BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **UNITED AIR LINES, INC.,** **BRITISH MIDLAND AIRWAYS LIMITED,** **AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG,** **LAUDA AIR LUFTFAHRT AG,** **DEUTSCHE LUFTHANSA AG,** **and** **SCANDINAVIAN AIRLINES SYSTEM** under 49 U.S.C. §§ 41308 and 41309 for approval and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement	)	**Docket OST-01-10575**

MOTION OF DEUTSCHE LUFTHANSA AG
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12

Communications with respect to this document should be sent to:

NICOLAI VON RUCKTESCHELL
Senior Vice President and General Counsel
ULRICH SCHULTE-STRATHAUS
Senior Vice President
Head of International Relations and
Environmental Affairs
DEUTSCHE LUFTHANSA AG
Flughafen-Bereich West
D-60546 Frankfurt/Main
Germany

SHEILA C. CHESTON
DAVID HEFFERNAN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6081 (phone)
(202) 663-6363 (fax)
scheston@wilmer.com (e-mail)

Counsel for
DEUTSCHE LUFTHANSA AG
(Lufthansa German Airlines)

DATED: October 18, 2001

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **UNITED AIR LINES, INC.,** **BRITISH MIDLAND AIRWAYS LIMITED,** **AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG,** **LAUDA AIR LUFTFAHRT AG,** **DEUTSCHE LUFTHANSA AG,** **and** **SCANDINAVIAN AIRLINES SYSTEM** under 49 U.S.C. §§ 41308 and 41309 for approval and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement	)	**Docket OST-01-10575**

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Deutsche Lufthansa AG ("Lufthansa"), pursuant to Rule 12 of the Department's Rules of Practice (14 C.F.R. § 302.12), requests that the Department withhold from public disclosure documents that Lufthansa is filing herewith under seal in the above-captioned proceeding. These documents contain confidential, proprietary and commercially sensitive information. Lufthansa is submitting these documents to facilitate the Department's processing of the joint application of Lufthansa, United Air Lines, Inc., British Midland Airways Limited, doing business as bmi British Midland, Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, and Scandinavian Airlines System, and their respective affiliates, for approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement. In support of this request, Lufthansa submits the following:

I. LUFTHANSA'S CONFIDENTIAL DOCUMENTS ARE PROTECTED FROM PUBLIC DISCLOSURE BY THE FREEDOM OF INFORMATION ACT.

Lufthansa is voluntarily submitting documents in this proceeding to facilitate the Department's expeditious processing of the Joint Application. (An index of Lufthansa's confidential documents is attached hereto.) These documents, produced by Lufthansa in consultation with attorneys from the undersigned law firm, are confidential and proprietary.

These documents are protected from public disclosure under various exemptions to the Freedom of Information Act ("FOIA"), including 5 U.S.C. §§ 552(b)(3) and (b)(4). Exemption 3 protects from disclosure information specifically protected by another federal statute, including 49 U.S.C. § 40115. See British Airports Authority v. CAB, 531 F. Supp. 408, 414 (D.D.C. 1982). Section 40115 states that the Department "shall" withhold from public disclosure, among other things, information that would adversely affect an air carrier's competitive position in foreign air transportation. The materials at issue here clearly satisfy this standard. They contain extremely sensitive information, including Lufthansa views on its competitive and strategic positions. These materials have not been made publicly available. This information could be used by Lufthansa's competitors to their strategic advantage, and Lufthansa's disadvantage, in making competitive decisions.[1]

Exemption 4 protects from public disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or

[1] The Department has found that Exemption 3 also applies to information protected by 49 U.S.C. § 46311. See Order 2001-10-2, at 2-3. That statutory provision prohibits the release of information acquired by the Department "when inspecting the records of an air carrier" or information that "is withheld from disclosure under section 40115." 49 U.S.C. § 46311(a).

confidential." Gulf & Western Indus., Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1980) (citations omitted). All the documents at issue here clearly satisfy this standard. All are commercial or financial in nature; they were obtained from a private citizen; and are privileged or confidential. Lufthansa would suffer substantial competitive harm if the documents were publicly disclosed. See Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (defining the standard for whether a document is privileged or confidential). Public disclosure of such information could "'impair the Government's ability to obtain necessary information in the future or . . . cause substantial harm to the competitive position of the person from whom the information was obtained.'" National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 677-78 (D.C. Cir. 1976) (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765-70 (D.C. Cir. 1974)); Burke Energy Corp. v. DOE, 583 F. Supp. 507, 510-11 (D. Kansas 1984).

II. ACCESS TO LUFTHANSA'S CONFIDENTIAL AND PROPRIETARY DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS.

Due to the nature of the documents Lufthansa has filed, Rule 12 access should be limited to counsel and outside experts who file an affidavit stating that they will: (1) use the information only for the purpose of participating in this proceeding; and (2) not disclose the information to anyone other than counsel or outside experts who have filed a valid affidavit with the Department.

The documents Lufthansa has filed under Rule 12 contain highly sensitive commercial information relating to international strategy, performance and planning. In

order to protect Lufthansa's ability to compete effectively in international markets, it is imperative that this information not be disseminated to Lufthansa's competitors, even under Rule 12 procedures. In recent years, the Department has routinely limited Rule 12 access to such data filed in the course of antitrust proceedings to counsel and outside experts.[2] The Department also has adopted such procedures with respect to the pending American Airlines/British Airways and Delta Air Lines/Air France/Alitalia/Czech Airlines applications for antitrust immunity. See Notice dated August 16, 2001 (Dockets OST-01-10387, 01-10388); Notice dated August 21, 2001 (Docket OST-01-10429). By limiting access in this manner, the Department can permit parties to fully participate in this proceeding while limiting the risk of competitive harm that would result if the information were disseminated to Lufthansa's competitors.

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[2] See, e.g., Joint Application of United/Austrian/Lauda/Lufthansa/SAS (Docket OST-00-7828), Notice Granting Access to Confidential Documents (September 15, 2000); Joint Application of American Airlines, Inc. and the TACA Group (Docket OST-00-7088), Notice Granting Access to Confidential Documents (April 7, 2000); Joint Application of Alitalia-Linee Aeree Italiane-S.p.A., KLM Royal Dutch Airlines and Northwest Airlines, Inc. (Docket OST-1999-5674), *Scheduling Notice and Initial Determination on Motion for Confidential Treatment Under* 14 C.F.R. 302.39 (July 19, 1999); and Joint Application of United Air Lines, Inc. and Air Canada (Docket OST-96-1434), Notice Granting Access to Documents (July 11, 1997).

WHEREFORE, for the foregoing reasons, the Department should grant Lufthansa's motion to withhold from public disclosure the confidential, proprietary and commercially sensitive information that Lufthansa has filed under seal; limit Rule 12 access to counsel and outside experts as described above; and grant such other and further relief as the Department deems necessary.

Respectfully submitted,

SHEILA C. CHESTON
DAVID HEFFERNAN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6081 (phone)
(202) 663-6363 (fax)
scheston@wilmer.com (e-mail)

Counsel for
DEUTSCHE LUFTHANSA AG
(Lufthansa German Airlines)

Dated: October 18, 2001

Deutsche Lufthansa AG
Index to Confidential Documents

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LH 000138 - 000139	10/17/00	Scand-USA	2

Additional Documents:

Exhibit C to Joint Applicants' letter dated October 18, 2001 (Lufthansa's O&D traffic data)

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of Deutsche Lufthansa AG on all persons named on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.

Kathleen A. Knowlton

Kathleen A. Knowlton

DATED: October 18, 2001

Megan Rae Rosia
Managing Director, Government Affairs
& Associate General Counsel
Northwest Airlines, Inc.
901 15th Street, N.W., Suite 310
Washington, D.C. 20005

USTranscom/TCJ5-AA
Attention: Air Mobility Analysis
508 Scott Drive
Scott AFB, IL 62225-5357

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20036

Roger W. Fones
Chief, Transportation, Energy &
Agriculture Section, Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W.
Suite 500
Washington, D.C. 20530

First Secretary (Transport)
British Embassy
3100 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Joanne Young
For America West Airlines
Baker & Hostetler
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

Nicholas Sabatini
Director of Flight Standards
Federal Aviation Administration
800 Independence Avenue, S.W.
AFS-1, Room 821
Washington, D.C. 20591

Brian Hunt
General Counsel
American Trans Air
P.O. Box 51609
Indianapolis, IN 46251-0609

John L. Richardson
For Amerijet
Crispin & Brenner, PLLC
1156 Fifteenth Street, N.W.
Suite 1105
Washington, D.C. 20005

Marshall S. Sinick
For Florida West International
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20004

Robert D. Papkin
Squire, Sanders & Dempsey, LLP
1201 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20004

Robert E. Cohn
For Delta
Alexander Van der Bellen
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

John Byerly
Office of Aviation Negotiations
Department of State
2201 C Street, N.W.
Suite 5830
Washington, D.C. 20520

Lorraine B. Halloway
For Emery Worldwide
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Nathaniel P. Breed, Jr.
For Federal Express
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

Jeffrey N. Shane
Hogan & Hartson, LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Michael F. Goldman
Silverberg, Goldman & Bikoff, LLP
1101 Thirtieth Street, N.W.
Suite 120
Washington, D.C. 20007

David Vaughan
For UPS
Kelley, Drye & Warren
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

Donald T. Bliss
For USAirways
O'Melveny & Myers
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

R. Bruce Keiner
For Continental
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004

Stephen H. Lachter
For DHL
Law Offices of Stephen H. Lachter
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

Richard Taylor
For Evergreen International Airlines
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Julie Sorenson Sande
Manager, Contract and Regulatory Affairs
World Airways, Inc.
HLH Building
101 World Drive
Peachtree City, GA 30629

Alfred J. Eichenlaub
Senior Vice President and General Counsel
Polar Air Cargo, Inc.
100 Oceangate, 15th Floor
Long Beach, CA 90802

J. E. Murdock III
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

Charles J. Simpson
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Washington, D.C. 20006

Edgar N. James
Marie Chopra
James & Hoffman, P.C.
1101 Seventeenth Street, N.W.
Suite 510
Washington, D.C. 20036

Daryl A. Libow
Sullivan & Cromwell
1701 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006

Don H. Hainbach
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Russ Pommer
Atlas Air, Inc.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

Vicki L. Hassman
For Air Transport International
BAX Global Inc.
16808 Armstrong Avenue
P.O. Box 19571
Irvine, CA 92623-9571

Anita Mosner
Eclat Consulting
Suite 602
1555 Wilson Boulevard
Arlington, VA 22209

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