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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
LETTERS

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UNITED AIR LINES, INC.,)
BRITISH MIDLAND AIRWAYS LIMITED,)
AUSTRIAN AIRLINES, ÖSTERREICHISCHE)
LUFTVERKEHRS AG,)
LAUDA AIR LUFTFAHRT AG,)
DEUTSCHE LUFTHANSA, A.G.,)
and)
SCANDINAVIAN AIRLINES SYSTEM)

Docket OST-01-10575 - 8

under 49 U.S.C. §§ 41308 and 41309 for approval of and)
antitrust immunity for an Alliance Expansion Agreement)
and an Amended Coordination Agreement)
_____)

**MOTION OF SCANDINAVIAN AIRLINES SYSTEM FOR
CONFIDENTIAL TREATMENT OF DOCUMENTS UNDER 14 C.F.R. 302.12**

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DATED: October 19, 2001

interested parties who have filed an affidavit as described in 14 C.F.R. § 302.12(d)(3). The documents for which such confidential treatment is sought are specifically identified in the "Index of SAS Confidential Documents" attached hereto as Exhibit A. The documents are submitted in response to the Department's request as specifically identified in Exhibit B hereto.

I. SAS' CONFIDENTIAL DOCUMENTS SHOULD BE PROTECTED FROM PUBLIC DISCLOSURE

Pursuant to 14 C.F.R. § 302.12, participants in any proceeding before the Department may request that information submitted to the Department not be disclosed to the public if that information falls within one of the exemptions from disclosure in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9)("FOIA"). SAS submits that the information for which it seeks confidential treatment falls within exemptions 3 and 4 of FOIA.

FOIA exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Exemption 4 has been held to include "information that is not the type usually released to the public and is of the type that, if released to the public, would cause substantial harm to the competitive position of the person from whom the information was obtained." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C.Cir. 1980)("Gulf & Western"); see also American Airlines, Inc. v. NMB, 588 F.2d 863, 871 (2nd Cir. 1978); National Parks & Conservation Ass'n. v. Kleppe, 547 F.2d 673, 684 (D.C.Cir. 1976); Joint Application of Delta and Virgin Atlantic, Order 94-5-42 (May 28, 1994); Joint Application of United and Lufthansa, Order 93-12-32 (December 18, 1993); Joint Application of Northwest and KLM, Order 93-1-11 (January 8, 1993). Exemption 4 is designed 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. Sterling Drug, Inc. v. Federal Trade Commission, 450 F.2d 698, 709 (D.C.Cir. 1971); Burke Energy Corp. v. Dept. of Energy, 583 F.Supp. 507, 510 (D.Kan. 1984).

In order to fall within exemption 4, the information at issue must be: (1) commercial or financial in nature; (2) obtained from a person outside the government; and (3) privileged or confidential. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C.Cir. 1983); Gulf & Western, *supra*, 615 F.2d at 529. The information for which confidential treatment is sought in this case clearly meets this three-part test.

With respect to the first prong of the test, the documents for which SAS seeks confidential treatment are commercial and/or financial in nature. The documents in question consist of commercially sensitive, privileged marketing and corporate information reflecting the internal decision-making processes of SAS. This type of information is highly proprietary and confidential, and would not normally be made available to the public. However, this information is being submitted so that the Department can expeditiously evaluate the public benefit that will result from a grant of approval of and antitrust immunity for the proposed alliance expansion agreement and amended coordination agreement.

With respect to the second prong of the confidentiality test, it is axiomatic that the information at issue has been "obtained from a person outside the government" (it is being provided by a private, foreign entity, SAS).

Finally, with respect to the third element of the test (the "confidential" nature of the information), the D.C. Circuit has held that a commercial or financial matter 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 of the information is likely to have either of the following effects: (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. National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C.Cir. 1974). SAS submits that the information for which confidential treatment is sought herein clearly meets the definition of "confidential."

As noted above, the information contained in the documents listed in the "Index of SAS Confidential Documents" is information that is not normally disclosed to the public, and disclosure of this information would cause substantial harm to the competitive position of SAS. Indeed, if the documents listed in the Index were released, competitors would gain valuable insights into the internal strategies, objectives and business plans of SAS, including the strategies, objectives and plans related to the proposed alliance expansion agreement and amended coordination agreement. Moreover, disclosure of this information might well impair the Government's ability to obtain similar necessary information in the future. Accordingly, the documents that SAS seeks to have the Department withhold from disclosure clearly meet the definition of "confidential" required for such treatment.

Moreover, in addition to exemption 4, FOIA exemption 3 also strongly supports withholding SAS' confidential commercial documents in this case. Exemption 3 protects from disclosure information that is specifically exempted from disclosure by a statute that either requires such information be withheld from disclosure or that establishes particular criteria for

withholding certain information. See 5 U.S.C. § 552(b)(3). Pursuant to 49 U.S.C. § 40115, the Department "shall" withhold from public disclosure, among other things, information that would "have an adverse effect on the competitive position of an air carrier in foreign air transportation." In the instant proceeding, release of the information for which SAS has requested confidentiality clearly would "have an adverse effect on the competitive position of [SAS] in foreign air transportation." Accordingly, the documents listed in the Index should be withheld pursuant to both exemption 3 and exemption 4.

II. ACCESS TO THE CONFIDENTIAL DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS FOR INTERESTED PARTIES

SAS is submitting highly sensitive internal corporate documents which should be accorded limited access. Such access should be granted only to counsel and outside experts for interested parties who file affidavits pursuant to 14 C.F.R. § 302.12(d)(3) affirming that they will: (1) use the information only for purpose of participating in this proceeding; and (2) not disclose the information to anyone other than counsel or outside experts who have also filed such an affidavit.

The documents in question contain highly sensitive commercial information related to international planning and strategic decision-making by SAS, and none of this information has heretofore been released by SAS to the public. As noted above, if the documents listed in the Index were released, competitors would gain valuable insights into the internal strategies, objectives and business plans of SAS, including the strategies, objectives and plans related to the proposed alliance expansion agreement and amended coordination agreement.

In order to minimize the risk of harmful disclosure of this sensitive information, access should be strictly limited. SAS is separately filing, concurrently with this Motion, six sets of this information, in sealed envelopes labeled "Confidential Treatment Requested Under 14 C.F.R. § 302.12; Access Is Limited To Counsel Or Outside Experts Who Have Filed Proper Confidentiality Affidavits."

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and policy. For instance, in connection with the United/Lufthansa application for antitrust immunity cited above, the Department granted the applicants' request to limit access to certain confidential information to counsel and outside experts for interested parties who had filed appropriate affidavits. See Order 93-12-32, supra. In so limiting access to the information, the Department balanced the policies favoring disclosure of information against the competitive harm to the applicants that would result if access to confidential documents were expanded, and concluded that "the undue competitive harm to the applicants outweighs the commenters' need for expanded access to highly sensitive material . . ." Id. at p. 5. The Department also noted that "interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials." Id.; see also Joint Application of American and Canadian International, Order 96-1-6 (January 11, 1996) at p. 3. Access to SAS' internal documents and data in this proceeding should be similarly restricted in light of the competitive harm to SAS that would result from a broader disclosure of such confidential information.

CONCLUSION

For the foregoing reasons, SAS requests that the documents listed in the attached Index of SAS Confidential Documents be granted confidential treatment and withheld from public disclosure, and that access to such documents be limited to counsel and outside experts for interested parties that have filed proper affidavits as directed by the Department.

Respectfully submitted,



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DATED: October 19, 2001

INDEX OF SAS CONFIDENTIAL DOCUMENTS

<u>Bates Range</u>	<u>Date</u>	<u>Description</u>	<u>Responsive to Document Production Request Item _____</u>
0000001-0000002	2000(est.)	SAS Challenges 2000	2
0000003-0000006	2000(est.)	SAS Versus Continental-Negative	2
0000007-0000008	2000(est.)	SAS Versus Continental-Positive	2
0000009-0000011	2000(est.)	Improvement of SAS vis-a-vis Competition	2
0000014-0000015	October 13, 1999	Meeting w/Icelandair	2
0000032-0000033	September 1999	Reporting to STONI (North America)	2
0000034-0000035	October 1999	Reporting to STONI (North America)	2
0000036-0000037	November 1999	Reporting to STONI (North America)	2
0000038-0000041	Jan-Dec 1999	Reporting to STONI (North America)	2
0000045-0000062	N/A	Sales Platform 2000	2
0000063-0000069	N/A	Business Plan (North America 1999)	2
0000092-0000105	January 2000	SAS Intercontinental Routes	2
0000106-0000109	December 17, 1999	FI-SK Meeting (Minutes of Meeting)	2

<u>Bates Range</u>	<u>Date</u>	<u>Description</u>	<u>Responsive to Document Production Request Item</u>
0000218-0000221	November 8, 1999	MD Report to Board	2
0000225-0000228	October 6, 1999	MD Report to Board	2
0000229-0000231	November 10/11, 1999	MD Report to Board	2
0000232-0000241	November 10/11, 1999	SAS Business Plan 2000-2003	2
0000242-0000243	December 15, 1999	MD Report to Board	2
0000244-0000245	February 7, 2000	MD Report to Board	2
0000250-0000254	March 2000	SAS O&D Top City Pairs (YE 9/30/99)	2
000255-000281	September 2000	London Hub Structure Report	2, 3, 4
000282-000320	August-September, 2000	Star Alliance Hub Investigation	2, 3, 4
000321-000323	August-September, 2000	London Heathrow Airport: Evaluation of different scenarios regarding LHR	3, 4
000339	December 4, 2000	SAS/Icelandair Cooperation Paper	2
000361-000384	April 1, 2001	Partner Brief	2
000388-000389	November 7, 1999	Minutes of Meeting Re: SK/OS Networks and Codeshares	2
000390-000391	October 2001	SAS O&D for Top 100 City-Pairs	Ex. C

DOCUMENT PRODUCTION FOR PROPOSED ALLIANCE AMONG UNITED, LUFTHANSA, SAS, AUSTRIAN AND BRITISH MIDLAND

1. All studies, surveys, analyses and reports (dated or created since August 31, 1999, by United, Austrian, Lufthansa, SAS or British Midland staff for corporate officers) evaluating or analyzing the effects of adding British Midland to the existing immunized alliance among United, Lufthansa, SAS and Austrian, including effects on market shares, competition, competitors, fares, markets, potential for traffic growth or expansion into geographic markets. (If not contained in the document itself, include the date of preparation and the name of the individual who prepared each document.)
2. All studies, analyses and reports (dated or created since August 31, 1999, by United, Austrian, Lufthansa, SAS or British Midland staff for corporate officers) that address the subject of competition between the U.S. and the U.K., or the U.S. and Europe, including travel between the U.S. and Europe via the U.K.
3. All studies, analyses and reports (dated or created since August 31, 1999, by United, Austrian, Lufthansa, SAS or British Midland staff for corporate officers) discussing any service or operational changes anticipated at the Joint Applicants' hub airports resulting from the addition of British Midland to the existing immunized alliance among United, Lufthansa, SAS and Austrian.
4. All studies, analyses or reports (dated or created since August 31, 1999, by United, Austrian, Lufthansa, SAS or British Midland staff for corporate officers) addressing airline access to Gatwick and Heathrow Airports, including the ease or difficulty for any airline of improving or increasing service at these airports, procedures or strategies for obtaining slots or facilities at that airport, and other airlines' attempts to obtain slots or facilities.
5. All studies, analyses or reports (dated or created since August 31, 1999, by United, Austrian, Lufthansa, SAS or British Midland staff for corporate officers) that discuss, consider or analyze the impact of the display of code-share arrangements in computer reservation systems (including the multiple displays of flights under different codes) on travel agency bookings, airline sales, and airline market share.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of Scandinavian Airlines System for Confidential Treatment of Documents under 14 C.F.R. 302.12 upon all persons on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.


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DATED: October 19, 2001

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