**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>AMR CORPORATION, AMERICAN AIRLINES, INC, and AMERICAN EAGLE HOLDING CORPORATION,<br><br>Defendants. | ) | Civil Action No. 99-1180-JTM |

**MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ITS OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DOCUMENTS RESPONSIVE TO AMERICAN'S FIRST AND SECOND REQUESTS FOR DOCUMENTS**

## I. INTRODUCTION

We oppose American's motion because it would require us to violate the Antitrust Civil Process Act, to violate an order entered by the United States District Court of the Eastern District of Michigan, and also to divulge to American confidential materials that Plaintiff has obtained from American's competitors in connection with its on-going law enforcement investigations involving suspected anticompetitive conduct of other air carriers in hubs other than DFW -- the only hub at issue in this case.

American seeks disclosure of two general categories of documents. First, American seeks documents obtained by the United States pursuant to Civil Investigative Demand ("CID") in connection with its investigations of other carriers in the domestic airline industry. To support its claim for these documents, American argues erroneously that the United States has failed to produce to American the one category of documents that all parties agree should be produced to American: *all* documents obtained by the United States during its investigation into American's suspected predatory conduct (the "American predation investigation"). American's claims for the documents from investigations of carriers other than American fail for the following reasons:

- The Antitrust Civil Process Act, 15 U.S.C. §§ 1311, *et seq.* (the "Act"), forbids the United States from making information obtained pursuant to the Act (*i.e.*, pursuant to CID) available for examination by American except in limited circumstances. *See* 15 U.S.C. § 1313(c); *United States v. American Telephone & Telegraph Co.*, 86 F.R.D. 603, 647-48 (D.D.C. 1979) ("*AT&T*").

- Consistent with *AT&T* and Division policy, the United States has produced to American *all of the materials* that it obtained in connection with its investigation of American's predatory conduct at DFW, including materials that it obtained pursuant to CID.

- To the extent that the United States uses (as that term is defined in *AT&T*) *in this case* any documents or information that it has obtained pursuant to the Act while investigating potential predatory conduct by other carriers at hubs other than DFW, it either has already produced such documents and information to American or will continue to produce as such use of the documents is made.

- The United States has properly asserted the law enforcement investigatory files privilege with respect to documents and information that it has obtained during ongoing investigation of potential predatory conduct by other carriers at hubs other than DFW.

Second, American contends that the United States should have disclosed to American documents obtained from American's competitors in discovery in the *United States v. Northwest*

*Airlines Corp. and Continental Airlines, Inc.* ("*NW/CO*") action, pending in the United States District Court for the Eastern District of Michigan. While American may be able to obtain such documents from their owners (and the United States would not object), American's attempt to obtain these documents by this motion must be rejected because:

- *NW/CO* is an action that was filed on October 23, 1998 to challenge Northwest Airlines Corp.'s ("Northwest") purchase of a controlling interest in Continental Airlines, Inc. ("Continental"). The Complaint against Northwest and Continental was filed in the United States District Court for the Eastern District of Michigan and does not include any claims alleging violation of Section 2 of Sherman Act, 15 U.S.C. § 2; rather, *NW/CO* involves an alleged violation of Section 7 of the Clayton Act (15 U.S.C. § 18) and Section 1 of the Sherman Act (15 U.S.C. § 1).

- *NW/CO* was brought under a different statutory provision than the statutory provision involved in this case because the conduct challenged in the two cases is very different. *NW/CO* challenges an agreement between Northwest and Continental to combine their ownership, which the United States alleges would result in harm to competition. *NW/CO does not involve* any allegations of predatory conduct by either Northwest or Continental, nor does it involve a claim of monopolization or attempted monopolization of a hub by either Northwest or Continental. (Conrath Decl., Ex. 1).

- The Protective Order entered by Judge Hood in *NW/CO* prohibits the United States from disclosing Confidential or Highly Confidential materials produced in discovery in that case outside of *NW/CO except* "to employees of the Executive Branch outside of the Department of Justice." *NW/CO* Protective Order, ¶ 2. (Conrath Decl., Ex. 2)

- Where the United States has *used* documents from *NW/CO* discovery, as the *NW/CO* Protective Order permits it to do, it has subpoenaed those documents *in this case* so that American can also have those documents. American has already received six of seven such documents.

In short, the United States has produced to American all of the responsive, non-privileged documents and information in its possession that it is legally empowered to produce. Moreover, the United States has taken steps to make information that it is not legally empowered to produce available to American *in this case* through the issuance of subpoenas for the information *in this case*. Plaintiff is

simply not required to violate a federal statute and an Order of another District Court, especially when it has taken steps to ensure that American's legitimate discovery demands are met. American's Motion should be denied.

## II. ARGUMENT

### A. Plaintiff Has Produced All Responsive, Non-privileged Materials Pertaining to Its Investigation of American's Predatory Conduct at DFW

The requests contained in American's Second Set of Document Requests are so broad that they implicate virtually every document the United States has ever obtained, whether or not relevant to this case, in connection with any law enforcement investigation that it has conducted in the domestic airline industry. For context, therefore, we explain briefly the general nature of the United States' law enforcement activities in the domestic airline industry.

The Division is charged with conducting law enforcement investigations into suspected anticompetitive conduct in a variety of industries, including the domestic airline industry. American has been involved, either as a subject or a third party participant, in several such investigations over the years, as have other domestic air carriers. These investigations have ranged in subject matter from the suspected monopolistic conduct of a particular domestic air carrier (as is alleged against American in this case) to suspected anticompetitive combinations (either by alliance or merger or otherwise) of domestic air carriers (as is alleged in the *NW/CO* case) to other types of suspected anticompetitive conduct in a variety of geographic markets by a variety of different domestic air carriers. If an investigation reveals that law enforcement action against anticompetitive conduct is warranted, the Assistant Attorney General in charge of the Division may make the decision to file a lawsuit.

The Division's monopolization investigations are typically focused on conduct by a particular air carrier in particular geographic markets. The investigation into American's suspected predatory conduct, for example, examined *American's conduct* at *American's Dallas/Ft. Worth hub*. As a general rule, therefore, documents and information obtained in investigations involving the conduct of *other* carriers in *other* hubs are not relevant to this case. To be sure, the Division's different investigations into the domestic airline industry may touch on similar questions relating to the structure of markets in the domestic airline industry, but they do not involve common legal issues except in the limited sense that they all involve airlines.

Most of the documents and information that the Division receives during the course of a civil investigation are produced in response to a Civil Investigative Demand ("CID") issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. § 1311 *et seq.* (the "Act"). Material produced in response to a CID can include documents, interrogatory answers and transcripts of oral testimony. 15 U.S.C. §1312. All material produced in response to a CID is protected from disclosure by 15 U.S.C. § 1313(c), which prevents the Division from disclosing information obtained pursuant to a CID except in limited circumstances. 15 U.S.C. § 1313(c) provides, in relevant part:

> 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*. (Emphasis supplied.)

The statutory protection for information obtained by the Division pursuant to CID is vital to not only the

protection of the confidential information produced by CID recipients, but also the ability of the Division to perform its law enforcement duties. (Nannes Decl., ¶ 15.)

As noted above, the Act allows disclosure of CID material in very limited circumstances, *e.g.*, when the producing party consents or in response to a request by Congress. The Act also provides for disclosure of CID materials in connection with litigation:

> Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

15 U.S.C. §1313(d). The United States District Court for the District of Columbia addressed the problem of reconciling "the confidentiality provision of §1313(c)(3) with the provision of §1313(d)(1) authorizing the government to use CID material in a suit subsequent to the investigation that yielded the CID material" in *United States v. AT&T*, 86 F.R.D. 603, 647-48 (D.C. 1980).[1] While noting that "a literal reading of the two provisions admits of the construction that the Government could keep the material in custody until the point in the trial when it is needed, and then simply offer the material in evidence," the court determined that a "more just interpretation of the statute would require that the

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[1]American discusses the *AT&T* opinion in its brief, but also suggests that the guidelines in that case are not binding in this case. During the meet-and-confer process, the United States asked whether American believes some other standard applies in this case, but American has not suggested a standard that it believes is more appropriate. (Conrath Decl., ¶ 7).

privilege elapse not simply when the Government might offer CID material at trial, but at such earlier point as would give defendants fair opportunity to study it and thus meet it at trial." *Id.* at 648. The court rejected the notion that "all material collected by the Government would be discoverable, even if the Government made no use of it . . . ;" the Court thus established the "use" standard that has been followed by the United States in this case. *Id.*

In *AT&T*, the District Court found that, while "mere perusal" of protected material by the government does not terminate the statutory protection against disclosure, direct "use" of the documents in the pretrial stage terminates the protection and requires the government to produce both the material it "used" and any "material that throws light on the material to be produced." *Id.* With respect to the "direct use" standard, Judge Greene held that:

> [f]or this purpose, 'direct 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. The Division has followed the *AT&T* decision in its production of CID materials in this case.

Thus, during the course of the law enforcement investigations conducted by the Division, the Division may seek, typically pursuant to CID, production of highly sensitive, confidential business information from both subjects of the investigations and third parties (usually competitors or customers). In order for the Division to continue to be in a position to obtain such information from such persons without having to resort to enforcement of its CIDs by a Court, CID recipients must have confidence that the confidential information that they provide the Division will be protected from disclosure to their

competitors, suppliers, or customers to the fullest extent possible under the law.

Finally, the documents in the possession of the United States because it is currently investigating possible predation by other domestic air carriers are also protected from disclosure by the law enforcement investigatory files privilege. The law enforcement investigatory files privilege applies to investigatory files compiled for law enforcement purposes and is intended to protect ongoing investigative efforts. *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977)(privilege is based on harm to law enforcement efforts that might arise from public disclosure of investigatory files); *National Union Fire Insurance Co. of Pittsburgh, PA v. FDIC*, 1995 WL 104835 (D. Kan. 1995) (privilege applied where potential interference with an ongoing investigation from disclosure of documents outweighed plaintiff's interest in discovering them).[2] The policies behind this privilege, which is vital to the ability of the Division to carry out its law enforcement mandate, reinforce the confidential nature of CID material.

**1. Plaintiff Has Produced All Materials That It Obtained Pursuant To CID In Connection With The Investigation Leading To The Filing Of This Case**

Upon receipt of American's First Set of Document Requests, the United States identified CID materials that it had received in connection with its investigation of American's predatory conduct at DFW that led to the filing of this complaint. *All such materials (interrogatories, documentary materials and transcripts of CID depositions) were therefore produced to American in response*

[2]A true and correct copy of the *National Union Fire Insurance* case is attached to the Appendix in Support of Plaintiff's Opposition to American's Motion to Compel Documents Responsive to American's First and Second Sets of Document Requests ("Appendix") as Ex. A.

*to its First Set of Document Requests.* (French Decl., ¶ 5.)[3]

**2. Plaintiff Has Followed *AT&T* And Produced All CID Materials That It Has Obtained In Investigations Other Than The American Predation Investigation Where It Has Used Such Materials In This Case**

In response to American's Second Set of Document Requests, Plaintiff has also produced to American *all* CID materials obtained by the United States in other ongoing investigations where the trial staff in this case has made direct use of *any* of those materials in the pre-trial or trial stages of this litigation.[4] These CID materials were produced because of a determination that they constituted "related material held by the custodian that throws light on the material to be introduced." *AT&T*, 86 F.R.D. at 648. This determination is not, as American claims,[5] inconsistent with the position Plaintiff has taken with respect to the documents at issue in this Motion.

American appears to be confused as to what Plaintiff has and has not produced. Thus, American argues that Plaintiff produced 15 CIDs issued in connection with an ongoing predation investigation of carriers other than American, but "in response to Request No. 26, which called for the production of any documents produced in connection with those CID's, *the DOJ produced nothing*." (Opp. Memo., at 13-14 (emphasis supplied).) In fact, as Plaintiff has previously informed American, Plaintiff has produced *all* of the materials obtained pursuant to the 15 CIDs that American references in

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[3]The United States has not produced publicly available documents nor documents received from American.

[4]The United States will continue to produce CID materials in accordance with the *AT&T* holding, as use is made of those documents.

[5]*See* Memorandum of Law in Support of Defendants' Motion to Compel Documents Responsive to American's First and Second Sets of Document Requests ("AA Memo."), at 16 n.14.

its Memorandum. (French Decl., ¶¶ 4-5.)[6] What Plaintiff has not produced, however, is copies of three other CIDs issued to the subjects of the Division's ongoing investigation of possible predation by two other carriers in other geographic markets and copies of the materials produced in response to those CIDs.[7]

American argues that Plaintiff has artificially defined the "American predation investigation" so as to avoid producing to American documents Plaintiff obtained pursuant to CID in connection with an omnibus predatory conduct investigation that American believes exists. Whether the investigation into predation in the airline industry is characterized as a single investigation or as separate investigations of conduct by various air carriers in various markets, the fact remains that the United States based its suit against American only on the evidence gathered in its investigation of American and not on evidence gathered in its investigation of conduct by other airlines in other markets.

As has been explained repeatedly to American,[8] the Division originally opened a preliminary inquiry ("PI") solely to investigate American's conduct in city pairs emanating from DFW. The form memorandum requesting PI authority identifies only American as a potential defendant and identifies as

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[6]The documents at issue (CID materials obtained by the United States from three low-cost airlines) were also responsive to other requests in Defendants' Second Set of Document Requests (including Request No. 3 and Request No. 4). Like other documents responsive to multiple requests, these documents were not labeled to correspond with any particular request.

[7]The CIDs, correspondence relating to them, and other correspondence relating to the ongoing investigation have been withheld on the basis of the law enforcement investigatory files privilege, further explained below. As for the materials obtained in response to those CIDs, the United States will continue to supplement its production of documents responsive to Defendants' discovery request if use is made of those documents.

[8]*See* Conrath Decl., Ex. 5 (February 16, 2000 letter to Edward Soto, Esq., from Craig Conrath).

the geographic markets to be investigated only city pair markets emanating from Dallas/Ft. Worth, Texas. (Nannes Decl., ¶ 7.) When the Department later decided to investigate other carriers in different geographic markets, "add-on" clearance was obtained from the Federal Trade Commission.[9] (*Id*. at ¶ 9.) The investigation of those other carriers have involved different hubs and different conduct, than the investigation of American. *(*Conrath Decl., ¶ 9.)

Finally, we note that the materials obtained during the ongoing investigation of predatory conduct by other carriers is of marginal, if any, relevance to this case. This case is not going to be about conduct by other carriers at their hubs, but instead will be about *American's conduct at its Dallas/Ft. Worth hub*. Nor does Plaintiff anticipate using in this case any of the information that the Antitrust Division obtained in connection with its now closed investigation into travel agency overrides.[10] Whatever the merits of American's claims for production of these documents, their relevance to this case is dubious at best.

American contends the United States, by its reference to fifty-three (53) depositions taken in past investigations of the airline industry, conceded that the transcripts of such depositions should be produced in this case. American obtained the number 53 from Appendix D to the government's Rule 26(a) Initial Disclosures. (French Decl., ¶ 5, Ex. 2.) In the Rule 26(f) conference, American insisted that the United States search all investigatory files involving barriers to entry at any hub in preparing its Rule 26(a) Initial Disclosures. The United States attempted to satisfy American's overbroad request by

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[9]It is not unusual for the Division to investigate multiple possible violations with the same matter number, and for those investigations to lead to the filing of different cases. (Conrath Decl., ¶ 9.)

[10]Plaintiff has already produced copies of the CIDs, correspondence relating to the CIDs, and information supplied orally to the Division in connection with that investigation.

disclosing persons and materials identified in searching files other than the predation investigation files and noted its doubts as to the relevance of the persons and materials identified in those appendices to this case.[11] That disclosure was neither an admission of relevance nor an admission that the transcripts were used in connection with this action.

All of the deposition transcripts listed in Appendix D of the United States Rule 26(a) Initial Disclosures were of depositions taken pursuant to the CID statute. Eight of the depositions were taken in connection with an investigation, closed in 1996, of whether Delta's acquisition of certain slots at New York's La Guardia Airport was anticompetitive; and thirty-one were taken in connection with an investigation, also closed in 1996, into whether agreements between travel agencies and certain air carriers for paying market-share based commission overrides to the travel agents were unreasonable restraints of trade. (French Decl., ¶ 9.) To the extent that those transcripts contained information called for by the Court's February 7, 2000, order, that information has been produced. The remaining depositions were taken in the Division's investigation of Northwest's purchase of a controlling interest in Continental Airlines and are protected by both the CID statute and the NW/CO protective order. These depositions were not covered by the Court's February 7, 2000, order because the NW/CO investigation was not a monopolization investigation. None of the fifty-three deposition transcripts referenced by American have been used by the Division in connection with this case, except to the extent that they were reviewed in order to comply with the Court's February 7, 2000, order. *Id*.

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[11] The United States stated in its disclosure that American's interpretation of Rule 26 seemed "designed to encourage overbroad disclosure, as the United States has contacted representatives from almost every domestic airline, numerous airports, and many travel-related businesses in the course of its prior investigations in this industry." (French Decl., Ex. 2.)

### 3. The Law Enforcement Investigatory Files Privilege Protects from Disclosure Documents Contained In The Division's Open Investigative Files Relating To Ongoing Investigation of Carriers Other than American

The documents that American seeks from the Division's open investigative files relating to possible predation by other carriers are not only protected from disclosure by 15 U.S.C. § 1313(c), as discussed above, but also by the law enforcement investigatory files privilege.[12] The files of this open investigation contain confidential business information of American's competitors, and reveal information about the carriers that the Division is investigating. The files also contain internal memoranda describing the status of those matters, the disclosure of which could prematurely reveal the government's theories. In its response to Defendants' document requests 3, 4, 24, 25 and 26, the government objected to the production of certain documents, and asserted the law enforcement investigatory privilege.[13] (French Decl., Ex. 1)

Defendants argue, erroneously, that the government was required, at the time it first asserted the privilege to defendants, to provide an affidavit from the agency head specifying the particular information for which the privilege is asserted, and explaining why the privilege applies. The proper time for the government to submit such an affidavit is when the matter is brought before the court, in this case, by a motion to compel. *Cf. In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)(White

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[12] The only documents being withheld solely in reliance on the law enforcement investigative files privilege are the CIDs issued to the carriers being investigation inthe Division's ongoing investigation and correspondence between those carriers and the United States.

[13]The United States also asserted the deliberative process privilege as to any document request calling for internal, pre-decisional memoranda. We do not understand Defendants' pending motion to be seeking such documents.

House was not obliged to "formally invoke its [executive] privileges in advance of the motion to compel;" the fact that it said, in response to a subpoena, that it "believed the withheld documents were privileged," was sufficient; *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 1987 WL 20408, at *7 (N.D. Ill. Nov. 20, 1987)(rejecting the assertion that agency head's affidavit must be submitted when the privilege is first invoked); *Abramson v. United States*, 39 Fed. Cl. 290, 294 n.3 (1997) ("procedural requirements generally are satisfied through the production of a declaration or affidavit by the agency head . . . in response to a motion to compel."); *SEC v. Downe*, 1994 WL 23141, *5 (S.D.N.Y. Jan. 27, 1994)(government meets its obligation regarding affidavit by filing it with its opposition to motion to compel).

Cases cited by defendants do not provide otherwise. In *National Union Fire Insurance Co. of Pittsburgh, PA v. FDIC*, 1995 WL 104835 (D. Kan. 1995), the FDIC sought a protective order against production of certain documents, claiming the law enforcement investigatory privilege. The court found that the agency head's declaration was sufficient to assert the privilege. In *Pontarelli Limousine, Inc. v. City of Chicago*, 652 F. Supp. 1428 (N.D. Ill 1987), the United States filed a motion to quash two subpoenas, but did not provide the requisite detailed declaration from an agency head. That case has no bearing on the instant case in which the United States has provided a detailed declaration to the court. *Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996), which defendants cite to enumerate the factors the court must consider in determining the applicability of the privilege, is in fact procedurally similar to this case. In that case, the Department of Justice filed its detailed declaration in response to a motion to compel. According to the *Tuite v. Henry* court,

Common sense and the purpose of the rule dictate that the "subject to" language of

> Rule 45(c)(2)(B) does not mandate that the full description required by Rule 45 (d)(2) be provided at the time the initial objection is asserted.

*Id.* at 1416.

Defendants have now filed a motion asking this Court to compel production of all documents relating to any of the Division's predation investigations, including its open and ongoing investigations.[14] The United States is therefore providing the Declarations of A. Douglas Melamed, Acting Assistant Attorney General in charge of the Antitrust Division, and of John M. Nannes, Deputy Assistant Attorney General, which describe the materials over which the privilege is asserted and explain why the privilege applies.

The attached declarations also explain how disclosure of information from the Division's open investigative files relating to possible predation by carriers other than American with respect to hubs other than DFW, particularly while still pending, could have an adverse effect on the progress of those matters and on any future attempts by the Division to initiate litigation against the airlines under investigation.

The United States agrees with defendants that the Court should consider the following factors when deciding whether to compel disclosure of material protected by the law enforcement investigatory privilege:

(1) the extent to which disclosure will thwart governmental processes by discouraging

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[14] Mr. Nannes' affidavit does not address the government's four other open investigations of possible anticompetitive conduct by domestic carriers. The United States has not produced documents from those investigations, three of which involve suspected anticompetitive combinations and one of which involves possible violation of a consent decree entered in *United States v. ATP*, 1994 WL 502091 (D.D.C. Aug. 10, 1994).

> 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 the 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 sought to the [other side's] case.

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

The relevant factors can be balanced upon the following considerations. The Division is continuing to investigate possible predation by air carriers other than American. As long as the Division is continuing to investigate, disclosure of material from the investigative files could discourage potential witnesses from coming forward with information. To the extent that the United States believed that the balancing of the factors referenced above required disclosure of particular documents to American, it has already disclosed those documents (*e.g.*, the CIDs issued to low-cost carriers and all materials submitted in response to those CIDs, where the United States has made or intends to make direct use in this case of any CID materials produced by the particular low-cost carrier.) The fact that the United States disclosed these documents without forcing American to file a motion to compel should not be taken as a waiver of its right to assert the privilege as to any documents contained in its open investigative files. *See In re Sealed Case*, 121 F.2d 729, 741 (D.C. Cir. 1997)(holding that release of a particular document only waives governmental privileges as to the document and not all related materials.) Under American's view, the law enforcement investigatory files privilege would essentially

terminate whenever the Division files a lawsuit in the same industry in which it continues to investigate potential violations of the antitrust laws. Such an interpretation simply cannot be correct.

The United States has not produced documents addressed to or received from the subjects of its ongoing predation investigation of other carriers, including CIDs issued to those subjects and materials it received in response to CIDs. American's argument that the privilege should not apply because "[t]he vast majority of documents the DOJ is withholding were produced by large corporations who are already protected by the procedures set forth in the Protective Order entered by this Court," seems to be directed at this information. We know of no law that makes investigations involving "large corporations" any less entitled to the protection afforded by the privilege than investigations involving individuals or small corporations. Nor do we know of any law that renders application of the law enforcement investigatory files privilege moot in the face of a Protective Order. Similarly, American's claim that the privilege should not apply because it is seeking "purely factual material" ignores the fact that the material it seeks was provided by subjects of an ongoing investigation in response to a process which guarantees a high degree of confidentiality to the material provided. Production of CID materials and related correspondence from an open investigation in this case could jeopardize the Division's ability to provide the confidentiality assurances necessary to conduct future investigations in this industry.

While one of the government's rationales for refusing to disclose this information is based in part on its recognition that premature disclosure could potentially prejudice the rights of those parties under investigation, 40 Op. A.G. 45 (1941), the government's primary interest here is to protect its on-going ability to conduct its law enforcement activities. *Black v. Sheraton Corp.*, 564 F.2d 531,

541 (D.C. Cir. 1977)("law enforcement operations cannot be effective if conducted in full public view . . . .") Disclosure of information provided either voluntarily or in response to compulsory process by parties to ongoing investigations could deter those parties from continuing to cooperate in our ongoing investigations, and could frustrate future settlement negotiations.

A major balancing factor is whether the information sought is available through other discovery or from other sources. In this instance, the Court should consider the fact that American has issued subpoenas to every major domestic air carrier. Those subpoenas request all documents provided by each major carrier to the Department of Justice since January 1, 1994, "relating to alleged, actual, or proposed conduct by any U.S. airline, . . . ." Carriers that received CIDs in connection with the Division's ongoing investigations of their conduct at their hubs may choose to raise an objection to American's subpoena to the extent that the request is overly broad and not reasonably calculated to lead to the discovery of admissible evidence in this case (which involves American's conduct at DFW), an objection which could not have been raised in response to a CID issued in an investigation involving the CID recipient's conduct at its own hubs. Such discovery requests are the proper way to proceed. Upon balancing the potential harm to the Division's ongoing and future investigations against American's need to obtain these documents from the Division's investigative files, American's motion to compel should be denied.

### B. The *NW/CO* Protective Order Precludes Plaintiff From Disclosing Documents From That Case To American Absent An Order Modifying the Protective Order

As set forth above, the *NW/CO* case was filed on October 23, 1998 to challenge Northwest's purchase of a controlling interest in Continental. Unlike this case, *NW/CO* does not involve claims of

monopolization or attempted monopolization of a hub by either Northwest or Continental in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, but instead was brought under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1. (Conrath Decl., Ex. 1). The subject matter of the *NW/CO* case and this case are thus completely unrelated.

Nonetheless, American presses for the documents that have been produced to the United States through discovery in the *NW/CO* case.[15] The United States has no objection to American obtaining these documents in any of several appropriate ways. American could subpoena the documents directly from their owners.[16] Or American could seek the permission of the owners for the United States to provide the documents to American.[17] Or American could seek to modify the Protective Order that prevents the United States from turning over the documents.[18] The United States' only objection is to American's demand that it turn over these documents in a way that violates

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[15]In the pre-complaint investigation of Northwest and Continental, the United States received documents from Northwest, Continental and third parties pursuant to CIDs. Since filing its complaint in the Northwest/Continental litigation, the United States has received more documents pursuant to discovery subpoenas. Parties and non-parties were given an opportunity to designate document produced prior to the complaint in accordance with the protective order. The vast majority of the documents produced both pre and post complaint have been designated as confidential or highly confidential pursuant to the NW/CO protective order.

[16]Indeed, American has done so, and has provoked at least one relevance objection from the documents' owner. American has issued subpoenas to all of the airlines that produced documents in *NW/CO* seeking all documents produced to the United States, and most (if not all) of these airlines have objected to the production of the totality of these documents to American (*See, e.g.*, French Decl., Ex.3).

[17]The United States suggested such an approach to American. See Conrath Decl., Ex. 4).

[18]The United States informed American that it would not object to such a modification request. See Conrath Decl., Ex. 4.

the Protective Order of another District Court.

As Plaintiff has informed American repeatedly, the Protective Order entered by Judge Hood in the *NW/CO* case prohibits the disclosure to American of documents designated as either confidential or highly confidential pursuant to that Order.[19] American is fully familiar with the Protective Order entered by Judge Hood because American itself was served with a subpoena in *NW/CO*. Indeed, in order to protect American's confidential information in documents that it produced in *NW/CO*, American's counsel participated in a May 3, 1999, hearing on the United States' motion for entry of the *NW/CO* Protective Order. (Conrath Decl., Ex.3).

Paragraph 2 of the *NW/CO* Protective Order states, in pertinent part:

> Disclosure of Confidential or Highly Confidential material to any person pursuant to this Order shall be solely for the purposes of the preparation, hearing, trial, and any appeal of this action, and *for no other purpose whatsoever*, provided, however, that the Department of Justice, subject to taking appropriate steps to preserve the confidentiality of such material, may disclose material designated as confidential or Highly Confidential to employees of the Executive Branch outside the Department of Justice, and *may use such information for any valid law enforcement purpose* pursuant to 15 U.S.C. § 1 *et seq.*; 15 U.S.C. § 1311-14 *et seq.*; 15 U.S.C. § 12 *et seq.*; or any other applicable law. (Emphasis supplied).

In other words, Judge Hood specifically created a structure that balanced the confidentiality expectations of the airlines that produced materials in the *NW/CO* case and the legitimate needs of the United States to *use* the *NW/CO* materials for "any valid law enforcement purpose." The terms of the *NW/CO* Protective Order cannot be mistaken -- the United States *may not disclose* materials subject

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[19]The United States did inform American, in its Rule 26(a)(1) Initial Disclosures, that it possessed documents from the *NW/CO* investigation, but it would not be producing those documents due to the Protective Order in place in the *NW/CO* case. Obviously, the United States cannot waive the rights of third parties.

to the *NW/CO* Protective Order outside of the context of *NW/CO* except to members of the Executive Branch. *NW/CO* Protective Order, ¶ 2. While Plaintiff has no desire to prevent American from gaining access to the *NW/CO* materials, Plaintiff does not find in the *NW/CO* Protective Order any exception to the language of Paragraph 2 that would permit it to disclose materials protected by the *NW/CO* Protective Order absent an Order from Judge Hood modifying the terms of Paragraph 2.

American nevertheless has stubbornly held to the position that the United States can comply with Judge Hood's Order essentially by complying with the terms of the September 14, 1999, Protective Order ("Stipulated Protective Order") entered in this case. American thus claims that the United States, upon receiving American's Second Set of Document Requests, should have notified all persons that had produced documents in *NW/CO* potentially responsive to American's overly-broad discovery requests that a request concerning their documents had been received,[20] giving those persons 21 days to either designate whether documents were confidential or to petition the Court for an order limiting disclosure of that information.[21] The *NW/CO* Protective Order, however, simply does not permit the United States to proceed as American prefers.[22]

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[20]Alternatively, under American's view, the United States should have reviewed all documents produced in *NW/CO* to determine whether they were potentially responsive to American's discovery request and then notified the original producers.

[21]Contrary to American's claims, the United States has never told American that it would invoke the "notice" procedures suggested by American. Once American made clear in the meet-and-confer process that it expected the United States to proceed by invoking the "notice" procedures, we agreed to confer with the Division staff working on the *NW/CO* case regarding whether the process was consistent with Judge Hood's Protective Order. The response we received to that inquiry was a resounding "no." (Conrath Decl., ¶5)

[22]Indeed, such disclosure could result in other airlines' *NW/CO* documents receiving less protection from disclosure to American's business executives than American's counsel sought -- and

The United States believes that the proper forum for deciding issues relating to the correct interpretation of the *NW/CO* Protective Order (which, unlike the Stipulated Protective Order, did not result from an agreement between the parties but was entered by the Court over Northwest's objections) is before the Court that entered that Order. Proceeding in such a manner would permit the parties whose documents American seeks to state their views on the discoverability of these documents before the documents are produced.

The United States has taken steps to make any the few *NW/CO* documents that it has used in this case available to American. Plaintiff has thus issued subpoenas *in this case* for those *NW/CO* documents that it has used,[23] thereby providing American with notice that the documents had been used and ensuring that American would receive copies of the documents in discovery in this case. American has already received six of the seven documents so used. French Decl., ¶ 11.

## CONCLUSION

For the aforementioned reasons, Defendants' motion should be denied.

Respectfully submitted,

Plaintiff United States

By: /s/

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obtained -- for its own documents in the *NW/CO* proceeding. (*See* Conrath Decl., Ex. 3 and 4).

[23]The United States found only six documents in the documents produced by Delta in response to a NW/CO subpoena that it believes are in any way relevant to this case, and only one document produced by Midwest Express has been used by the United States in this case.