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**

JOINT MOTION OF AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG AND LAUDA AIR LUFTFAHRT AG
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12

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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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Austrian Airlines, Österreichische Luftverkehrs AG, and Lauda Air Luftfahrt AG (collectively, the "Austrian Group"), pursuant to Rule 12 of the Department's Rules of Practice (14 C.F.R. § 302.12), request that the Department withhold from public disclosure documents that the Austrian Group is filing herewith under seal in the above-captioned proceeding. These documents contain confidential, proprietary and commercially sensitive information. The Austrian Group is submitting these documents to facilitate the Department's processing of the joint application of the Austrian Group, United Air Lines, Inc., British Midland Airways Limited, doing business as bmi British Midland, Deutsche Lufthansa 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, the Austrian Group submits the following:

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

To facilitate expeditious processing of the Joint Application, the Austrian Group is voluntarily submitting documents similar to those submitted to the Department in conjunction with other recent applications for antitrust immunity. (An index of the Austrian Group's confidential documents is attached hereto.) These documents, produced by the Austrian Group 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 the Austrian Group's views on its competitive positions and its strategic intentions. These materials have not been made publicly available. This information could be used by the

Austrian Group's competitors to their strategic advantage, and the Austrian Group'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 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. The Austrian Group 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).

[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).

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

Due to the nature of the documents the Austrian Group 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.

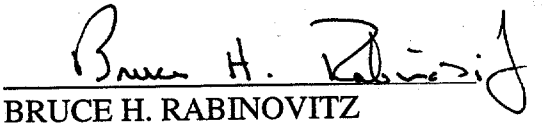
The documents the Austrian Group has filed under Rule 12 contain highly sensitive commercial information relating to international strategy, performance and planning. In order to protect the Austrian Group's ability to compete effectively in international markets, it is imperative that this information not be disseminated to the Austrian Group'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

[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).

proceeding while limiting the risk of competitive harm that would result if the information were disseminated to the Austrian Group's competitors.

WHEREFORE, for the foregoing reasons, the Department should grant the Austrian Group's motion to withhold from public disclosure the confidential, proprietary and commercially sensitive information that the Austrian Group 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,



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Dated: October 18, 2001

Index of Austrian Group Confidential Documents

Bates Range	Date	Title/Description	Responsive to Document Production Number
OS 000001 - 000016	Undated	Austrian Group Overview Presentation and Opportunities for Joint Success	2
OS 000017 - 000019	09/10/1999	Request of Austrian Group for Support and Commitment from United	2
OS 000020	09/13/1999	Table of Transatlantic Operations per week	2
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OS 000035 - 000041	01/31/2000	Cooperation UA/OS Common Benefits	2
OS 000042 - 000046	Undated	Delta vs. United Evaluation	2
OS 000047 - 000060	09/08/1999	United/Austrian Agenda	2
OS 000061 - 000065	Undated	North Atlantic Strategy Austrian Airlines Group	2

Additional Documents:

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

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Joint Motion of Austrian Airlines, Österreichische Luftverkehrs AG and Lauda Air Luftfahrt AG on all persons named on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.

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DATED: October 18, 2001

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