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

MEMORANDUM AND ORDER

This is an antitrust case in which the United States claims that defendants violated Section 2 of the Sherman Act by engaging in anticompetitive and predatory conduct to monopolize airline passenger service. This matter is before the court on defendants' motions to compel interrogatory answers (Doc. 103) and document production (Doc. 141). For the reasons stated below, the motion to compel interrogatory answers will be denied; the motion to compel documents will be granted in part and denied in part.

I. Motion to Compel Interrogatory Answers and for Sanctions (Doc. 103)

Defendants charge that plaintiff improperly answered Interrogatory Nos. 3, 4, 5, 6, and 9 and request sanctions which would limit the scope of plaintiff's case to its initial answers to the interrogatories. In the alternative, defendants recommend imposition of a

deadline for plaintiff to *fully and finally* provide interrogatory responses and an extension of discovery. Plaintiff counters that it properly answered and supplemented answers to defendants' interrogatories and thus, no basis exists for the imposition of sanctions. Further, discovery continues and any deadline for "final" factual and legal contentions would be premature. Plaintiff also argues that a prohibition from further supplemental answers would be inconsistent with the continuing duty to supplement interrogatory answers found in Fed. R. Civ. P. 26(e).

The crux of defendants' motion is the timing, rather than the substance, of plaintiff's supplemental answers. The Scheduling Order established an accelerated schedule for completion of fact discovery (April 3, 2000). Defendants argue that allowing plaintiff's supplemental answers is unfair because they will have no opportunity to conduct fact discovery on the new information. However, defendants' timing argument became moot with the Scheduling Order modification which allowed time for additional factual discovery.

Defendants' argument that the court should establish a deadline for plaintiff to *fully and finally* answer the interrogatories is not persuasive. Pared to its essentials, the argument amounts to a transparent request for a final pretrial order, a request which is premature. Discovery continues and plaintiff is entitled to develop its case.

Defendants' request for the imposition of sanctions is also without merit. Plaintiff timely objected to Interrogatory Nos. 3 through 6 and 9 based on prematurity *and then also*

answered the interrogatories.[1] The parties conferred over the sufficiency of plaintiff's answers as required under Fed. R. Civ. P. 37(a)(2) and D. Kan. Rule 37.2 and plaintiff thereafter supplemented its interrogatory answers on two occasions. The court has reviewed both the initial and supplemental answers and finds them sufficient; thus, sanctions are not warranted.

In summary, defendants' motion to compel and for sanctions shall be denied. Plaintiff properly asserted an objection and also provided answers. Defendants' concerns about the timing of the supplemental answers are mooted by amendments to the scheduling order.

II. Defendants' Motion to Compel Documents (Doc. 141)

Defendants move for an order compelling production of nonprivileged documents responsive to the following document requests:[2]

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[1] Plaintiff objected that the interrogatories were premature because discovery had just commenced and portions of the answers could/would involve expert witness disclosures that, under the scheduling order, were due after completion of "fact" discovery. As noted, plaintiff then answered the interrogatories. The "premature" objection placed defendants on notice that plaintiff reserved the right to supplement its answers as discovery and expert testimony developed.

[2] Although the caption of defendants' motion states that it seeks to "Compel Documents Responsive To American's First and Second Set of Document Requests," defendants' brief discusses only Request Nos. 3, 25, and 26 (Second Set).

Request No. 3

All documents collected by the United States in connection with any investigation by the United States of alleged anticompetitive practices by any air carrier that pertain to any allegations raised in the Complaint.

Request No. 25

All written responses received by the United States in response to the Civil Investigative Demands produced in connection with Request No. 24.[3]

Request No. 26

All documents received by the United States in response to the Civil Investigative Demands produced in connection with Request No. 24.

Although plaintiff produced documents, defendants complain that it failed to produce all documents from the following categories:

- Civil Investigative Demands (CID);[4]
- CID written responses;
- CID documents; and

Request No. 24 seeks "All documents that constitute any Civil Investigative Demand issued by the United States since January 1, 1990 in which questions were posed concerning competition with, between, or among 'low-cost carriers,' as the phrase is used in the Complaint, and/or barriers to entry at hubs, as the term hub is used in the Complaint, and/or competition between non-stop and one-stop and/or connecting flights as those terms are used in the complaint." Apparently satisfied with plaintiff's response, defendants have not sought to compel Request No. 24.

Civil investigative demands are explained in greater detail at page 7 herein.

discovery responses from United States v. Northwest Airlines Corp. and Continental Airlines, Inc., Case No. 98-74611, E. D. Michigan (the "NW/CO litigation").

Plaintiff opposes the motion, contending that it has properly withheld documents based on 1) a protective order in the NW/CO litigation, 2) statutory limitations related to the disclosure of CID materials, and 3) a law enforcement investigative privilege. Plaintiff's objections are discussed in greater detail below.

A. The NW/CO Litigation Protective Order

Defendants argue that plaintiff has failed to produce relevant documents which resulted from discovery conducted in the NW/CO litigation. Highly summarized, the NW/CO litigation involves claims by the government under Section 1 of the Sherman Act (related to anticompetitive agreements) and Section 7 of the Clayton Act (related to mergers and acquisitions) to divest Northwest of its stockholder voting control over Continental Airlines. Plaintiff contends that production of documents from that case would violate the protective order entered in it. Rather than pursuing a motion to compel in this case, plaintiff maintains that defendants should seek modification of the NW/CO protective order from the judge (United States District Judge Denise Hood) who issued the protective

order.[5] Defendants counter that the 1) NW/CO protective order does not prohibit disclosure in this case and 2) the stipulated protective order *in this case* allows production of NW/CO discovery.[6]

In the final analysis, defendants' arguments that this court should order production of the NW/CO discovery materials are unpersuasive. Although paragraph 2 of Judge Hood's protective order allows the Department of Justice to *use* the documents for law enforcement proposes, paragraphs 8 and 9 describe in detail the persons *to whom the discovery materials may be disclosed.* Defendants do not fall within the category of persons specified in the protective order. The court agrees with plaintiff that providing the NW/CO discovery documents to defendants would violate Judge Hood's protective order.

Defendants' alternative argument that the stipulated protective order in this case

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[5] While plaintiff questions the relevance of the NW/CO discovery in this case it will not oppose any motion by defendants to amend the NW/CO protective order. The protective order in the NW/CO case was a contested matter and defendants appeared before Judge Hood and supported issuance of the order. Defendants have presented no persuasive explanation why they have not sought to modify the protective order in the NW/CO litigation. This failure is puzzling, given defendants' participation in the NW/CO hearing on the protective order.

[6] Although the parties debate production of the NW/CO discovery at length, it is questionable whether the three document requests (3, 25, and 26) even involve NW/CO documents. Request Nos. 25 and 26 involve CID materials which were produced prior to the filing of the NW/CO litigation. Request No. 3 limits production to "any allegations raised in the [USA v. AMR, et al.] Complaint." Because this case alleges predatory conduct by AMR (under section 2 of the Sherman Act), the relevance of documents concerning merger/voting rights in the NW/CO litigation would seem to be dubious.

somehow "trumps" Judge Hood's protective order is also rejected. Judge Hood entered a protective order concerning discovery materials generated during the course of the Michigan case. It is well established that a party must seek modification from the court which entered the protective order in order to gain access to discovery responses in that case. See, e.g., United Nuclear Corporation v. Crawford Insurance Company, 905 F.2d 1424 (10th Cir. 1990)("widely recognized" that correct procedure to challenge a protective order is through intervention in that case). Because no persuasive basis has been shown by defendants to depart from the generally accepted procedure for challenging protective orders, the court declines defendants' invitation to embark on such a departure. The motion to compel NW/CO discovery documents will be denied.

B. Statutory Limits on the Disclosure of CID Materials

Congress enacted the Antitrust Civil Process Act, 15 U.S.C. §§ 1311, et seq. (the "Act") to enable the Department of Justice to determine whether an antitrust violation has occurred and, if so, to enable the Department to properly plead a civil complaint. Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963). 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). The Act imposes restrictions on disclosure of CID responses and those restrictions are vigorously disputed in this motion.

15 U.S.C. § 1313(c) provides:

> Except as otherwise provided in this section, while in the possession of the custodian, **no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts**, and in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

Id. (emphasis added). In addition to consensual disclosure, a Department of Justice attorney may disclose the CID material "for official use in connection with any case ... as such attorney determines to be required." 15 U.S.C. § 1313(d).

Relying on §§ 1313(c) and (d), plaintiff argues that it has produced all CID materials which it has used or intends to use in this case.[7] Defendants counter that plaintiff's interpretation of "use" is too narrow and should extend to *any* CID materials

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[7] Plaintiff represents that it has produced all CID materials produced during plaintiff's pre-complaint investigation of defendants' predatory conduct. The CID materials in controversy relate to other investigations conducted by the Department of Justice.

reviewed by a Department of Justice attorney.

The seminal case reconciling the confidentiality provision of § 1313(c)(3) and the government's "use" of CID materials under § 1313(d)(1) is United States v. AT&T, 86 F.R.D. 603, 647-48 (D. D.C. 1980). The court noted that a literal reading of the two provisions could permit the government to secrete the material until the point of trial and then simply offer the material in evidence. Id. at 648. The court rejected such an approach as manifestly unfair in view of the modern principles of discovery and adopted an interpretation that § 1313(d) requires disclosure at an earlier point so that defendants have a fair opportunity to study the evidence prior to trial. Id. AT&T held that the nondisclosure provision expires during the pretrial stage if the government made "use" of the materials. Id. As defined by the court, "use" requires more than merely viewing the materials.

> '[D]irect use' means offering the material in evidence at trial, listing it in a pretrial order as material to be introduced in evidence, showing it to a witness in preparing the witness' testimony at a pretrial deposition or at trial, using it to impeach a witness at pretrial deposition or at trial, formulating interrogatories, demands for admission, or questions to be propounded at a deposition, or similar use.

Id. at 647.[8] Plaintiff asserts that it has produced all CID materials it has used or intends to use in this case, as defined by AT&T.

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[8] In addition to materials "directly used," the government would also have to disclose materials which "throw light on the material to be produced." Id. at 468.

Defendants' argument that "use" includes *any* CID materials reviewed by Department of Justice attorneys was considered and rejected in AT&T because such a construction would nullify the disclosure restrictions found in §§ 1313(c) and (d). Under defendants' interpretation, *all* CID materials would have to be produced in every case and the nondisclosure provisions in § 1313 would be meaningless. This court concurs with and adopts the analysis set forth in AT&T. Defendants are not entitled to CID documents merely because the government's trial attorney may have perused the materials. Id. at 648.

However, the defendants' alternative argument for production consistent with the protective order in this case is persuasive. Plaintiff and defendants entered into an agreed protective order which established a specific procedure for the disclosure of materials produced by non-parties to the Department of Justice. That order provides, in relevant part:

> 4. Simultaneous with entry of this Order, the Department of Justice shall provide notice and a copy of this Order to all non-parties who provided materials to the Department of Justice that is sought in discovery in this action, and shall call their particular attention to this paragraph. The non-party who produced that material shall have 21 days from the notice of entry of this Order to make appropriate confidentiality designations consistent with the terms of this Order, and in the meantime, the parties shall treat all such materials as Level Two (as that term is defined in Paragraph 1(g) of this Order). The plaintiff will produce to the defendants all materials provided to it by a non-party in connection with the DOJ investigations, that are responsive to a valid discovery request, within 9 days after receiving the designations of confidentiality from the non-party, so that discovery can proceed without unnecessary delay. If no

> designation is made by the non-party within the 21 day period, the materials produced shall be treated as Level One (as that term is defined in Paragraph 1(f) of this Order). If, within 21 days after entry of this order, a non-party who provided materials to the Department of Justice files a motion for a protective order objecting to the production of its documents pursuant to this paragraph, the plaintiff shall not produce those documents until the Court has ruled on the pending motion.

(Emphasis added.) The Department of Justice expressly agreed to this procedure and its failure to provide notice of the protective order to persons who supplied the CID materials in dispute is unexplained.[9] Consistent with the protective order, plaintiff shall promptly provide notice to third parties who provided the CID materials in dispute. The time period for a non-party to designate materials as confidential or to move for a protective order shall be extended to **fourteen days from the date of this order.** Plaintiff shall produce the CID materials, unless protected by another privilege, consistent with the terms of the protective order.

C. Law Enforcement Investigatory Privilege

Plaintiff claims a law enforcement investigatory privilege with respect to CIDs issued to two carriers concerning their conduct at hubs other than Dallas/Ft. Worth.[10] A

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[9] Plaintiff did not address defendants' arguments about the protective order. Having voluntarily agreed to the order, plaintiff remains bound by its requirements.

[10] The two "other" carriers which plaintiff is investigating and the hubs involved have not been identified for the court. The record is ambiguous whether defendants know the names of those carriers and hubs.

law enforcement investigative privilege is "based primarily on the harm to law enforcement efforts which might arise from public disclosure of ... investigatory files." United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1980)(quoting Black v. Sheraton Corporation, 564 F.2d 531, 541 (D.C. Cir. 1977)). In order to invoke the privilege, the responsible official in the Department must 1) lodge a formal claim of privilege after actual personal consideration, 2) specify with particularity the information for which protection is sought, and 3) explain why the information falls within the scope of the privilege. Winner, 641 F.2d at 831.

In support of its claimed privilege, plaintiff provides the declarations of A. Douglas Melamed, the Principal Deputy Assistant Attorney General for the Antitrust Division, and John M. Nannes, Deputy Assistant Attorney General. Mr. Nannes explains that the Department of Justice has open and ongoing investigations which involve two carriers for their activities at hubs other than Dallas/Ft. Worth. The investigative files contain the following documents:

i. Interview memoranda prepared by or at the direction of attorneys;

ii. Correspondence between the Division and the carriers under investigation;

iii. CIDs issued to the carriers under investigation and to third parties with relevant information;

iv. Responses to interrogatories obtained pursuant to CIDs from the carriers under investigation;

v. Documents obtained pursuant to CIDs from carriers under investigation and

from third parties; and

vi. Memoranda from staff to their supervisors, reporting on the status of the investigation and recommendations for actions by attorneys and economists.

Mr. Melamed declares that he has delegated authority to invoke the privilege for the Department of Justice and, after personal consideration, he has determined that release of the documents could have an adverse effect on the progress of the ongoing investigation of the two other carriers.[11]

Defendants contend that the Department's privilege claim is procedurally defective because plaintiff failed to provide the requisite declarations/affidavits when the privilege was initially raised. This procedural objection is unpersuasive. Plaintiff placed defendants on notice that it claimed the privilege in its initial response to production requests. The procedural requirements for asserting the privilege are satisfied when the declaration or affidavit are provided in response to a motion to compel. See, e.g., SEC v. Downe, 1994 WL 23141, *5 (S.D.N.Y., January 2, 1994)(obligation to provide affidavit satisfied when filed with response to motion to compel). The court concludes that, from a procedural perspective, the law enforcement privilege has been properly asserted.

However, procedural compliance does not end the court's inquiry. The privilege

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[11] A highly summarized account of the declarations has been provided because defendants' procedural objection goes to the timing rather than the content of the declarations. The declarations discuss in greater detail the harm to law enforcement efforts if the documents and identity of the other carriers were revealed at this time.

claimed by plaintiff is qualified and the court must weigh the government's interest in nondisclosure against defendants' need for access to the privileged information. Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). Factors the court should consider in deciding whether to compel disclosure include:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure: (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the ... investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information to plaintiff's case.

National Union Fire Insurance of Pittsburgh v. FDIC, 1995 WL 104835 (D. Kan. 1995)(quoting Everitt v. Brezzel, 750 F. Supp. 1063, 1066-67 (D. Colo. 1990).

The court has weighed the relevant factors and concludes that the government's interests outweigh defendants' need for disclosure.[12] The investigation concerning the two carriers is ongoing and a decision whether to bring an action has not been made. Disclosure of questions asked and the carriers' responses would chill further discussions

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12 Obviously, a number of the factors are inapplicable in the present context. Thus, the court comments only on those factors which it finds most relevant.

between the government and those parties. Moreover, defendants' argument that they have a critical need to know the details concerning the government's *investigation of other carriers at other hubs* is unpersuasive. Defendants have not shown the relevance of predatory conduct by other airlines at other hubs and the request for this information appears to be an extended and unwarranted fishing expedition. Plaintiff's privilege claim is sustained. Plaintiff will not be ordered to produce the CID questions or responses related to the two carriers at hubs other than Dallas/Ft. Worth.

IT IS THEREFORE ORDERED that defendants' motion to compel interrogatory answers and for sanctions (Doc. 103) is **DENIED**. **IT IS FURTHER ORDERED** that defendants' motion to compel production requests (Doc. 141) is **DENIED IN PART** and **GRANTED IN PART**, consistent with this opinion. Plaintiff shall notify non-parties, consistent with the protective order, that their CID materials are the subject of discovery. Non-parties shall have **fourteen (14) days from the date of this order** to designate their materials as confidential or move for a protective order.

A motion to reconsider is not encouraged. However, if a motion is filed, it shall be limited to four pages. Any response shall also be limited to four pages and no reply shall be filed.

Dated at Wichita, Kansas this 9th day of May 2000.

Karen M. Humphreys

KAREN M. HUMPHREYS
UNITED STATES MAGISTRATE JUDGE