IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-1180-JTM
	)	
AMR CORPORATION, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

This antitrust action is before the court on defendants' motion (Doc. 348) to modify the parties' September 14, 1999 stipulated protective order (Doc. 27).[1] The parties conferred and agreed to a modified order with one exception: materials provided by third-parties to the United States pursuant to civil investigative demands (CID).[2] As explained

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1 The motion reflected by docket number 348 is a modification of defendants' original motion, docket number 345.

2 The Antitrust Civil Process Act, 15 U.S.C. §§ 1311, et seq. (the "Act") permits the Attorney General or her designee to issue, before filing suit, a civil investigative demand (CID) requiring persons to produce documents, answer written interrogatories, or give oral testimony relevant to a civil antitrust investigation. 15 U.S.C. § 1312(a). If a person fails to comply with a demand, the Attorney General may compel compliance by filing a petition in federal court. 15 U.S.C. § 1314. Responses to CIDs are deposited with a designated Justice Department employee who serves as custodian. 15 U.S.C. § 1313(a).

in greater detail below, the parties ask the court to select one of two proposed versions of the modified protective order.

Background

On September 14, 1999, the court approved the parties' "Stipulated Protective Order Governing Confidential Information." The order 1) establishes a protocol for designating certain information as "confidential," 2) limits disclosure of this confidential information to certain individuals, and 3) restricts American's use of the confidential information to the present action. Consistent with the agreed protocol, the United States designated third-party responses to CID requests as confidential and, after giving notice and an opportunity to object to third-parties, provided those documents to American.

American is also a defendant in several private class action lawsuits filed in the District of Kansas (consolidated as Case No. 99-1187-JTM and designated "*In re American Airlines Antitrust Litigation*"). Discovery in *In re American Airlines Antitrust Litigation* has been stayed while this action proceeds to trial on May 22, 2001. The stay was conditioned on American providing the private antitrust plaintiffs with "all documents [American] produced to the government or depositions taken in the future." *In re American Airlines Antitrust Litigation*, Case No. 99-1187-JTM, Order at 10 (D. Kan. November 10, 1999).

Consistent with the stay order, American provided private plaintiffs with documents

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it had previously delivered to the government. However, based on this court's September 14 protective order, American withheld those "confidential" documents which the United States had provided to American. After review of American's initial disclosures, the private plaintiffs requested access to the third-party "confidential" documents which had been produced to American by the United States. Judge Bostwick deferred ruling on that request, holding that the parties must first seek modification of the protective order from the court which entered the order. See *In re American Airlines Antitrust Case*, Order filed October 13, 2000 at 2. Following Judge Bostwick's directive at a status conference, the private plaintiffs filed a response brief in this antitrust case asking that the protective order be modified to allow American to produce the CID materials.[3]

Analysis

Having reviewed the two competing versions of the modified protective order, the court concludes that the issue presented is one of protocol rather than substance. The United States agrees that the protective order should be altered but argues that the modified order should prohibit American from producing or using the CID materials in the private antitrust case *without the express consent of a third-party who provided the CID materials.*

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[3] American moved to modify the protective order, but took no position on which of the two modifications the court should adopt. The United States and the private plaintiffs filed responses setting out their respective positions.

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The private plaintiffs propose language which would require American to provide *notice of the protective order to third-parties* who produce CID or other confidential documents. Third-parties who object to disclosure of their CID material would then have *twenty-one days to seek a protective order*. Under this approach, the third-party's failure to request a protective order would be construed as an *implied consent* to disclosure of the CID materials.

The court is persuaded that providing notice and an opportunity to object affords adequate protection to the privacy concerns of those third parties who provided CID materials. This protocol was utilized when the United States delivered the CID materials to American and notably, no third-party ever sought a protective order. Further, this approach is consistent with the policy that the rules of civil procedure be construed and administered to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.[4] Accordingly, the court will enter a modified protective order consistent with the private plaintiffs' proposal.[5]

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[4] If the modification is not granted, the private plaintiffs' alternative is to serve a subpoena duces tecum individually on third parties to secure the information. Such a laborious procedure would be a waste of resources, particularly where none of the third parties sought a protective order when CID materials were produced in this case.

[5] The order proposed by the private plaintiffs is both confusing and inadequate. The court has drafted its own version which will be submitted to counsel for review prior to its filing.

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IT IS THEREFORE ORDERED that American's motion to modify the September 14, 1999 protective order (Doc. 348) is **GRANTED**. The court will enter a separate protective order with modifications consistent with the opinion expressed herein.

Dated at Wichita, Kansas this 5th day of February 2001.

Karen M. Humphreys

KAREN M. HUMPHREYS
UNITED STATES MAGISTRATE JUDGE

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