *i.e.* the
23 record of tickets sold during a specific period:

24 4.4 Sales Transmittals:

25 4.4.1 The Agent shall . . . submit Sales Transmittals in the
26 form and manner as prescribed in the AIRS Agent Manual, to

1 the office designated by AIRS as the ISP Processing Center.

2 4.4.2 The frequency for submitting Sales Transmittals shall
3 be as specified in the ISP Reporting and Remitting Calendar
4 that is established from time to time by AIRS and notified in
5 writing to each Agent. The time span covered by the Sales
6 Transmittal shall be hereinafter referred to as "the reporting
7 period."

8 4.4.3 Each Sales Transmittal shall include all transactions for
9 which Traffic Documents were issued and all Credit, Debit
10 and other accountable forms received by the Agent during
11 the reporting period.

12 4.4.4. The Agent shall submit Sales Transmittals to the
13 Processing Center by the date (hereinafter "submission date")
14 as specified in the ISP Reporting and Remitting Calendar.
15 The deadline for receipt of such submissions shall be the
16 Clearing Bank's close of business on the submission date.

17 See Exh. 6.

18 9. Initially, CNMI Travel properly submitted the sales transmittals to the
19 processing center in accordance with the requirements of the Agreement. The
20 information in the sales transmittals included the amount that was to be
21 remitted to AIRS's clearing bank from CNMI Travel's Bank of Guam account.
22 (During the relevant time periods in 2003, the clearing bank used by AIRS was
23 Citibank N.A. Guam.)
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1 10. Under § 4.5 of the Agreement, the data processing center was to:

2 4.5.2.1 Process the contents of the Agent's Sales Transmittals;

3 4.5.2.2 Provide to the Agent a summary of all
4 transactions contained therein;

5 4.5.2.3 Compute the net amount due to Carriers; and

6 4.5.2.4 Instruct AIRS bankers to initiate direct debit action
7 from the Agent's bank account on the settlement
8 date.... The "settlement date" shall be specified in the
9 ISP Reporting and Remitting Calendar.
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11 *See Exh. 6.*

12 11. To facilitate this transfer of funds from CNMI Travel's Bank of
13 Guam account, CNMI Travel authorized the Bank to transfer funds for
14 payment by automatic debit or other means, pursuant to the ISP. Once the
15 processing center had verified CNMI Travel's sales transmittals for a given
16 period (usually one calendar week), the processing center would instruct AIRS's
17 clearing bank, Citibank, to debit CNMI Travel's Bank of Guam account the
18 proper amount of money. *See Exh. 22.*
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1 This procedure to debit an account was authorized by § 4.5 of the Agency
2 Agreement:
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4 4.5 Processing of Sales Transmittals and Settlement Thereof.

5 4.5.1 The Agent shall provide AIRS with an authorization
6 in the form prescribed from time to time in the AIRS Agent
7 Manual, permitting AIRS or the Processing Center to direct
8 debit the Agent's bank account in favor of AIRS for payment
9 of all amounts due to Carriers. The Agent shall give thirty
10 (30) days advance notice in writing to AIRS of its intention to
change its bank and/or bank account.

11 12. The dates on which the direct debits were to occur were the
12 "settlement dates" found on the reporting and remitting calendar. See Exh. 6,
13 Agreement, § 4.5.2.4. The reporting and remitting calendar was provided by
14 AIRS to CNMI Travel. See Exh. 25. This calendar provided a reporting period
15 of one week in duration; a sales transmission date for the prior week's sales, and
16 an agent's remittance settlement date (the date monies were to be transmitted to
17 the clearing bank). See Exh. 25. On the remittance settlement date, funds were
18 to be debited from CNMI Travel's account. It was CNMI Travel's
19 responsibility to make sure that the remittances were made in a timely manner
20 on the "settlement dates" specified in the Calendar.
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1 13. In accordance with the Agreement, defendant CNMI Travel filed
2 with the processing center its sales transmittal report for each prior week's
3 reporting period. From that information, the data processing center calculated
4 the amount due AIRS and prepared a billing which was sent to CNMI Travel in
5 accordance with the Agent Manual. *See* Exh. 6, Agent Manual § 5.2 at p. 53.
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7 The billing sent to CNMI Travel each week was for sale of travel documents
8 issued by CNMI Travel for the reporting period found on the reporting and
9 remittance calendar.
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12 14. The Agency Agreement and the Agency Manual required CNMI
13 Travel to insure that "[a]ll remittances are to be in the possession of the Clearing
14 Bank before its close of business on the Remittance Date." *See* Exh. 32, Agency
15 Manual § 6.1, p. 57. CNMI Travel acknowledged that all funds to be remitted
16 by CNMI Travel to AIRS were to be available in its designated bank account
17 with the Bank of Guam on the settlement date. *See* Exh. 33, Aguon Depo. at p.
18 27, l. 11 - 13 and 17 - 18.
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22 15. CNMI Travel, on occasions within the 12-month period preceding
23 August, 2003, had its remittances dishonored, which resulted in failed transfers
24 to AIRS through the Bank of Guam account. *See* Exh. 34, Aguon Depo., p. 13,
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1 lines 10 - 14; p. 14, l. 4 - 5.

2 16. The AIRS Agent Agreement provided a procedure for settling
3 irregularities between the parties, including payments missed on settlement
4 dates due to the dishonor of a remittance for insufficient funds. Section 4.6
5 states that if a remittance is dishonored, upon demand, the agent (CNMI Travel)
6 must make immediate payment to AIRS of the full deficiency owed:
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9 4.6.3: Dishonored Remittances:

10 4.6.3.1: If a direct debit or check drawn on the Agent's bank
11 account for settlement of sales made by the Agent under this
12 Agreement is dishonored, AIRS shall demand Immediate
13 Payment in the form of a cashier's check by the Agent to
14 cover such dishonor. AIRS shall issue a notice of charge to
15 the Agent for the dishonored remittance....

16 See Exh. 6.

17 When AIRS receives notification of a dishonored remittance from the
18 clearing bank, AIRS notifies the agent by e-mail or facsimile, or the notice may
19 be made orally by a telephone call. See Exh. 35, Murdoch Depo. at pp. 100 -
20 101.
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23 17. On each of the remittance settlement dates set out below, AIRS,
24 through its direct-debit arrangement with Citibank, attempted to debit the
25 correlating amount due from defendant CNMI Travel's account with Bank of
26

Guam.

	Reporting Period	Settlement Date	Amount Due
a.	Feb. 3 to Feb. 9, 2003	Feb. 24, 2003	\$18,856.56
b.	June 30 to July 06, 2003	July 22, 2003	\$40,408.71
c.	Aug. 4 to Aug. 10, 2003	Aug. 25, 2003	\$82,069.00;
d.	Aug. 18 to Aug. 24, 2003	Sept. 08, 2003	\$56,645.27;
e.	Aug. 25 to Aug. 31, 2003	Sept. 15, 2003	\$53,635.10;
f.	Sept. 1 to Sept. 7, 2003	Sept. 22, 2003	\$50,867.92;
g.	Sept. 8 to Sept. 14, 2003	Sept. 29, 2003	\$32,309.26;

See Exh. 25, Reporting and Remittance Calendar for 2003.

18. Each of the following remittances was dishonored by the Bank of Guam because AIRS failed to have the necessary funds in the designated Bank of Guam account on the settlement date:

a. The February 24, 2003, remittance of \$18,856.56. See Exh. 36, copy of an e-mail regarding this dishonored remittance; and, Exh. 37, copy of Notice of Insufficient Funds from Bank of Guam to CNMI Travel.

b. The July 22, 2003, remittance of \$40,408.71. See Exh. 39, copy of an e-mail from Citibank to IATA regarding dishonor, dated July 24, 2003.

1 c. The August 25, 2003, remittance of \$82,069.00. *See* Exh. 40, copy of an
2 e-mail from Citibank to IATA; and, Exh. 41, copy of a Notice of Insufficient
3 Funds from Bank of Guam to CNMI Travel; and Exh. 18, CNMI Travel's First
4 Amended Answer and Counterclaim at p. 7, ¶ 26 (Apr. 30, 2004).
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7 d. The September 08, 2003, remittance of \$56,645.27. *See* Exh. 42, e-mail
8 from Citibank to IATA.
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10 e. The September 15, 2003, remittance of \$53,635.10. *See* Exh. 43, e-mail
11 from Citibank to IATA.
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13 f. The September 22, 2003, remittance of \$50,867.92. *See* Exh. 44, e-mail
14 from Citibank to IATA.
15

16 g. The September 29, 2003, remittance of \$32,309.26. *See* Exh. 45, e-mail
17 from Citibank to IATA.
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19 19. AIRS and CNMI Travel took these respective actions for each of the
20 dishonored remittances:
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22 a. February 24, 2003, remittance: On February 24, 2003, Bank of Guam
23 by letter notified CNMI Travel of the dishonor.³ *See* Exh. 37. On February 28,
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25 ³

26 CNMI Travel previously had a dishonored remittance within 12 months
of the February 24, 2003, dishonor. On July 19, 2002, the clearing bank notified
AIRS by e-mail that CNMI Travel's remittance in the amount of \$61,939.30 had

1 2003, AIRS received notification of the dishonored remittance for the February
2 24, 2003, settlement date. *See* Exh. 36. AIRS sent CNMI Travel a facsimile
3 notice of the dishonor and a request for immediate payment. *See* Exh. 46, Bates
4 p. 0361. On February 28, 2003, CNMI Travel wired the delinquent amount to
5 Citibank, N.A. Guam, the AIRS clearing bank. *See* Exh. 47, Bates p. 0362; and
6 Exh. 48, Aguon Depo. at p. 67, l. 1. On February 28, 2003, Kevin Bushby,
7 AIRS collection officer, sent CNMI Travel an e-mail acknowledging the
8 remitted settlement and reminded CNMI Travel that the Agent Agreement
9 required termination if an agent had two dishonors within 12 months. The e-
10 mail also suggested that Dina Aguon ask the Bank of Guam to write her a letter
11 to explain the reason for the dishonor. Mr. Bushby explained that the AIRS
12 Agent Agreement provides for dispensation (*i.e.* reinstatement) where a *bona*
13 *fide* bank error caused the direct debit to be returned unpaid. *See* Exh. 49, Bates
14 p. 0365.

21 Dina Aguon acknowledged receiving the February 28, 2003, e-mail
22 message from Mr. Bushby. *See* Exh. 51, Aguon Depo. at p. 67, l. 11 - 15.
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26 been returned due to insufficient funds. *See* Exh. 50, copy of e-mail from
Citibank to IATA.

1 However, she either did not try or was unable to obtain a letter from the Bank
2 of Guam that would have been grounds for dispensation, *i.e.* that would have
3 exempted CNMI Travel from the mandatory termination required by the AIRS
4 Agent Agreement and/or allowed reinstatement. *See* Exh. 52, Aguon Depo. at
5 p. 68, l. 17 - 21.
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8 Having received nothing upon which to grant a dispensation, on March 4,
9 2003, Jeff Murdoch sent Dina Aguon a letter, "Notice of Charge - Dishonored
10 Remittance," because of the dishonored remittance of February 24, 2003. In the
11 letter he stated that if two dishonored remittances were recorded against CNMI
12 Travel during any consecutive twelve-month period, AIRS would initiate action
13 to terminate the AIRS Agent Agreement and notify all Carriers. *See* Exh. 53,
14 Bates p. 0366. Dina Aguon testified that she signed her name to the letter,
15 acknowledging receipt. *See* Exh. 54, Aguon Depo. at p. 72, l. 1 - 14.
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19 On March 11, 2003, Mr. Murdoch sent CNMI Travel a "Notice of
20 Termination - Accumulated Charges." This letter stated that the termination
21 was based upon the two dishonored remittances of July 20, 2002, and February
22 24, 2003. He reiterated that the AIRS Agent Agreement obligated AIRS to
23 terminate the Agreement immediately because two Notices of Charge had been
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1 issued. See Exh. 55, Bates p. 0367; and Exh. 56, Aguon Depo. at p. 78, l. 15.

2 CNMI Travel sought reinstatement on March 14, 2003, and requested the
3 procedure for reinstatement. See Exh. 57, Bates p. 0369; and Exh. 58, Aguon
4 Depo. at p. 79, l. 6 - 8. Kevin Bushby responded the same date with the three
5 requirements that needed to be met before reinstatement. See Exh. 59, Bates p.
6 0370.
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9 Because this was a first termination of CNMI Travel by AIRS, § 5.1 of the
10 AIRS Agent Agreement permitted reinstatement within thirty days:
11

12 5.2 Reinstatement Within Thirty (30) Days.
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14 If this Agreement is terminated by AIRS due to the
15 Agent's non-payment of any obligation which arises
16 hereunder, the Agent may apply for reinstatement of
17 the Agreement if:

18 5.2.1 The Agent has paid in full, without recourse to
19 funds available from any financial guarantee held at the
20 time by AIRS, all amounts due the Carriers and to
21 AIRS under the terms of this Agreement within thirty
(30) days of receipt of the AIRS's termination notice;

22 5.2.2 The Agent pays a non-refundable reinstatement
23 fee in an amount as may be established from time to
24 time by AIRS; and

25 5.2.3 Increases its financial security, if so requested and
26 within 30 days of such request being made, in an
amount determined at the sole discretion of AIRS as a

1 condition of reinstatement.

2 The Agent may be reinstated only once in any
3 consecutive twelve month period.

4 CNMI Travel paid the arrearages and the fine and was reinstated in April,
5 2003. See Exh. 61, Letter from Lou Sanchez, Continental Airlines, Bates pp.
6 0373 and 0374.
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9 b. The July 22, 2003, remittance of \$40,408.71: On July 24, 2003, AIRS
10 received from Citibank a notice of dishonor of remittance for insufficient funds
11 on CNMI Travel's Bank of Guam account. See Exh. 39. On August 1, 2003,
12 CNMI Travel received a facsimile "Notice of Charge - Dishonored Remittance"
13 letter from Jeff Murdoch. See Exh. 62, Bates p. 0048. The letter notified CNMI
14 Travel that the remittance of \$40,408.71 that had been due on July 21, 2003, had
15 been dishonored by Bank of Guam. In the letter, Mr. Murdoch again reminded
16 Dina Aguon that if two dishonored remittances were recorded against CNMI
17 Travel during any consecutive 12-month period, AIRS would initiate action to
18 terminate its Agreement with CNMI Travel. Dina Aguon received the letter.
19 See Exh. 63, Aguon Depo. at p. 88, l. 4 - 8.
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25 c. The August 25, 2003, remittance of \$82,069.00: Dina Aguon
26 acknowledged that funds were not available to cover the \$82,069.00 settlement

1 amount to be remitted by CNMI Travel to AIRS on August 25, 2003. *See* Exh.
2 64; Exh. 65, Aguon Depo. at p. 8, l. 22 - 23; Exh. 66, Aguon Depo. at p. 11, l. 17;
3 Exh. 67, Aguon Depo. at p. 25, l. 17 - 22; and Exh. 68, Aguon Depo. at p. 48, l. 3
4 - 4.

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7 On August 22, 2003, the board of directors of CNMI Travel met to
8 discuss CNMI Travel's insufficient funds held in trust in its account to cover the
9 remittance amount due on August 25, 2003, the settlement date on which the
10 next remittance was due AIRS. *See* Exh. 64, Aguon Depo. at . 91 - 93. At that
11 meeting, the board approved a loan from board member Richard Untalan to
12 CNMI Travel in the amount of \$20,000.00, to cover the anticipated deficient
13 amount. *See* Exh. 64.

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17 On September 4, 2003, AIRS received from the clearing bank notice of
18 dishonor of \$82,069.00 that was due on August 25, 2003. *See* Exh. 40. This was
19 the second dishonor of a remittance since CNMI Travel had been reinstated as
20 an Agent under the AIRS Agent Agreement in April, 2003.

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23 When AIRS was notified by Citibank on September 4, 2003, that the
24 August 25, 2003, remittance had been dishonored due to insufficient funds,
25 Kevin Bushby sent a facsimile notice to CNMI Travel stating that the
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1 remittance amount of \$82,069.00 must be deposited immediately by CNMI
2 Travel. *See* Exh. 69, Aguon Depo. at p. 50, l. 9 - 12; Exh. 70, Bates p. 0345.
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4 CNMI Travel received that document the same day. *See* Exh. 71, Aguon Depo.
5 at p. 102, l. 19 - 23.
6

7 CNMI Travel first learned of the dishonor of the remittance on
8 September 4, 2003. *See* Exh. 72, Aguon Depo. at p. 103, l. 6 - 8. By September
9 4, 2003, Untalan's personal loan to CNMI Travel had cleared Bank of Guam
10 and CNMI Travel had sufficient funds in its account to cover the \$82,069.00
11 remittance amount due. However, CNMI Travel did not want to pay the
12 settlement amount until it received a letter from the Bank of Guam stating that
13 the Bank of Guam had made a bank error, thus allowing CNMI Travel to avoid
14 termination by AIRS in accordance with their contract. *See* Exh. 72, Aguon
15 Depo. at p. 103, l. 13 - 16; p. 104, l. 16 - 18; and, p. 112, l. 9 - 11.
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20 On September 8, 2003, AIRS issued a Notice of Charge for the
21 dishonored remittance of August 25, 2003. *See* Exh. 73, Bates p. 0028.
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23 On September 10, 2003, the Continental Airlines and Northwest Airlines
24 identification plates were removed from CNMI Travel in accordance with §
25 5.1.1 of the Agent Agreement. *See* Exh. 74, Aguon Depo. at p. 31, l. 1; and, p.
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1 45, l. 4 - 13.

2 After the material breach of the Agreement on August 25, 2003 (which
3 was the second dishonor in a 12-month period and which would result in
4 termination of CNMI Travel as an agent), and AIR's first notice of the breach
5 on September 4, 2003, the following occurred. Although not dispositive of this
6 motion, these events are indicative of defendant CNMI Travel's lack of good
7 faith in trying to gain reinstatement.
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11 On September 11, 2003, AIRS's clearing bank, Citibank, notified AIRS by
12 e-mail that the September 9, 2003, remittance in the amount of \$56,645.27 from
13 CNMI Travel had been dishonored due to insufficient funds. See Exh. 42. This
14 was the third dishonor for insufficient funds after CNMI Travel had been
15 reinstated in April, 2003. See Exh. 75, Aguon Depo. at p. 122, l. 9 - 12.
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18 When CNMI Travel did not settle the delinquent funds, AIRS, in
19 accordance with the procedures set out in the BSP and the Agency Agreement,
20 initiated a default action to terminate the Agreement. See Exh. 76, Aguon Depo.
21 at p. 51, l. 4 - 8.
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24 On September 12, 2003, Mr. Murdoch sent CNMI Travel a "Notice of
25 Termination - Accumulated Charges" letter, in which he informed CNMI
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1 Travel that the grounds for termination were the prior Notices of Charge that
2 had been issued to CNMI Travel in the past twelve months. *See* Exh. 77, Bates
3 p. 0029.
4

5 This was the second time in a 12-month period that AIRS had terminated
6 the Agency Agreement with CNMI Travel because of dishonored remittances.
7 (*See, supra*, first termination on March 11, 2003, following the February 24,
8 2003, dishonored remittance, which was the second dishonored remittance
9 within a 12-month period.)
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12 CNMI Travel acknowledged that it received all of the money due from its
13 customers for all the reporting periods in August, 2003. *See* Exh. 79, Aguon
14 Depo. at p. 15, l. 7 - 9.
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17 CNMI Travel acknowledged that the remittance to be made on August
18 25, 2003, was not made in a timely manner. *See* Exh. 65.
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20 CNMI Travel stated that it did not remit the funds to AIRS because it
21 wanted first to obtain a letter from the Bank of Guam stating that the Bank of
22 Guam had made an error. *See* Exh. 80, Aguon Depo. at p. 99, l. 12 - 14.
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24 CNMI Travel has acknowledged that AIRS is in no way at fault for the
25 dishonor of remittance that was owed on August 25, 2003. *See* Exh. 81, Aguon
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1 Depo. at p. 101, l. 6 -7.

2 d. The September 8, 2003, remittance of \$56,645.27. On September 11,
3 2003, AIRS's clearing bank, Citibank, notified AIRS by e-mail that the
4 September 8, 2003, remittance in the amount of \$56,645.27 from CNMI Travel
5 had been dishonored due to insufficient funds. See Exh. 42.
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7 e. The September 15, 2003, remittance of \$53,635.10. On September 18,
8 2003, AIRS's clearing bank notified AIRS by e-mail that the September 15, 2003,
9 remittance from CNMI Travel in the amount of \$53,635.10 had been
10 dishonored due to insufficient funds. See Exh. 43.
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12 f. The September 22, 2003, remittance of \$50,867.92. On September 24,
13 2003, AIRS's clearing bank notified AIRS by e-mail that the September 22, 2003,
14 remittance from CNMI Travel in the amount of \$50,867.92 had been
15 dishonored due to insufficient funds. See Exh. 44.
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17 g. The September 29, 2003, remittance of \$32,309.26. On October 1,
18 2003, AIRS Clearing Bank notified AIRS by e-mail that the September 29, 2003,
19 remittance from CNMI Travel in the amount of \$32,309.26 had been
20 dishonored due to insufficient funds. See Exh. 45.
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1 20. The BSP provides in § 6.2 that an agent wishing to change banks or
2 bank accounts must notify the BSP manager of that intention by certified mail
3 thirty days in advance of the change. See Exh. 2, Bates p. 0201. CNMI Travel
4 changed its bank account used to hold the AIRS trust funds from Bank of Guam
5 to First Hawaiian Bank without notifying AIRS. See Exh. 88, Aguon Depo. at
6 p. 125, lines 10 - 23.

7
8 Under § 4.7 of the AIRS Agent Agreement, the changing of the bank
9 holding the trust funds so that the direct debit could not be transacted is another
10 ground for termination of the agreement between AIRS and CNMI Travel:
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12

13 4.7 Other Irregularities
14

15 If . . . there is consequent serious jeopardy to the
16 Carrier's ability to collect payment for Traffic
17 Documents issued, AIRS shall withdraw all Traffic
18 Documents and Carrier Identification Plates from the
19 Agent, and shall terminate this Agreement and notify
20 all Carriers.

21 See Exh. 6.

22 21. Again, *supra*, although not dispositive to this motion, it is
23 unchallenged that CNMI Travel, on at least three occasions after the breach of
24 August 25, 2003, intentionally withheld from AIRS the funds it held in trust for
25 AIRS, by transferring money from its Bank of Guam account to an account at
26

1 First Hawaiian Bank which CNMI Travel had opened in early September 2003,
2 prior to September 8, 2003. *See* Exh. 84, Aguon Depo. at p. 125. First, Dina
3 Aguon, CNMI Travel's President, had a cashier's check issued to her in her
4 name in the amount of \$70,000.00 drawn on the Bank of Guam account the
5 same day that the September 08, 2003, remittance of \$56,645.27, was due to
6 AIRS. *See* Exh. 85, Bates p. 0658; and, Exh. 86, Aguon Depo. at p. 131, l. 15 -
7 20. Second, on September 16, 2003, Dina Aguon again had a cashier's check
8 issued, this time to CNMI Travel, for \$70,000 from the Bank of Guam account
9 the day after the September 15, 2003, remittance for \$53,635.10, was due to
10 AIRS. *See* Exh. 85. And, finally, on September 30, 2003, Dina Aguon had a
11 cashier's check made out to CNMI Travel in the amount of \$57,165.67, drawn
12 on the Bank of Guam account the day after the September 29, 2003, remittance
13 for \$32,309.26, was due to AIRS. *See* Exh. 85.

14 The actions of CNMI Travel after September 4, 2003, are indicative of its
15 approach to its obligations under its contract with AIRS. If CNMI Travel had
16 left the trust funds in the Bank of Guam account, there would have been
17 sufficient money to cover each of the settlement amounts owed AIRS. *See* Exh.
18 87, Aguon Depo. at p. 134, l. 9 - 13; and, p. 135, l. 13 - 17.

1 22. CNMI Travel made repeated promises to pay AIRS the money owed.
2 *See* Exh. 89, Bates p. 0019, 0034. On September 17, 2003, CNMI Travel's legal
3 counsel wrote: "I have advised CNMI Travel to immediately release the
4 requested funds to AIRS that CNMI Travel is holding for the Carriers.
5
6 Accordingly, and because of the late time of this communication, Ms. Aguon
7 informs me that the funds will be transferred by tomorrow." *See* Exh. 89, Bates
8 p. 0034. On September 22, 2003, legal counsel again wrote: "I have been in
9 contact with the principals of CNMI Travel who have advised me that they are
10 wiring the Carrier Funds below to AIRS Citibank account pursuant to AIRS
11 instructions. I have been advised that such wire transfer will occur today with a
12 facsimile confirmation to AIRS of such wire transfer. I will advise of any
13 change or update to my information. Please confirm your receipt of the funds
14 when you are advised of the completion of the wire." *See* Exh. 90, Bates p. 0071;
15 and Exh. 91, Aguon Depo. at p. 154, l. 8 - 20. CNMI Travel authorized legal
16 counsel to write the letter and Dina Aguon as a principal of CNMI Travel
17 agreed to wire the funds to cover the August 25, 2003, dishonored remittance.
18 *See* Exh. 91, l. 21 - 23.
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1 23. Except for the August 25, 2003, scheduled remittance, the dishonor of
2 which CNMI Travel blames on the Bank of Guam, CNMI Travel acknowledges
3 that each of the other six dishonored remittances of 2003 were due to its failure
4 to have the requisite trust funds in its Bank of Guam Account. See Exhs. 65, 84,
5 85, 86, and 87.
6

7
8 24. The AIRS Agent Agreement does not have a specific termination
9 date. It provides several bases of termination between AIRS and the Agents. See
10 Exh. 6, Agent Agreement § 4.6.3.1 and § 4.6.3.2. The Agreement specifically
11 states that if a direct debit from CNMI Travel trust account remittance is
12 dishonored, and CNMI Travel fails to make immediate payment, AIRS shall
13 terminate the Agreement:
14
15

16
17 4.6.3: Dishonored Remittances – Mandatory Termination:

18 4.6.3.1: If a direct debit or check drawn on the Agent's bank
19 account for settlement of sales made by the Agent under this
20 Agreement is dishonored, AIRS shall demand Immediate
21 Payment in the form of a cashier's check by the Agent to
22 cover such dishonor. AIRS shall issue a notice of charge to
23 the Agent for the dishonored remittance. If the Agent fails to
24 make Immediate Payment, AIRS shall remove all Traffic
25 Documents and Carrier Identification Plates, and shall
26 terminate this Agreement and notify all Carriers; however, if
 it is subsequently established that the direct debit or check
 was dishonored due to a verifiable bank error outside the
 control of the Agent, AIRS shall withdraw the notice of

1 charge, return Traffic Documents and Carrier Identification
2 Plates to the Agent and notify all Carriers.

3 See Exh. 6.

4 This section requires termination if there is a dishonor (a step necessarily
5 taken by AIRS, since it was acting on behalf of the carriers and had to protect
6 their, and consequently its own, interests), a notice to make payment has been
7 issued, and the Agent has failed to make immediate payment of the dishonored
8 amount.
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11 There is a second basis for termination:
12

13 4.6.3.2: If two notices of charge relating to dishonored
14 remittances are issued to an Agent within any consecutive
15 twelve month period, AIRS shall remove all Traffic
16 Documents and Carrier Identification Plates and shall
17 terminate this Agreement and notify all Carriers.

18 25. CNMI Travel had two dishonored remittances within a 12-month
19 period between July, 2002, and February, 2003, which led to its first termination
20 in March of 2003. Prior to termination, AIRS reminded CNMI Travel that, to
21 avoid being terminated, it could secure from Bank of Guam a letter stating that
22 a dishonored remittance was due solely to bank error. This would cause AIRS
23 to grant the dispensation of reinstatement. CNMI Travel did not obtain such a
24 letter from the Bank of Guam and was first terminated as an agent pursuant to
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1 the provisions of the AIRS Agent Agreement for two dishonored remittances
2 during the preceding 12-month period. See ¶ 18, *supra*.
3

4 26. However, after a first termination, § 5.2 of the AIRS Agent
5 Agreement provides that an agent can be reinstated if it pays to AIRS within 30
6 days of receipt of the termination notice all monies owing, plus pays a non-
7 refundable reinstatement fee, and increases its security. CNMI Travel complied
8 with these requirements and was reinstated in April, 2003.
9
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11 27. After it had been reinstated by AIRS, CNMI Travel had another
12 dishonored remittance on July 22, 2003, and the second dishonored remittance
13 on August 25, 2003. Even though by September 4, 2003, CNMI Travel had
14 sufficient funds in its account to cover the dishonored August 25, 2003,
15 remittance, Dina Aguon stated at her deposition, "We know the consequence
16 that if we get dishonored on this one, then so far, that the consequences would
17 be severe that CNMI Travel would be completely terminate." See Exh. 94,
18 Aguon Depo. at p. 113, l. 3 - 5. "In order for AIRS not [to] terminate CNMI
19 Travel it needed to obtain a letter from Bank of Guam to state that it was a
20 bonafide bank error." See Exh. 95, Aguon Depo. at p. 114, lines 5 - 7.
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1 28. CNMI Travel withheld the funds it was holding in trust for AIRS
2 because it thought their retention would give it leverage in its attempts to be
3 reinstated as an agent by AIRS. *See* Exh. 96, Aguon Depo. at p. 147, l. 12 - 16;
4 and, p. 155, l. 13 - 15. When AIRS declined reinstatement, CNMI Travel
5 continued to withhold the funds with the approval of its Board. *See* Exh. 96.
6

7 29. CNMI Travel knew that § 5.3 of the AIRS Agent Agreement stated
8 that an agent whose agreement has been twice terminated in any consecutive 12-
9 month period could not be considered for inclusion on the ISP official List of
10 Agents until one year following the date on which the second termination
11 notice had been issued by AIRS.
12

13 30. CNMI Travel withheld the funds from AIRS while it was negotiating
14 with AIRS and the Bank of Guam because it knew that if it did not get the letter
15 from the Bank of Guam stating that the dishonor of the remittance of August
16 25, 2003, had been a bank error, it would be terminated twice in one year and
17 not subject to renewal for a one-year period. *See* Exh. 97, Aguon Depo. at p.
18 151, l. 20 - 23; and, p. 152, l. 1 - 7.
19

20 31. All of the money held in trust by CNMI Travel for AIRS that was
21 not remitted to AIRS through its clearing bank was used by CNMI Travel for
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1 its overhead expenses. *See* Exh. 99, Aguon Depo. at p. 129, l. 13 - 17.

2 32. During the entire period of the Agency Agreement, AIRS and the
3 Carriers fully performed their obligations under the contract with CNMI
4 Travel. Plaintiffs provided CNMI Travel with carrier identification plates and
5 traffic documents necessary for CNMI Travel to issue passenger tickets for
6 Continental and Northwest. *See* Exh. 100, copy of Plaintiffs' Complaint at ¶ 12;
7 and Exh. 18, CNMI Travel's Answer, ¶ 1.
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11 33. From August 4 to September 21, 2003, CNMI Travel issued Travel
12 Documents on behalf of Continental Airlines in the amount of \$167,626.58. *See*
13 Exh. 103, Debt Summary for CNMI Travel, No. 54-6 3319-1, as of November 7,
14 2003.
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16

17 34. During the same period, Defendant issued Travel Documents on
18 behalf of Northwest Airlines in the amount of \$112,785.27. *See* Exh. 103.
19

20 35. On or about September 22, 2003, CNMI Travel had sufficient funds
21 to pay AIRS the full amount of \$275,526.55 which was the full amount then
22 owing, according to Ms. Aguon. *See* Exh. 102, Aguon Depo. at p. 156, l. 20 - 23;
23 and, p. 157, l. 1.
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36. AIRS, on behalf of plaintiff carriers, collected \$134,935.00 at the end of September, 2003, from a line of credit established by CNMI Travel as security. *See* Exh. 103; and, Exh. 104, Bates p. 0249.

37. At this time, CNMI Travel acknowledges that it owes AIRS more than \$135,000.00. *See* Exh. 105, Aguon Depo. at p. 158, line 1. To date, CNMI Travel has not paid, and continues to refuse to pay, the total amount due of \$140,591.55, plus interest. *See* Exh. 103.

Conclusions of Law

1. The contract between AIRS and defendant CNMI Travel is a legal, binding contract.

2. The terms of the contract do not shock the conscience in any manner.

3. Plaintiff AIRS, acting on its behalf and on behalf of beneficiaries Northwest Airlines and Continental Airlines, acted in complete compliance with its obligations and responsibilities under the contract.

4. Defendant CNMI Travel materially breached the contract on or before August 25, 2003, by failing to hold monies in trust, with no legal justification.

5. The contract is structured in such a way that an agent who breaches the payment terms of the contract by defaulting when payment is due is given

1 an opportunity to cure the breach. The steps necessary to cure a breach are not
2 onerous and do not shock the conscience, particularly given the fact that agents
3 are required by the contract to hold money due to AIRS in trust for the carriers.
4 That is, all of the money owed to AIRS by an agent should always be instantly
5 available because the money is to be held in trust, after the agent has first
6 deducted its commissions.
7

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10 6. Defendant CNMI Travel's breach of the contract was not known to
11 AIRS until September 4, 2003, when it learned that the August 25, 2003,
12 remittance to AIRS of monies held in trust for the carriers by CNMI Travel had
13 not been made.
14

15 7. Complying with the terms of the contract, plaintiff AIRS gave
16 defendant CNMI Travel an opportunity to cure the breach by obtaining a letter
17 from Bank of Guam stating that the Bank had committed an error, and that the
18 Bank was responsible for the failed remittance on August 25, 2003. No such
19 letter was ever provided, presumably because the Bank, following standard
20 banking practice, held Mr. Untalan's off-island check until it had cleared, which
21 was after the August 25, 2003, remittance date.
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1 8. Although not dispositive to this motion, defendant CNMI Travel
2 committed repeated, legally untenable breaches of its contract with AIRS by
3 withholding successive weekly remittances during September and the first week
4 of October, 2003, and converting the monies held in trust for the carriers to its
5 own uses. The initial, dispositive breaches of July 22 and August 25, 2003, are
6 sufficient to deny defendant CNMI Travel the equitable remedy of specific
7 performance, and the later breaches solidify the court's legal conclusion that
8 CNMI Travel has no equitable grounds to seek relief against plaintiffs.
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12 9. Defendant CNMI Travel had no factual or legal justification for
13 retaining monies held by it in trust for plaintiffs.
14

15 10. Defendant CNMI Travel has no credible factual or legal basis for any
16 set-off of sums owed to plaintiffs.
17

18 11. Defendant CNMI Travel presently owes to plaintiffs the sum of
19 \$140,591.55, plus interest at the legal rate from entry of judgment. 28 U.S.C. §
20 1961(a). The court also awards, as damages, pre-judgment interest on each
21 amount wrongfully withheld, from the date of the wrongful withholding until
22 judgment, at the legal interest rate in effect on the respective dates the sums
23 were withheld. 11 Corbin on Contracts § 1046 (2002). Plaintiffs shall supply
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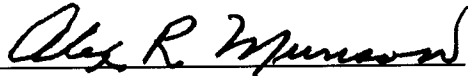
1 the court with those calculations within seven days of the date of this order.

2 Judgment shall then enter accordingly.

3
4 FOR THE FOREGOING REASONS, plaintiffs' motion for summary
5 judgment is granted and defendant's motion for summary judgment, not being
6 supported by the material facts and the law, is denied.
7

8 IT IS SO ORDERED.

9 DATED this 12th day of January, 2005.
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14 _____
15 ALEX R. MUNSON
16 Judge
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