

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of :
CONTINENTAL AIRLINES, INC. :
and : Docket OST-00-8577
COMPAÑÍA PANAMEÑA DE AVIACIÓN, S.A. :
under 49 U.S.C. §§ 41308 and 41309 for approval :
of, and antitrust immunity for, an alliance agreement :

JOINT MOTION OF
CONTINENTAL AIRLINES, INC. AND
COMPAÑÍA PANAMEÑA DE AVIACIÓN, S.A.
FOR CONFIDENTIAL TREATMENT

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February 9, 2001

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Pursuant to Rule 12 of the Department's Rules of Practice, Continental¹ and COPA move the Department to withhold from public disclosure confidential information contained in the complete copy of the Continental/COPA Alliance Agreement submitted under seal with this motion.² This document is submitted to

¹ Common names are used for airlines.

² Continental and COPA seek confidential treatment only for portions of the complete copy of the Continental/COPA Alliance Agreement that disclose information not included in the redacted copy of the Alliance Agreement submitted to the Department and made public on June 12, 1998. (See Joint Application of Continental and COPA for Statements of Authorization to Engage in Reciprocal Code-Share Operations, Undocketed, June 12, 1998) Redactions in that document were portions of Article B (3), Article C and Article D. The complete Continental/COPA Alliance Agreement includes previously redacted material, except for the Code-Share Commission percentage (see Article B 3 (a)) and Frequent Flyer Program settlement charges (see Article C 1 (c)), which are not relevant and thus are not required by the Department. (See, e.g., Orders 95-11-5 and 97-5-4 and the Department's Notice dated February 12, 1998, in Docket OST-97-3285)

February 9, 2001

the Department to satisfy the requirements of Order 2001-2-5 and support the joint application of Continental and COPA for approval of, and antitrust immunity for, their alliance agreement.³ In accordance with Rule 12 of the Department's Rules of Practice, Continental and COPA are submitting copies of this document to the Department separately in a sealed envelope bearing the above-referenced caption and marked "Confidential Treatment Requested Under § 302.12." The scope of this request for confidential treatment is limited to information in this document that did not appear in the redacted copy of the Continental/COPA Alliance Agreement submitted to the Department and made public on June 12, 1998.

Continental and COPA state as follows in support of their motion:

1. Continental and COPA are seeking confidential treatment under Rule 12 for the confidential information in the complete copy of the Continental/COPA Alliance Agreement because the information is commercially sensitive and confidential. The Freedom of Information Act ("FOIA") Exemption 4 protects from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (5 U.S.C. § 552(b)(4)) Courts have interpreted this FOIA statutory exemption to prevent public disclosure of

³ Notwithstanding this request for confidential treatment, Continental and COPA understand the Department has granted interim access to counsel and outside experts for interested parties who have submitted appropriate affidavits with the Department in advance (Order 2001-2-5 at 2), and Continental and COPA have no objection to such access.

information that is not usually released to the public and which, if released, would cause substantial harm to the competitive position of the person from whom the information was obtained. (See, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980); American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 871 (2d Cir. 1978); and National Parks & Conservation Association v. Kleppe, 547 F.2d 673, 684 (D.C. Cir 1976)) The Department has consistently followed this interpretation of FOIA Exemption 4. (See, e.g., Orders 2000-5-18 and 99-9-9) The purpose of this statutory exemption "is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens' ability to confide in their government." (Burke Energy Corp. v. Department of Energy, 583 F.Supp. 507, 510 (D. Kansas 1984))

2. To qualify for this exemption, information must be: (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. (See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983)) The confidential document submitted by Continental and COPA with this motion satisfy this three-part test.

First, the information is commercial or financial in nature. The document discloses commercial and financial information in connection with the Continental/COPA alliance that is confidential and was not disclosed in the redacted copy of the Continental/COPA Alliance Agreement previously made public. Moreover, this confidential information is proprietary, commercially sensitive and of

a commercial and financial nature and would not otherwise be made public.

Continental and COPA are providing this confidential information in the complete copy of the Continental/COPA Alliance Agreement to the Department only to satisfy the requirements of Order 2001-2-5 and enable the Department fully and expeditiously to evaluate the Continental/COPA request for antitrust immunity for their alliance agreement.

Second, the information submitted under seal has been "obtained from a person" within the meaning of Exemption 4. Continental and COPA are each a "person" as defined by 5 U.S.C. § 551(2).

Third, the information is "confidential." This confidential information is not generally available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the court held that information is "confidential" for purposes of Exemption 4 if it would not customarily be released to the public by the person from whom it was obtained and if disclosure is likely to have either of the following results: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

(498 F.2d at 770) The Department has found in similar antitrust-immunity cases that the confidential information submitted to the Department should be accorded confidential treatment. (See, e.g., Orders 2000-5-18 and 99-9-9) In doing so, the Department has said that granting confidential treatment to information contained

in documents such as the one being submitted by Continental and COPA is justified since they are "private documents which would not otherwise be made available to the public." (See, e.g., Order 89-11-8 at 9, made final by Order 89-11-26 at 1)

Moreover, public disclosure of the confidential information covered by this motion would cause substantial harm to the competitive position of Continental and COPA and could impair the Department's ability to obtain similar information on a voluntary basis from other persons in the future.

WHEREFORE, Continental and COPA ask the Department to grant their joint motion for confidential treatment of the information in the complete copy of the Continental/COPA Alliance Agreement submitted with this motion that was not disclosed to the public in the redacted copy of the Continental/COPA Alliance Agreement.

Respectfully submitted,

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INDEX OF CONFIDENTIAL DOCUMENT

Continental/COPA Alliance Agreement dated May 22, 1998
29 pages (complete)

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document on all persons served with the joint application of Continental and COPA in accordance with the Department's Rules of Practice.

/s/ Thomas Newton Bolling

Thomas Newton Bolling

February 9, 2001

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