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

DEPT. OF TRANSPORTATION

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**Joint Application of**

**SCANDANAVIAN AIRLINES SYSTEM**

**and**

**ICELANDAIR (FLUGLEIDIR HF.)**

**under 49 U.S.C. §§ 41308 and 41309 for  
approval of and antitrust immunity  
for Cooperation Agreement**

**Docket No. OST-00- 7248-3**

**MOTION OF ICELANDAIR FOR CONFIDENTIAL TREATMENT**

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April 21, 2000

**BEFORE THE  
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Flugleidir Hf. (“Icelandair”) hereby moves that the Department withhold certain proprietary and commercially sensitive confidential information from public disclosure. Icelandair is submitting such information to the Department in connection with its joint application with Scandinavian Airlines System (“SAS”) for approval of and antitrust immunity for a Cooperation Agreement between Icelandair and SAS. This information consists of documents separately submitted concurrently herewith under seal and marked with a request for confidential treatment pursuant to Rule 12 of the Department’s Rules of Practice for aviation economic proceedings (14 C.F.R. § 302.12). Pursuant to Rule 12,

an index of these documents is attached hereto as Exhibit A. Icelandair requests that these documents be withheld from public disclosure for a period of at least ten (10) years.

In support of this motion, Icelandair states as follows:

**I. ICELANDAIR'S CONFIDENTIAL DOCUMENTS ARE PROTECTED FROM PUBLIC DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT**

The confidential documents submitted concurrently herewith are protected from public disclosure under various exemptions in the Freedom of Information Act ("FOIA") including 5 U.S.C. § 552(b)(4) (FOIA exemption (4)). The purpose of these exemptions "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. Dep't of Energy*, 583 F. Supp. 507, 510 (D. Kan. 1984). In previous applications for alliance approval and antitrust immunity, the Department has restricted access to such documents to counsel and outside experts for interested parties under procedures designed to protect the confidentiality of the information involved. See, e.g., Scheduling Notice and Initial Determination on Motion for Confidential Treatment, July 19, 1999 (Joint Application of Alitalia, KLM and Northwest); Notice, Jan. 9, 1998 (Joint Application of American and Lan Chile); Order 97-3-42, Mar. 28, 1997 (Joint Application of American and British Airways); Order 96-3-26, Mar. 13, 1996 (Joint Application of United and Lufthansa); Order 94-5-42, May 28, 1994 (Joint Application of Delta and Virgin Atlantic); Order 93-12-32, Dec. 22, 1993 (Joint Application of Lufthansa and United).

FOIA exemption (4) protects from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” This exemption has been construed to prevent public disclosure of information that is not the type usually released to the public, and that if released would cause substantial harm to the competitive position of the person from whom the information was obtained. *See, e.g., Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1980); *Am. Airlines, Inc. v. Nat’l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976). For information to qualify under exemption (4), it must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

All the documents submitted concurrently herewith under seal by Icelandair satisfy this three-part test.\* First, the confidential information is commercial and financial in nature, and it relates to the commercially sensitive and proprietary decisionmaking of Icelandair. It is being submitted to the Department so that the Department may expeditiously evaluate the public interest benefits that will result from granting approval of and antitrust immunity to the Cooperation Agreement between Icelandair and SAS, and it would otherwise not be made public. Second, the information has been “obtained from a person” within the meaning of exemption (4). Third, the information is “confidential.” This confidential information is not available to the public,

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\* Icelandair is submitting all relevant documents it is not otherwise under legal obligation not to disclose to a third party.

and its public disclosure is not required to further the public interest or to promote competition.

In *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (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 "(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." Icelandair submits that public disclosure of the type of confidential information in the documents it is submitting under seal would cause substantial harm to its competitive position, and could impair the Government's ability to obtain similar information on a voluntary basis in the future.

**II. ACCESS TO THESE CONFIDENTIAL AND COMMERCIALY SENSITIVE DOCUMENTS SHOULD BE RESTRICTED TO COUNSEL AND OUTSIDE EXPERTS**

Icelandair is submitting highly sensitive internal corporate documents, studies, surveys, analyses, reports, and data that should be accorded limited access. Such access should be granted only to counsel and outside experts who file Rule 12 affidavits stating that the affiant will (1) use the information only for the purpose of participating in this proceeding, and (2) not disclose such information to anyone other than counsel or outside experts who have filed a valid affidavit. In order to minimize the risk of harmful disclosure of this competitively sensitive information, access should be strictly limited, as requested. Icelandair is separately filing, concurrently with this motion, three copies of the documents in question in sealed envelopes labeled "Confidential Treatment

Requested Under § 302.12. Access is limited to counsel or outside experts who have filed valid affidavits.”

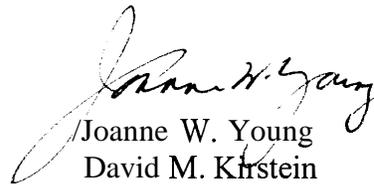
The subject materials contain highly sensitive commercial information relating to internal planning and strategic decision-making by Icelandair. The information contained in these documents has not been publicly released. If released, competitors would gain valuable in-sights into Icelandair’s internal strategies and objectives with respect to the most competitively sensitive matters relating to their individual business plans and strategies, and to their planned implementation of their proposed Cooperation Agreement.

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and policy. Thus, in Order 93-12-32, *see supra*, the Department granted Lufthansa and United’s request to limit access to certain confidential information to counsel and outside experts who filed appropriate affidavits. Commenters American and Delta had argued that in-house experts should not be excluded from the confidential materials submitted by Lufthansa and United. In deciding not to so expand access to the materials, the Department balanced the disclosure of the confidential information against the competitive harm to the applicants that would result if access were expanded, and concluded that “the undue competitive harm to the applicants outweighs the commenters’ need for expanded access to the highly sensitive material in this case . . . .” Order 93-12-32 at 5. The Department also noted that interested parties to such proceedings “can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials . . . .” *See id.* *See also* Order 96-1-6, Jan. 11, 1996 at 3 (Joint Application of American and Canadian

International). Access to Icelandair's corporate planning and financial documents should be limited in a comparable manner, in light of the undue competitive harm to Icelandair that would result from a broader disclosure of such highly sensitive information.

WHEREFORE, Icelandair respectfully requests the Department grant its motion to withhold certain proprietary and commercially sensitive, confidential documents from public disclosure, as requested herein.

Respectfully submitted,



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April 21, 2000

Listing of Confidential Information in Icelandair and SAS Antitrust Immunity Joint Filing

**INDEX A**

| <u>Title</u>                         | <u>Description</u>     | <u>Number of Pages</u> |
|--------------------------------------|------------------------|------------------------|
| Marketing Plan 2000                  | Marketing Presentation | 215                    |
| Marketing and Sales Plan 2000 Sweden | Marketing Presentation | 16                     |
| Gallup Iceland                       | Market Research        | 22                     |
| Marketing Plan 2000 Norway           | Marketing Presentation | 35                     |
| In-Flight Survey November 1999       | Marketing Presentation | 8                      |
| 3rd Minnesota Awareness Report       | Report                 | 20                     |
| O&D Data                             | Research Data          | 5                      |
| Perceptions of Airlines              | Market Research        | 3                      |
| Western Region Marketing Plan 1999   | Marketing Presentation | 96                     |
| Internet Marketing                   | Marketing Presentation | 50                     |

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of April, 2000, I caused a true and correct copy of the foregoing Motion of Icelandair for Confidential Treatment to be served by first-class U.S. mail, postage prepaid, upon the parties listed on the following Service List.

  
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