IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-1180-JTM
	)	
AMR CORPORATION, AMERICAN AIRLINES, INC., and AMR EAGLE HOLDING CORPORATION,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the court on defendants' motion to compel answers to Interrogatory No. 2 (Doc. 49). Plaintiff opposes the motion, arguing that Interrogatory No. 2 improperly seeks work product and is unduly burdensome. For the reasons stated below, the motion will be granted.

Background

Plaintiff alleges in this antitrust action that defendants, when confronted with new low-cost and low-fare competition on routes in and out of American's hub at Dallas/Fort Worth International Airport, responded with a predatory strategy designed to protect their monopoly. The strategy included flooding the newly competitive routes with additional

flights and slashing fares until the new competitor withdrew. After the competitor withdrew, defendants curtailed service and raised fares.

Prior to filing the complaint, the Department of Justice (DOJ) conducted a two and one-half year investigation into allegations that defendants monopolized or attempted to monopolize certain markets for air passenger service. As part of that pre-complaint investigation, DOJ attorneys and staff conducted interviews and solicited information from defendants' current and former employees; travel agencies; defendants' competitors; and airport authorities.

Plaintiff disclosed the names and addresses of 159 third-party witnesses who provided information during the pre-complaint investigation.[1] The present dispute concerns defendants' efforts to discover, witness-by-witness, the material or principal facts supporting plaintiff's claims. The sole interrogatory in dispute (No. 2) requests the following information:

> With respect to the persons identified in response to Interrogatory No. 1, identify in detail all material or principal facts supplied to you by these persons that are relevant to your claims that American monopolized or attempted to monopolize any relevant market for air service. For this

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[1] Because defendants participated in pre-complaint interviews of their own employees, defendants only seek discovery of information DOJ acquired from third-party witnesses. Further, although defendants' opening brief states that 161 persons were identified, plaintiff responds that its interrogatory answer (No. 1) listed 159 third-party witnesses. Neither the interrogatory nor plaintiff's answer have been provided to the court and because defendants' reply brief does not contest plaintiff's count, the court relies on the number set forth in plaintiff's response.

purpose, relevant facts include facts relating to your decision to investigate American with regard to these claims; facts relating to whether any of American's fares are below any relevant measure of costs; facts relating to American's ability to charge what you believe to be supracompetitive fares for air service to and from any airport or city; facts relating to competition (from other air carriers providing air service or otherwise) faced by American in providing air service to any airport or city; facts relating to the identification or definition of any relevant market; and facts relating to reasons other than American's predatory conduct that any other carrier determined to enter or exit from city-pairs or airport-pairs you claim American monopolized or attempted to monopolize.

Plaintiff objected and defendants moved to compel. In responding to the motion, plaintiff has narrowed its opposition to arguments that the interrogatory (1) improperly seeks work product and (2) is overly broad and unduly burdensome. Defendants counter that they do not seek counsel's work product but rather the facts supporting plaintiff's claims. Further, defendants do not seek a narrative recitation of all facts, only "material and principal" facts.

Analysis

I. Work Product

The party asserting the work product doctrine as a bar to discovery must show that the privilege is applicable. Resolution Trust Corporation v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995). "The work product privilege protects against disclosure of the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'" Id. at 266 (quoting Fed. R. Civ. P. 26(b)(3)).

However, "because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product." Id., See also Starlight International Inc. v. Herlihy, 186 F.R.D. 626, 645 (D. Kan. 1999)(work product doctrine protects attorney's mental impressions and conclusions, not facts).

Plaintiff contends that Interrogatory No. 2 is objectionable because it asks counsel to provide witness-by-witness summaries of the facts supplied to government attorneys in anticipation of litigation. Because witness-by-witness interview summaries would reveal the mental impressions of counsel, plaintiff argues that Interrogatory No. 2 seeks "classic work product" and the motion to compel should be denied. See Hickman v. Taylor, 329 U.S. 495 (1947)(work product doctrine protects attorney from being forced "to repeat or write out all that witnesses have told him").

The court finds plaintiff's assertion of the work product doctrine to avoid answering Interrogatory No. 2 unpersuasive. Contrary to plaintiff's characterization, Interrogatory No. 2 does not request the DOJ attorneys' notes, internal memoranda, or mental impressions; defendants request only the material or principal facts related to plaintiff's claims. As previously noted, the work product doctrine does not protect plaintiff's facts from discovery. Dabney, 73 F.3d at 266. See also Hickman, 329 U.S. at 507 ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his

possession.")

Plaintiff's argument that linking the names of witnesses to facts violates the work product doctrine is also unpersuasive. It is beyond question that a party is entitled to discover the names of witnesses and the facts in the case. Interrogatories asking for witness names and the facts they possess are standard discovery questions and routinely employed to assist a party in determining which witnesses to depose. See e.g., Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 405 (plaintiff ordered to provide principal or material facts and identify witnesses to support those facts).[2] This case is unusual only because plaintiff has provided 159 witness names. Associating the 159 names with the facts they possess may raise other concerns such as undue burden, but it is not a violation of the work product doctrine.

In summary, the court rejects plaintiff's objection based on work product. Work product is not a defense because Interrogatory No. 2 requests facts and not counsel's mental impressions or conclusions. The interrogatory does not require a complete recitation of statements a witness may have provided to counsel; plaintiff is only required

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[2] In support of its argument, plaintiff relied on opinions issued in the early 1960's and 1970's. In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973); Shultz v. United Steelworkers, Civ. Action No. 69-919 (W.D. Pa. June 10, 1970)(unpublished); Uinta Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495, 498-502 (D. Utah 1964); Harvey v. Eimco Corp., 28 F.R.D. 380 (E.D. Pa. 1961). The court has carefully reviewed plaintiff's case citations and finds no persuasive authority to support plaintiff's argument that listing the witnesses' name with the facts they possess violates the work product doctrine.

to provide the substance of the "material or principal facts" which the witness possesses concerning this case.

II. Overly Broad and Unduly Burdensome

Plaintiff also objects that Interrogatory No. 2 is overly broad and unduly burdensome because it asks for all "material or principal facts" supplied by the 159 witnesses that are "relevant to your claim that [defendants] monopolized or attempted to monopolize any relevant market or air service." Plaintiff complains that this single interrogatory encompasses virtually all allegations in the government's 57-paragraph complaint. Because Interrogatory No. 2 is a "blockbuster" request covering all allegations, plaintiff argues that the motion to compel should be denied.

The above quoted language from Interrogatory No. 2 is overly broad and unduly burdensome because it sweeps virtually all allegations within plaintiff's complaint into one interrogatory. Hilt v. SFC, Inc., 170 F.R.D. 182 (D. Kan. 1997)(interrogatory which indiscriminately sweeps entire pleading is overly broad and unduly burdensome); cf. IBP, Inc. v. Mercantile Bank, 179 F.R.D. 316 (D. Kan. 1998)(interrogatory which does not encompass every allegation or a significant number of allegations in complaint reasonably places a duty on party to answer with material or principal facts).

However, Interrogatory No. 2 continues by explaining that relevant facts include:

(1) facts related to your decision to investigate [defendants] with regard to these claims;

(2) facts relating to whether any of [defendants'] fares are below any relevant measure of cost;

(3) facts relating to [defendants'] ability to charge what you believe to be supracompetitive fares for air service to and from any airport or city;

(4) facts relating to competition (from other air carriers providing air service or otherwise) faced by [defendant] in providing air service to any airport or city;

(5) facts relating to the identification or definition of any relevant market; and

(6) facts relating to reasons other than [defendants'] predatory conduct that any other carrier determined to enter or exit from city-pairs or airport-pairs you claim [defendant] monopolized or attempted to monopolize.

These six separate inquiries are sufficiently defined and narrow enough to withstand plaintiff's objection and the court will order plaintiff to answer them.[3]

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[3] Although defendants have presented a compound interrogatory with multiple parts, the court will not delay discovery by requiring defendant to reissue separately numbered interrogatories.

IT IS THEREFORE ORDERED that defendants' motion to compel (Doc. 49) is GRANTED, consistent with the rulings stated herein. Plaintiff shall answer defendants' Interrogatory No. 2 on or before February 22, 2000.

Dated at Wichita, Kansas this 7th day of February 2000.

KAREN M. HUMPHREYS
UNITED STATES MAGISTRATE JUDGE