IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* v. AMR CORPORATION, AMERICAN AIRLINES, INC., and AMR EAGLE HOLDING CORPORATION, *Defendants.*	Civil Action No.: 99-1180-JTM

PLAINTIFF'S COMMENTS REGARDING MODIFICATION OF THE COURT'S SEPTEMBER 14, 1999 STIPULATED PROTECTIVE ORDER GOVERNING CONFIDENTIAL INFORMATION

Plaintiff United States submits this memorandum to clarify its position regarding American's Motion to Modify the Court's September 14, 1999 Stipulated Protective Order Governing Confidential Information ("September 14 Order").[1] American seeks modification of the September 14 Order to allow it to comply with certain discovery orders in *In re*

[1] In its Supplemental Motion, American states that the United States asked American to clarify the position of the United States in this matter. While the United States notified American that American's original Motion to Modify did not accurately represent the position that the United States had previously communicated to American's counsel, the United States did not ask American to file a Supplemental Motion, and has always intended to file its own response to American's Motion to Modify.

American Airlines Antitrust Litigation, Master File No. 99-1187-JTM. Plaintiffs in *In re American Airlines Litigation*, Master File No. 99-1187-JTM ("Class Plaintiffs") have filed a response to American's motion. The only issue as to which the United States, American, and the Class Plaintiffs are not in agreement is the propriety of modifying the September 14 Order to allow the disclosure to Class Plaintiffs of materials received by the United States from persons other than American in response to Civil Investigative Demands ("CIDs") issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§1311, *et seq*. (the "CID statute") -- without the consent of the owners of those documents. The United States recommends that the Court enter an order that protects the interests of the owners of the documents. Such an order would also recognize the public interest in procedural protections of the confidentiality of information obtained by CID.

I. INTRODUCTION

Discovery has been stayed in *In re American Airlines Litigation,* conditioned upon production by American to Class Plaintiffs of certain enumerated documents produced by American to the United States in this action. *In re American Airlines Litigation*, Master File No. 99-1187-JTM (D. Kan. Nov. 10, 1999). Class Plaintiffs have asked American to produce all materials obtained in discovery in the current matter. American concluded that it could not comply with Class Plaintiffs' request without modification of the September 14 Order.

American has submitted three alternative modifications of the September 14 Order, but takes no position as to which alternative the Court should enter. Class Plaintiffs filed a response to American's motion requesting that the Court enter the proposed modification attached as Exhibit E to American's May 25 Memorandum ("the Exhibit E proposal"), which would "permit the further disclosure and use, in *In re American Airlines Litigation*, of all confidential information obtained in discovery in the current matter." Although the United States has indicated its willingness to stipulate to the entry of either of American's two other proposed modifications, the United States objects to the Exhibit E proposal because it would allow American to disclose third-party CID materials produced to American by the United States and designated confidential by their original producers in accordance with the September 14 Order.

The Exhibit E proposal would expand the limited exceptions to the discovery stay in place in *In re American Airlines Antitrust Litigation* through a modification of this Court's September 14 Order. There is no order in *In re American Airlines Antitrust Litigation* that either directs or permits the production of third-party CID materials to Class Plaintiffs; yet Class Plaintiffs and American seek a modification of this Court's September 14 Order that would permit exactly that. In determining whether and how to modify the September 14 Order, the Court should balance the justifications set forth by American and Class Plaintiffs for entry of the requested modification against the United States' interest in preserving the

confidentiality designations applicable to third-party CID materials. *See United Nuclear Corp. v. Cranford Insurance Co.*, 905 F. 2d 1424, 1427 (10th Cir. 1990).

II. ARGUMENT

A. American Can Comply With Discovery Orders Entered in *In re American Airlines Litigation* Without Producing Third-Party CID Materials

American asserts that a modification of the September 14 Order is necessary so that it can comply with orders entered by Judge Marten and Magistrate Judge Bostwick in *In re American Airlines Litigation*. There is, however, no conflict between the September 14 Order and other extant orders; thus, no modification is required. On November 10, 1999, Judge Marten issued an order granting American's request to stay discovery in *In re American Airlines Litigation*. The November 10, 1999 Order ("November 10 Order") made the stay contingent upon "the production to plaintiffs of documentary and deposition evidence previously identified and produced to the government" and commanded American to continue providing Class Plaintiffs with copies of documents "produced to the government or depositions taken in the future, ..." *In re American Airlines Litigation*, Master File No. 99-1187-JTM, at 10 (D. Kan. Nov. 10, 1999). The obligation imposed on American was limited to those documents it produced to the government in the discovery process in this case, and did not include materials produced by the United States to American. On June 16, 2000, Magistrate Judge Bostwick entered a Stipulated Protective Order Governing Confidential Information ("MJB June 16 Order") which makes it clear that American's discovery obligations in the private action extend only to "all documents that it produced to

the United States pursuant to (i) Civil Investigative Demands pursuant to the DOJ investigations, and (ii) formal document requests that were propounded in the DOJ action." *In re American Airlines Litigation*, Master File No. 99-1187-JTM, at 4, ¶5 (D. Kan. June 16, 2000) (emphasis added).

The third-party CID materials were not produced by American to the government; rather, they were produced by the United States to American. Therefore, neither the November 10 Order nor the MJB June 16 Order requires American to produce the third-party CID materials to Class Plaintiffs at this time, and there is no need to modify the terms of the September 14 Order to allow their disclosure.

B. The Continued Protection of Designated Third-Party CID Materials by the September 14 Order Does Not Harm Class Plaintiffs

The United States has no interest in delaying Class Plaintiffs' prosecution of their claims against American or in forcing Class Plaintiffs to unnecessarily engage in repetitive discovery. The United States has therefore indicated its willingness to stipulate to a proposed modification allowing American to produce materials received from third-parties pursuant to post-complaint subpoenas issued by either the United States or American in this case (subject to a notice provision contained in each of the proposed modification orders), as long as the modification precludes the disclosure of third-party CID materials without the express consent of the producers of those materials.[2] The United States believes that such

[2] Class Plaintiffs' claim that the producers of third-party CID materials are "unlikely to consent to their production" has not been tested, since Class Plaintiffs have not yet sought such consent. Moreover, there is no reason to believe that Class Plaintiffs could not obtain some or all

a limited modification strikes the proper balance between Class Plaintiffs' understandable desire to avoid repetitive discovery and the interest of the United States in protecting, indeed its obligation to protect, the confidentiality of CID materials assigned confidentiality designations by third parties pursuant to the September 14 Order.[3]

C. The United States Relied on the Provisions of the Protective Order to Ensure the Continued Protection of Confidential CID Materials When Producing the CID Materials at Issue

As the Court noted in its May 9, 2000, Memorandum and Order, CID materials are deposited with a designated Justice Department employee who serves as custodian of those materials. 15 U.S.C. §1313(a). The CID statute ensures the continued confidentiality of CID materials by restricting the custodian's ability to disclose CID materials to limited circumstances. *See* May 9 Order, at 8. When a Department of Justice attorney is "designated to appear before any court, . . . in any case or proceeding," the attorney may disclose CID material "for official use in connection with any such case . . . as such attorney determines to be required." 15 U.S.C. §1313(d). In enacting the 1976 amendments to the CID statute, Congress explicitly recognized that when the United States brings suit based on

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of the same materials through the subpoena process once the stay on discovery in their case is lifted. The United States will provide Class Plaintiffs with contact information for those third parties potentially affected by this modification.

[3] Class Plaintiffs claim that they will be "at a severe disadvantage" absent a modification of the September 14 Order allowing them access to all third-party CID materials because American can use the third-party CID documents "to prepare their defense against Class Plaintiffs" is without merit because the September 14 Order prevents American from using designated third-party material obtained through production in this case for any purpose other than preparation and trial of this action. September 14 Order at 6, ¶12.

CID information, the defendants to that civil action "may invoke their discovery rights under the Federal Rules of Civil Procedure, and obtain CID information relevant to their defense, in accordance with those rules." H.R. Rep. No. 94-1343, at 15 (1976).

The United States relied on this exception and legislative history when it produced third-party CID materials to American. Recognizing that American might not share its interest in protecting the confidentiality of third-party CID materials produced in discovery, the United States entered into a stipulated protective order (the September 14 Order) which limits American's ability to use and disclose third-party CID materials appropriately designated pursuant to that order by their original producers.

The CID statute prohibits the United States from providing the third-party CID materials directly to Class Plaintiffs. *See United States v. Alex Brown & Sons,* 169 F.R.D. 532, 543, n.5 (S.D. N.Y. 1997)(noting that government could not be compelled to disclose CID materials to plaintiffs in companion multidistrict action), and *In re Air Passenger Computer Reservation Systems Antitrust Litigation,* 116 F. R. D. 390, 392 (C.D. Ca. 1986) (noting that "plaintiffs could not obtain the transcripts they seek or any other CID documents from the government."). Class Plaintiffs cite the above-referenced cases to support their view that the CID statute does not prohibit them from getting the third-party CID materials from American, but fail to appreciate that in both of the cited cases, private plaintiffs were seeking CID materials directly from defendant companies which had either generated those materials (in the case of documents) or whose employees had generated those materials (in

the case of deposition transcripts) and not from a party that had received them from the United States via discovery and pursuant to a protective order.

In striking a balance between the legitimate discovery needs of private plaintiffs and the confidentiality provisions of the CID statute, the United States District Court for the Southern District of New York noted: "Defendants are protected from having their CID-related materials disclosed to anyone by the DOJ, and no one except a party who has brought an action against a subject of a CID and has demonstrated a need for access to a court can glean the information from the Defendants." *In re NASDAQ Market Makers Antitrust Litigation*, 929 F. Supp. at 725. American is the only subject of a CID being sued by Class Plaintiffs, and American has already provided Class Plaintiffs with its own CID materials. Class Plaintiffs should not be allowed to make an end-run around the CID statute by obtaining third-party CID materials directly from American.

CONCLUSION

The United States has no objection to either the proposed modification attached as Exhibit D to American's September 25 Memorandum or the proposed modification attached to American's September 27 Supplemental Motion, which both allow American to produce materials received from third parties pursuant to post-complaint subpoenas issued in this case. These alternatives protect the confidentiality of third-party CID materials by ensuring that their disclosure cannot occur without the express consent of the producers of those materials.

The United States objects to the proposed modification attached as Exhibit E to American's September 25 Memorandum. That modification, as it relates to third-party CID materials, is overbroad and destroys the legitimate confidentiality expectations relied on by both the United States and third parties in the CID process for no necessary purpose. Plaintiff therefore respectfully requests that, if the Court determines that a modification is necessary, the Court enter either the proposed modification attached as Exhibit D to American's September 25 Memorandum or the proposed modification attached to American's September 27 Supplemental Motion.

Dated: November 2, 2000

Respectfully submitted,

PLAINTIFF UNITED STATES

By: /s/

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