

BEFORE THE
OFFICE OF THE SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Application of:)	
)	
AEROPOSTAL ALAS DE VENEZUELA, C.A.)	
)	Docket OST-98-4917
for an Exemption from 49 U.S.C. §41301)	
(Venezuela - Dallas/Houston;)	
U.S. - Venezuela Code-Sharing))	
_____)	
Application of:)	
)	
AMERICAN AIRLINES)	
)	Docket OST-98-4911
for an Exemption (U.S. - Venezuela points; Code-)	
Sharing with Aeropostal Alas de Venezuela, C.A.))	
_____)	
Joint Application of:)	
)	
AMERICAN AIRLINES, INC.)	
AEROPOSTAL ALAS DE VENEZUELA, C.A.)	Undocketed
)	
for Statements of Authorization)	
Under 14 C.F.R. Part 212)	
_____)	

**CONSOLIDATED REPLY OF
AEROPOSTAL ALAS DE VENEZUELA, C.A. TO ANSWERS OF
ALAS INTERNATIONAL LIMITED AND AEROVIAS VENEZOLANA, S.A.**

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January 26, 1999

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Aeropostal Alas de Venezuela, C.A. (“Aeropostal”) respectfully submits this Reply to the

Answers of Alas International Limited (“Alas”) and Aerovias Venezolana, S.A. (“Avensa”) objecting to the Aeropostal/American Airlines code-share.¹

As grounds for their objection, Alas and Avensa incompletely and inaccurately refer to certain legal proceedings currently pending in New York, Venezuela and the Dominican Republic. These legal proceedings are part of a long-running, private commercial dispute dating back to 1996 between Alas and its principals, on the one hand, and Corporacion Alas de Venezuela, C.A. (“CAV”)², Mrs. Haydhelen Emilia Velasquez Morales and Mr. Nelson Ramiz³, on the other hand. The commercial dispute which has caused Alas to initiate these proceedings relates to the 1996 acquisition during the course of a Venezuelan Government-sponsored auction of certain of the assets of the old Government-owned Venezuelan airline Aeropostal⁴, more specifically, nine (9) DC-9 aircraft.

Aeropostal submits that Alas’ Answer herein is filed for the purpose of additional harassment and is simply the latest in a long line of improper efforts by Alas and its principals during the past two (2) years to use any means, whether they be extraneous or improper, to apply

¹ A Joint Reply by American and Aeropostal to the Answers of Continental, Polar and United was filed herein on January 11, 1998.

² CAV is the parent Venezuelan corporation of the applicant Venezuelan airline herein, Aeropostal.

³ Mrs. Velasquez and Mr. Ramiz are, respectively, President and COO of Aeropostal and are married. Aeropostal Exemption Application, AAV-4, p. 2 (Docket OST-98-3770).

⁴ Linea Aerea Venezolana, C.A. (“LAV” or “old Aeropostal”).

economic pressure against CAV, Mrs. Velasquez and Mr. Ramiz to achieve Alas' commercial objective. Avensa's objection is interposed as part of its campaign to use any means to try to eliminate Aeropostal as a competitor, both domestically, as well as on the all-important U.S. - Venezuela market routes.⁵

The Department's procedures are being improperly used in an attempt to gain an advantage in a private commercial dispute. The Department should dismiss the Alas/Avensa objections and follow its long-standing policy of not becoming involved in the resolution of private contractual disputes, particularly where those disputes are being litigated in the courts of more than one jurisdiction and more than one country.

BACKGROUND

The key dispute between the parties concerns the restraints in Venezuela regarding use of certain DC-9 aircraft. CAV asserts that the aircraft were acquired from the bankruptcy estate of the old Aeropostal with the intent, for the purpose, and pursuant to the requirement of the Venezuelan Government that the successful bidder could only dedicate these aircraft to the operation of a new Venezuelan airline. CAV asserts that Alas' intent was to remove these aircraft from Venezuela without the permission of the Venezuelan Government and to disregard the contractual commitments to the Venezuelan Government, the Bankruptcy Court and the

⁵ As the Department is aware, Avensa has taken the surprising and unusual position (for a Venezuelan carrier) of objecting to wet leases to Aeropostal, wet leases which Aeropostal is obliged to operate under through no fault of Aeropostal by FAA fiat. §III infra.

Bankruptcy Court-appointed Receivers.

In August 1996, the assets of LAV were being sold in Venezuela by the Venezuelan Bankruptcy Court-appointed Receivers⁶ for the old Aeropostal. These assets included nine (9) DC-9 aircraft, engines and related assets. With the full agreement of Alas' principals, CAV submitted a bid on August 31, 1996, pursuant to the terms of the Venezuelan Government-sponsored auction. Under the terms of the bidding rules, CAV had posted a bond of \$1 million and won with a bid of \$20 million, which Alas' principals had agreed to provide. Devorkin Affirmation, January 22, 1999, ¶7, copy attached hereto at Exhibit 1. Again with the full knowledge of Alas, CAV then entered into an Asset Purchase Agreement with the Venezuelan Bankruptcy Court-appointed Receivers to purchase the aircraft and the assets from the estate of the old Aeropostal. Devorkin Aff., ¶8.

With the full knowledge of Alas, the rules governing both the original bid as well as the Asset Purchase Agreement⁷, specifically required that the aircraft had to be used to operate a Venezuelan, regularly scheduled, commercial airline, which could only be done by a Venezuelan citizen. CAV was such a company; Alas and its principals were not. Devorkin Aff., ¶28.

⁶ LAV was a bankrupt airline owned by the Government of Venezuela. The Receivers were officers of the Bankruptcy Court acting under its direction, and the proceedings and the conditions of the sale were conducted at the direction of the Bankruptcy Court, then presided over by Judge Graciela Omana de Suarez. Devorkin Affirmation, ¶7.

⁷ Both the bidding rules and the Asset Purchase Agreement constitute acts of the Venezuelan Bankruptcy Court, which is part of the sovereign Government of Venezuela. Devorkin Aff., ¶28.

In sworn testimony in the New York state court litigation initiated by Alas in early 1997, the Director General of Venezuela's Ministry of Transportation and Communications ("MTC"), old Aeropostal's Receiver⁸ and the Venezuelan Bankruptcy Court Judges⁹, all testified under oath by Affidavit in Answers to Letters Rogatory that it was the clearly-stated policy of the Government of Venezuela that the assets of the old Aeropostal, including the nine (9) DC-9 aircraft, had to be allocated for the operation of a domestic, national, Venezuelan scheduled airline and that this threshold policy was specifically taken into account as a condition in the disposition of the assets to CAV. Devorkin Aff., ¶¶30-44. More importantly, when taken together, the testimony and orders of one of the Bankruptcy Judges, the three (3) Receivers and the former Government officials show that Alas and its principals, David Massie¹⁰ et al., were fully aware not only of the Venezuelan Government's policies at that time, but that any attempt to de-register and/or export those aircraft would violate the terms of the Asset Purchase Agreement, would not be permitted, and would have exposed CAV to claims of fraud and charges of crimes against the Government. Id.

⁸ Sworn Answers to Letters Rogatory issued by the New York Trial Court, infra, were recently submitted to that Court on January 15, 1999 by Bankruptcy Judges Omana and Guia, the three (3) Receivers in Bankruptcy and the Director General of the MTC. Devorkin Aff., ¶¶30-39.

⁹ Bankruptcy Judge Omana oversaw the Venezuelan bankruptcy proceedings from August 1995 - November 1996. Venezuela Bankruptcy Judge Guia is the current Bankruptcy Judge in charge of Old Aeropostal.

¹⁰ Mr. Massie is a principal of Alas and is ostensibly the person who filed the objection of Alas filed herein and who also signed certain defamatory advertisements in Venezuela. See infra.

It would appear that following CAV's acquisition of the assets of the old Aeropostal, it was always Alas' intention to de-register and export the aircraft, something which would clearly have violated the Venezuelan Government's threshold conditions. When Alas was unable to accomplish this goal, it immediately embarked on a campaign of harassment and litigation against CAV, Mrs. Velasquez and Mr. Ramiz.

I. Legal Proceedings

(i) The Venezuelan Legal Proceedings

In its Answer Alas states darkly, but misleadingly, that "we understand" criminal investigations of Mrs. Velasquez and Mr. Ramiz are pending in Venezuela in connection with the DC-9 and related asset acquisition. See Alas Answer, p. 6. This is not an accurate statement. The evidence gathered to date demonstrates that with the help of attorneys hired by Alas, using the testimony of Alas, multiple criminal proceedings have been commenced and there appears to be a comprehensive but improper campaign of harassment. Further, Alas fails to advise the Department that as a result of this campaign, Alas is now being sued for defamation in Venezuela.

Upon information and belief, it appears that attorneys for Alas have: (1) caused the commencement of multiple criminal actions in Venezuela by causing improper duplicative arrest warrants to be issued for the arrests of Mrs. Velasquez and Mr. Ramiz; and (2) sought to destroy the fledgling airline by publicly and falsely accusing the airline of flying unsafe aircraft and by

trying to destroy the airline's credit standing. Devorkin Aff., ¶46. As part of this campaign launched by Alas or its representatives against Mrs. Velasquez and Mr. Ramiz, Alas has for the past two (2) years improperly used the Venezuelan criminal legal process in an attempt to force a resolution in its favor of what is in reality an underlying civil business dispute.

(a) Criminal Proceedings

(i) Background

The civil and criminal legal systems of Venezuela are quite different from those in the U.S. Unlike in the U.S., the Venezuelan penal process is predominantly inquisitive and, for that reason, the Judge carries out the functions of both prosecutor and trial judge. The process is divided into two (2) phases or stages: (1) the indictment, and (2) the plenary stage.¹¹ The indictment phase has as its goal the gathering of evidence of the alleged crime and of the perpetrator of the act. These proceedings are kept secret from the person being investigated. The subject being investigated cannot review the records, and he cannot request copies of the investigations made until the point when the arrest warrant or the indictment is issued. Devorkin Aff., ¶59.

In Venezuela therefore, a third party completely unconnected to a transaction may file a

¹¹ During this second plenary phase the trial is conducted, and the Government attorney presents the charges against the accused(s). In the plenary stage, the defendant has the right to review all the evidence against him and to request a copy of the file. Devorkin Aff., ¶60.

complaint for criminal charges to be issued by a criminal court. Unlike in the U.S., an attorney for a real party in a Venezuelan civil dispute can therefore cause criminal charges to be issued against an adversary by using a completely judgment-proof stranger. Devorkin Aff., ¶61.

(ii) The Venezuelan Criminal Proceedings

In connection with their private commercial dispute, Alas or its representatives have improperly caused multiple, criminal actions to be issued against Mrs. Velasquez and Mr. Ramiz, thereby causing arrest warrants to be issued for the arrests of the individuals. Devorkin Aff., ¶¶62-82.

Shortly after the assets of the old Aeropostal had been acquired and the underlying commercial dispute arose, a criminal complaint was filed on January 21, 1997 against Mrs. Velasquez and Mr. Ramiz in the 32nd Criminal Court in Caracas. After the principals of Alas, on the one hand, and Mrs. Velasquez and Mr. Ramiz, on the other hand, had all testified, the tribunal on July 3, 1997 declared the criminal investigation closed because the acts complained of were not criminal in nature. Devorkin Aff., ¶¶63-64.¹²

¹² Whereas on appeal the tribunal's decision was reversed and the arrests of Mrs. Velasquez and Mr. Ramiz were ordered (Devorkin Aff., ¶65), this order was later reversed again by the Penal Chamber of Venezuela's Supreme Court of Justice on December 10, 1997. Devorkin Aff., ¶¶69 and 71. The Supreme Court of Venezuela's orders vacated the arrest warrants and held that their issuance violated the constitutional rights of Mrs. Velasquez and Mr. Ramiz. Id.

A couple of weeks after this favorable (for Mrs. Velasquez and Mr. Ramiz) July 3 decision, a campaign of terror and harassment continued with the filing of additional, repetitive and identical criminal complaints in other criminal courts in Venezuela: on July 17, 1997 (43rd Criminal Court, Caracas; Devorkin Aff., ¶¶66-68); on August 20, 1997 (4th Criminal Court, Carabobo; Devorkin Aff., ¶¶73-74); and on October 22, 1997 (3rd Criminal Court, Carabobo; Devorkin Aff., ¶75). As part of the campaign of harassment to seek a resolution of the underlying commercial dispute, it would appear Alas' attorneys have not only sought a criminal case, the arrest and jailing of Mrs. Velasquez and Mr. Ramiz has been sought (Devorkin Aff., ¶69) and the Venezuelan prison system is extremely dangerous. Devorkin Aff., ¶82.

On November 18, 1997, and again on March 26, 1998¹³, the Supreme Court of Justice decreed that all the cases initiated by Alas were related, and consolidated them before one of the courts. Devorkin Aff., ¶76.

Under these highly serious and unsatisfactory circumstances, the Venezuelan attorneys for Mrs. Velasquez and Mr. Ramiz have been obliged to recommend they not return to Venezuela because there can be no assurance that yet further improper criminal charges, albeit duplicative, will be sought and that they will not be incarcerated. These attorneys have stated that the current system of Venezuelan criminal procedure which Alas' attorneys are improperly manipulating does not guarantee against issuance of yet another detention decree by any Court of the Republic.

¹³ One of the other courts where other identical criminal proceedings had been improperly initiated by Alas refused to comply with the Supreme Court's decree necessitating another decree from the Supreme Court upholding its prior judgment. Devorkin Aff., ¶¶76-79.

Devorkin Aff., ¶81.

(b) Defamatory Statements in Venezuela

At the same time as the multiple criminal proceedings were being issued in Venezuela, Alas' representatives also engaged in a media campaign attacking the safety of the airline and the honesty and integrity of Mr. Ramiz. Devorkin Aff., ¶¶ 47-57.

In July 1997, advertisements were placed in Caracas' largest newspaper urging the public to stop flying Aeropostal and asking the entire airline industry to stop doing business with Aeropostal. Devorkin Aff., ¶¶47-49. In one advertisement, purportedly signed by Mr. Massie, the objector herein, it was alleged, inter alia, that Aeropostal's aircraft were not being properly or safely maintained. Devorkin Aff., ¶48. This is obviously the most serious charge that can be made against any airline and it is conduct that would not be tolerated in the U.S. The purpose of the ad was clearly to undermine and chill not only the confidence of the traveling public in this fledgling airline which had only been flying for a few months, but also the Venezuelan Government's willingness to grant Aeropostal a permanent certificate to replace the temporary certificate it then held. Devorkin Aff., ¶48.

As a result of the serious nature of this defamatory attack, Aeropostal filed suit in Caracas in August 1997 alleging these ads were part of a campaign of misinformation and defamatory statements by Alas and its agents and attorneys for the specific purpose of causing the demise of

the airline in the hope that, in this manner, the perpetrators could achieve the otherwise unlawful (in Venezuela) goal of export of the DC-9's from Venezuela. Devorkin Aff., ¶50.

In Alas' Answer to the defamation suit filed by its Venezuelan counsel, Alas not only denied the defamation allegations, it also affirmatively denied that it had paid for the published advertisements. Devorkin Aff., ¶53. However, during the course of discovery, the Public Relations firm which had placed the defamatory advertisement admitted that the ad had been placed by Alas' counsel, the same counsel who had denied any involvement by Alas. Invoices were produced evidencing same as well as documents showing the law firm had even paid this invoice with one of its own checks. Devorkin Aff., ¶¶55-57.

In March 1998, the Venezuelan court issued a preliminary order of attachment in favor of Aeropostal in the amount of \$22 million which applies to any of Alas' assets, including any recovery Alas seeks in the New York case, infra., and is intended to assure that any Venezuelan judgment awarded in favor of Aeropostal in Venezuela will be collectible since Alas may have no assets in Venezuela. Devorkin Aff., ¶51.

(ii) The New York Legal Proceedings

(a) Background

Parallel to the long-running and comprehensive campaign of harassment in Venezuela against CAV, Mrs. Velasquez and Mr. Ramiz, Alas also filed a civil action in New York state court in early 1997. Alas Answer, Exhibit 2. Alas' attempt to get control over the aircraft by the filing of this civil action has been rejected by the New York trial court. Devorkin Aff., ¶5.

One of the key disputes in New York involves restraints in Venezuela on the aircraft. CAV contends that the assets were purchased with the intent, for the purpose, and pursuant to the requirement of the Venezuelan Government that the assets would be dedicated to the operation of a new Venezuelan airline. CAV contends that: (i) this requirement to operate an airline was fully disclosed to Alas by CAV, both orally and in a written copy of the Asset Purchase Agreement with the Trustees; (ii) CAV would only be able to transfer title to the Aircraft to Alas and de-register the aircraft if one or more officials within the Government of Venezuela took certain actions; (iii) these Government officials refused to take the actions necessary to enable CAV to do what Alas wanted; (iv) the refusal of the Government officials to act is attributable to the wrongful conduct of Alas and its principals; (v) the failure of the Government officials to act rendered CAV's performance under this agreement impossible and illegal. Devorkin Aff., ¶15. CAV asserts that Alas embarked on an unjustifiable and outrageous course of conduct designed to destroy the defendants.

(b) The Status of the New York Litigation

There has been no trial in the New York case and it is far from over, but the trial court has denied Alas' application for a constructive trust or a receiver over the assets. Devorkin Aff., ¶17. Until August 1998, Alas had done nothing to move for any specific relief. It then moved for partial judgment on liability only against CAV, Mrs. Velasquez and Mr. Ramiz, and sought a constructive trust over the assets and the appointment of a receiver. Devorkin Aff., ¶18.

On November 2, 1998, the trial court granted Alas' motion but only in part. The court made a limited finding that there were no disputed facts as to liability, and that Velasquez and Ramiz had breached a contractual fiduciary duty to cause CAV to transfer the aircraft. Alas Answer, Exhibit 2. However, these extreme findings are completely unsupported by the record in this case, because numerous facts are in dispute which the trial court has either completely overlooked or misstated. Mrs. Velasquez and Mr. Ramiz have filed an appeal of this order, and briefs will be filed beginning in March, and the appeal should be argued in June, with a decision from one (1) to four (4) months later. Since in New York a court does not have the power to make such findings of fact, the defendants are confident that they will be reversed on appeal. Devorkin Aff., ¶19.

This limited finding exposes Mrs. Velasquez and Mr. Ramiz to a trial on damages, which will be decided by a jury, not the judge. This trial will not take place until discovery has been completed, the scope of which is still being litigated. It may not take place until after the appeal is

decided on liability, so that if the appellate court decides that there are issues of fact on liability which a jury must also decide, a trial will not be wasted. Devorkin Aff., ¶20.

(c) New Evidence Which Prevents the New York Court from Acting

Most recently, the Venezuelan Bankruptcy Judges who had jurisdiction over the assets filed Answers to the New York court's Letters Rogatory. That Answer, coupled with the previous answers filed by the Receivers and the Director General of Venezuela's MTC, together with the Asset Purchase Agreement itself, demonstrate that the performance sought by Alas (transfer and export of the aircraft) would be illegal in Venezuela. CAV contends that this evidence demonstrates there were sovereign acts of the Government of Venezuela relating to this property within its jurisdiction and that the New York State court is required to recognize and not contravene such acts. Devorkin Aff., ¶¶24-25. This issue is still under consideration by the trial court.

(iii) The Dominican Republic Legal Proceedings

In their Answers, Alas/Avensa further allege that Nelson Ramiz is a "fugitive" and is wanted on fraud charges¹⁴ in the Dominican Republic. Alas Answer, p. 6; Avensa Answer, p. 5, n. 8.

¹⁴ Alas attaches a certification of the Secretary of the Dominican Court certifying there is a criminal file dating back to 1987 concerning, *inter alia*, Nelson Ramiz, and his prosecution for failure to appear. Alas Answer, Exhibit 6, p. 2.

In making these inflammatory allegations, Alas/Avensa have once again deliberately and improperly failed to apprise the Department of the context of those Dominican Republic proceedings and the significant fact that, underlying those proceedings, is an unrelated commercial dispute between Mr. Ramiz and the Dominican airline Dominicana de Aviacion, C. por A. (“Dominicana”)¹⁵, which underlying commercial dispute was resolved in Mr. Ramiz’s favor in 1990 in litigation in Federal Court in New York.

(a) Background

During the mid-1980’s, Griesbach Investments Ltd., Inc., (“Griesbach”), entered into a commercial relationship with the then Dominican flag carrier Dominicana, assisting Dominicana in the location of commercial aircraft.¹⁶ In connection with this representation of Dominicana, Griesbach and Dominicana executed a May 20, 1985 contract and an August 5, 1985 Promissory Note in favor of Griesbach in the original principal sum of amount of \$875,000. Perez Affidavit, ¶¶3-5, copy attached hereto at Exhibit 2. In due course, Dominicana made an initial partial payment of \$125,000 under the Promissory Note. Perez Aff., ¶5.

In 1986, a new Government assumed power in the Dominican Republic, a new President of Dominicana was appointed and Dominicana subsequently reneged on its agreement with

¹⁵ To the best of Aeropostal’s knowledge, Dominicana is no longer in operation.

¹⁶ Griesbach was a special purpose Florida corporation created for the purpose of the Dominicana agreement. Griesbach is no longer in operation.

Griesbach. Perez Aff., ¶¶3-4. Pursuant to the Griesbach/Dominicana contract, Griesbach in 1990 filed a civil action in Federal Court in New York against Dominicana seeking to collect on the Promissory Note. Perez Aff., ¶3.¹⁷ In response to the Complaint, Dominicana filed an Answer and Counterclaim alleging fraud by Griesbach and Mr. Ramiz and that the transaction and Promissory Note were null and void. Perez Aff., ¶4.

Substantial written, testimonial and documentary discovery was given by Griesbach and Mr. Ramiz concerning the facts and circumstances surrounding the Griesbach/Dominicana transaction, including the underlying facts and reasons why Dominicana had executed the documents and Promissory Note in question, and demonstrated that Mr. Ramiz and Griesbach had indeed participated in the transaction by locating the specific type of aircraft that Dominicana had been seeking. Perez Aff., ¶5.

During the course of discovery, Dominicana referred to a criminal investigation into the operations of Dominicana which had been pending since approximately 1986. Perez Aff., ¶4. In 1986 a new Government assumed power and in the Dominican Republic at that time, criminal investigations were routinely commenced by opposition parties during the post-election transition. Id. However, it was apparent that the criminal allegations which arose out of the commercial dispute were unsupported by any evidence and were fueled by scandalous remarks made by the new administration in press reports. Perez Aff., ¶6.

¹⁷ Griesbach Investments, Ltd., Inc. v. Compania Dominicana de Aviacion, C. por A., EDNY, Case No. 90-1931 (DRH).

Dominicana's civil fraud counterclaims against Griesbach and Mr. Ramiz were vigorously defended. Among the documents presented to the Federal Court were Minutes of the Board of Directors of Dominicana specifically authorizing the transaction giving issue to the obligations of Dominicana to Griesbach. Perez Aff., ¶10. Pursuant to the Federal Rules of Civil Procedure and the Trial Judge's instructions, Dominicana was commanded to produce any witnesses, documents or other evidence supporting their claims. The witness produced by Dominicana as the person with the most knowledge concerning Dominicana's fraud claims against Griesbach/Ramiz was forced to admit under examination that the allegations of fraud against Ramiz were based solely on rumors and some documents he said he had reviewed. When asked to specify the documents to which he was referring, it turned out that they were the documents filed by Griesbach and Ramiz establishing Dominicana's obligations and evidence of the partial payment of \$125,000 by Dominicana satisfying the transaction. Perez Affirmation, ¶¶9-10.

Shortly after this sworn testimony of Dominicana's own witness in the New York civil suit, Dominicana agreed to a settlement with Griesbach and Mr. Ramiz wherein Dominicana agreed to pay \$425,000 (in addition to the \$125,000 Dominicana had paid under the Promissory Note prior to the suit) and Dominicana's fraud counterclaims against Griesbach and Mr. Ramiz were dismissed with prejudice. Perez Aff., ¶11.

At the same time that Dominicana had been forced to capitulate in the civil suit, the criminal action which Dominicana had initiated in the Dominican Republic remained dormant.

(b) Reactivation of the Criminal File

Up until approximately 1997 the criminal investigation files in the Dominican Republic lay dormant even though several citizens of the Dominican Republic had been named as alleged suspects and even though these individuals continued to reside in the country. Perez Aff., ¶4. During 1997, upon information and belief, a competitor of Aeropostal in conjunction with the attorneys representing Mr. Massie and Alas in the litigation pending in Venezuela and New York, leaked portions of this document file to the press in both countries and created significant controversies. Perez Aff., ¶13.

(iv) The Private Contractual Dispute Has no Bearing on This Proceeding

Aeropostal submits that the issues raised by Alas/Avensa go either to private contractual matters or to matters for resolution by the appropriate courts. Since Aeropostal comes duly licensed and designated by its homeland Government, the Department should follow its long-standing policy¹⁸ and not take a position on the merits of what is in reality a private commercial

¹⁸ See E.g., Compania de Aviacion "Faucett", S.A., Order 93-7-343 (...[the] concerns go either to private contractual matters or to matters for resolution by the Peruvian Government. Neither concerns warrants out regulatory intervention."); Aerolineas Nicaraguenses, S.A. (Aeronica), Order 82-1-146, p. 6 ("...we do not believe it necessary or desirable for us to address the bankruptcy-related issues raised by the Co-Trustee."); Lineas Aereas Costarricenses, S.A., Order 81-2-100, p. 5 ("As a private matter between the parties, it is not a matter for Board resolution. We do not wish to permit Board procedures to be used in an

dispute.

Since there has been litigation pending for two (2) years now in the courts of both Venezuela and New York involving the private contractual dispute with Alas, it is inappropriate to argue these cases before the Department.¹⁹ It has long been Department policy to avoid taking sides in such disputes. See Aeronica, et al., supra.

II. No False Information Has Been Submitted by Aeropostal to the Department

Regarding Alas/Avensa's charges that Aeropostal has submitted false information, these charges are simply untrue as a review of the information submitted clearly demonstrates and Alas/Avensa's improperly-motivated charges should be rejected. Alas/Avensa's charges and requests for an investigation are made in the same vein as Avensa's shrill charges that Aeropostal was acting in bad faith before the Department in connection with the Transaer wet lease application approved by the Department. Again, these improper charges are simply part of Alas/Avensa's campaign are simply part of Alas/Avensa's campaign to use any available means to interfere with Aeropostal's operations and thwart legitimate competition.

Firstly, Alas states that Aeropostal has misled the Department regarding the ownership of

attempt to resolve a private dispute.”)

¹⁹ Aeropostal has been obliged to fully summarize the status of these pending cases for the sole purpose of correcting the inaccurate and incomplete assertions of Alas in their Answer, but Aeropostal is not seeking resolution of these disputes before the Department.

the DC-9 aircraft and the consideration paid. Aeropostal's Exemption accurately summarizes the circumstances surrounding Aeropostal's commencement of operations and, as indicated above, the status of the DC-9 aircraft is unresolved and is being addressed by the courts of Venezuela and New York.

Secondly, Alas attempts to make much out of nothing regarding Mrs. Velasquez's and Mr. Ramiz's status as, respectively, President and COO of Aeropostal and the fact of their marriage. The fact that Mrs. Velasquez might "rel[y] primarily on her husband" is in no way inconsistent with her position as President of Aeropostal and Mr. Ramiz's position as COO, facts which were clearly disclosed to the Department as required, as well as their marital status. Exemption Application, Exhibit AAV-4, pp. 2-5. Regarding Mr. Ramiz's U.S. citizenship, again this fact was clearly indicated in the Exemption application and, to the extent it was even necessary, Aeropostal sought a waiver from the homeland ownership and control policy. Exemption Application, Exhibit AAV-4, p. 3.²⁰ Similarly, the citizenship of Mr. Massie et al. were indicated. Id.

Alas also contends that in the New York litigation, Mrs. Velasquez and Mr. Ramiz disputed a prior statement before DOT that Alas was a 49% owner of CAV. This is inaccurate. Mr. Ramiz and Mrs. Velasquez asserted that (i) Alas did not properly pay for such shares; (ii)

²⁰ Alas similarly attempts to make much of the residency of Mr. and Mrs. Ramiz. There is no inconsistency. As explained above, as a result of Alas' attorneys improper manipulations of the Venezuelan criminal justice system, Mrs. Velasquez and Mr. Ramiz have been unable to return to Venezuela where they maintain a residence.

Alas did not disclose to the Venezuelan authorities its actual owners in order to properly register its proposed foreign investment in CAV; (iii) Alas did not sign the books of the corporation as it was required to do; and (iv) Alas could not enforce its claimed rights in New York, because, as it had already conceded in a proceeding over the shares commenced in Venezuela, the language of the agreement about the shares did not contain an enforceable promise. *Devorkin Aff.*, ¶3, n. 1.²¹

Alas then contends that Aeropostal's statement as to ownership is incorrect, but fails to state that Aeropostal's parent CAV is a Venezuelan corporation owned and controlled by citizens of Venezuela. Alas further omits to point out that the Venezuelan MTC, which has strict homeland ownership and control policies, believes Aeropostal to be owned and controlled by citizens of Venezuela and has designated²² Aeropostal as such on several occasions.²³

III. FAA Category II

²¹ In its Answer, Alas correctly states that Aeropostal is 100% held by the Venezuelan parent corporation CAV. This fact is set forth in Aeropostal's Articles of Incorporation which were submitted in the Exemption Application. Exemption Application, Exhibit AAV-9, p. 8, Article 6. Through an oversight by counsel, Exhibit AAV-5, p. 1, incorrectly summarizes that Aeropostal is 51% owned by Mrs. Velasquez and 49% by CAV. This inadvertent error does not affect the status of Aeropostal.

²² Where an applicant has been properly "designated" by its Government under the terms of a bilateral air transport agreement, such designation is held to be highly significant and weighty evidence bearing upon the public interest in satisfaction of the requirements of Section 402 of the Act. Linea Aerea Nacional de Chile, 26 C.A.B. 604 (1958).

²³ The Government of Venezuela has designated Aeropostal as a carrier of Venezuela on the Venezuela - U.S. routes: Caracas/Port of Spain - San Juan; Caracas - Orlando/Atlanta; Venezuela points - Miami; Venezuela points - New York; and Venezuela points - Houston/Dallas.

Avensa argues that the FAA Category II policy would not permit the code-share authority sought herein by joint applicants American Airlines, Inc. (“American”) and Aeropostal. Avensa states further that Aeropostal will be without aircraft to serve the U.S. after either January 15, 1999²⁴, or April 26, 1999 and contends that American and Aeropostal have failed to provide the Department with the identity of the operator’s intra-Venezuela flights. Avensa’s arguments are incorrect and inaccurate on all counts. Further, Avensa is improperly using the FAA’s Category II situation as both a shield to protect itself from legitimate competition from another Venezuelan carrier, as well as a sword in order to harm Aeropostal commercially.

(i) Background

On April 24, 1998, Aeropostal filed an Exemption application for Scheduled Combination Authority on a number of bilaterally-authorized U.S. - Venezuela routes (Docket OST-98-3770), and a Part 212 Statement of Authorization for an Aeropostal/Delta code-share was applied for. Subsequent to those initial filings, other exemption applications were filed by Aeropostal for additional bilaterally-authorized U.S. - Venezuela scheduled routes (New York and Miami; Docket OST-98-3770). Although Avensa was clearly aware of the fact of these filings, Avensa did not object. All of Aeropostal’s applications were duly approved.

A specific condition included in all of Aeropostal’s DOT exemptions sets forth the

²⁴ Avensa’s argument that Aeropostal would have no wet-leased aircraft after January 15 was premised on Avensa’s assumption that its strenuous, lone objections to the Transaer wet lease would be successful. Avensa was incorrect.

requirement that in the conduct of its authorized U.S. - Venezuela operations, Aeropostal must use aircraft wet leased from a U.S. or authorized foreign air carrier (i.e., Category I Country) or code-share using the aircraft of the code-share partner.²⁵ In stark contrast, the objector herein Avensa is not required to wet lease aircraft in order to conduct its bilaterally-authorized U.S. operations and has continued to operate its U.S. services with its own fleet of aircraft. It is Aeropostal's understanding that were Avensa to seek additional route authority post-Category II, any award of such new route authority would be conditioned upon wet leasing from authorized (i.e., Category I country) carriers. However, since Avensa already held comprehensive U.S. - Venezuela economic authority prior to the Category II designation, this FAA Category II situation has had comparatively little effect on Avensa's ability to operate to the U.S.²⁶ In fact the only effect on Avensa's operations to the U.S. has been the commencement of Aeropostal's competitive service with modern A-320 aircraft on the flagship Miami route.

It is therefore truly amazing that Avensa is using the highly-controversial FAA Category II determination for Venezuela to exclude Aeropostal's competing U.S. - Venezuela services and is in effect improperly seeking protection from legitimate competition using Category II which, quite unfairly, does not restrict Avensa in the same way as Aeropostal. The timing of Avensa's DOT

²⁵ E.g., Aeropostal Notice of Action Taken, June 24, 1998 (Miami and New York routes); Aeropostal Notice of Action Taken, May 15, 1998 (Delta Code-Share and various U.S. - Venezuela routes). Aeropostal currently conducts its authorized U.S. - Venezuela operations pursuant to the Delta code-share, and has conducted its Miami - Venezuela services pursuant to wet leases with the U.S. carrier Transmeridian and the foreign air carrier Transaer.

²⁶ Whereas the FAA's Category II finding for Venezuela had the effect of "freezing" Avensa's FAA Part 129 Ops Specs, Avensa appears to have sufficient aircraft on those Ops Specs to maintain its U.S. - Venezuela services using that fleet of aircraft.

objections herein are clearly connected with the filing of the American/Aeropostal code-share which Avensa does not want to see implemented.

(ii) The FAA Policy Does not Extend to Venezuelan Domestic Flights

Whereas Avensa correctly states that as a post-Category II entrant Aeropostal is prohibited by FAA policy from operating its own aircraft to the U.S., Avensa is totally incorrect when it states that "...Aeropostal may not place a U.S. carrier's designator code on intra-Venezuela flights operated by Aeropostal with its own aircraft." Avensa Answer, p. 2. This has never been the position of the Department or even the FAA.²⁷

The Department's licensing policy as concerns carriers of Category II countries is clear:

Foreign air carriers from Category II countries are permitted to exercise authority in their OST licenses now being operated [Avensa's situation]... However, no authority to conduct new services, or expanded operations, will be issued for such carriers...unless operated using aircraft wet leased from a duly authorized and properly supervised U.S. or foreign air carrier...

Clarification Concerning Examination of Foreign Air Carrier Request for Expanded Economic Authority, Acting Assistant Secretary for Aviation and International Affairs, Department of Transportation, October 23, 1995.²⁸

²⁷ It is telling that Avensa felt compelled to specifically serve a copy of its Answer on the FAA's Director of Flight Operations.

²⁸ 60 F.R. 210, 55408.

This policy does not address code-shares behind the gateway and does not require that, in a code-share situation, the Category II country carrier must simply abandon use of its own domestic fleet and wet lease in U.S. or other flag aircraft to operate its domestic system. Clearly, adding American's code to Aeropostal's domestic flights is not "new services, or expanded operations" as intended by the Department as part of its implementation of the FAA's policy.

Indeed, were the Department to adopt the position advocated by Avensa, the U.S. would be engaging in an improper extra-territorial application of its aviation policies into Venezuela's domestic airline industry. The position Avensa is urging the Department and the FAA to adopt is a perfect "Catch-22", for Avensa. Assuming, arguendo, its position is correct, in order to comply with the Department's stated policy, Aeropostal's domestic (i.e., intra-Venezuela) service would have to be operated using aircraft wet leased from a U.S. carrier, and, according to Avensa, no other Venezuelan carrier could operate this domestic service for Aeropostal. However, as the Department can appreciate, no U.S. or foreign (i.e. non-Venezuelan) carrier would be permitted to perform these "cabotage" intra-Venezuela operations either. Just as the U.S. does not permit such cabotage operations²⁹ by foreign carriers within the U.S., Venezuela, like the rest of South America, takes a restrictive view as well. To pursue such a "Catch-22" policy at the same time the U.S. is seeking "Open Skies" would indeed be truly bizarre and unrealistic.

Further, the fact that U.S. carriers wet leasing to affected foreign carriers have already

²⁹ The only cabotage operations the Department and the FAA have permitted are the AN-124 outsized cargo operations conducted by the Russian/U.K. hybrid carriers due to special policy reasons.

been the substantial beneficiaries of the FAA's Category II designations of many countries with substantial aviation industries is well known. This is business those U.S. carriers would otherwise not have received. However, for a Venezuelan carrier comparatively unaffected by Category II to adopt the position that U.S. (or other) carriers should now operate the domestic system of a competing carrier of the affected country is truly amazing, particularly when Avensa knows full well this would not be permitted. The DOT/FAA Category II policy is clearly being misused by an unaffected foreign carrier in a way never intended by the Department.

This veritable leap sought by Avensa from the existing stated policy is simply an effort by Avensa to avoid competing with an American/Aerpostal code-share, a prospect Avensa obviously does not relish, and interference in the code-share arrangement should not be permitted. Avensa's interpretation of FAA Category II policy should be rejected. Failure to address this issue by the Department will obviously have enormous ramifications not only with Venezuela, but with all of South America.

(iii) Aerpostal's Aircraft

In answer to Avensa's allegedly unanswered questions, Aerpostal intends to continue to operate its substantial domestic route system using its own fleet of DC-9 and A-310 aircraft and has no plans to wet lease in aircraft from a U.S. or other carrier to operate this domestic service if this were even theoretically possible. As regards Avensa's detailed questioning of who is going to operate Aerpostal's U.S. flights after January 15 and April 26, 1999, Avensa should not be so

concerned with Aeropostal's fleet needs. Aeropostal intends to use the wet lease services of Transaer through April 26, 1999 when Transaer's aircraft return to Europe.

In the event Venezuela is not reinstated by FAA to Category I in April 1999, Aeropostal will be using the A-320 wet lease services of the U.S. carrier Transmeridian.

CONCLUSION

In view of the foregoing, Aeropostal respectfully urges the Department to approve its code-share with American consistent with the U.S. - Venezuela Air Transport Agreement, principles of comity and reciprocity and well-established principles of international aviation policy.

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Sincerely,

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