IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ITS OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

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INTRODUCTION

In this monopolization case, the United States alleges that AMR Corporation, American Airlines, Inc., and AMR Eagle Holding Corporation ("defendants" or "American"), 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 ("DFW"), respond with a predatory strategy designed to protect their monopoly. The predatory strategy includes flooding the newly competitive routes with additional flights and slashing their fares -- until the entrant withdraws. Then defendants curtail their service and raise fares.

The present dispute arises from defendants' efforts to discover, by interrogatory, information contained in notes and memoranda memorializing interviews conducted during various Department of Justice ("DOJ") law enforcement investigations and in anticipation of litigation by DOJ attorneys.

Defendants' interrogatory also seeks information that was supplied to DOJ attorneys even if that information is not described in notes or memoranda.

Defendants' interrogatory number 2 provides:

> With respect to the persons [from whom you solicited and/or received information], 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 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 cost; 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 of 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.

In essence, defendants seek to require the United States to create a lengthy, witness-by-witness summary, drawn from numerous interviews conducted during its investigation of defendants' conduct, and during four other investigations into allegations of monopolization in the airline industry.[1]

During its investigations, DOJ's Antitrust Division gathers information by means of voluntary, informal interviews conducted by attorneys.[2] The attorneys who conduct the interviews generally take notes, and frequently, an attorney, or a paralegal under the supervision of an attorney, prepares a

[1]In their Memorandum of Law, defendants have clarified that they seek only information supplied orally by third parties, thereby relieving the United States of the obligation to summarize information supplied in writing.

[2]The Antitrust Division is also authorized to issue investigative subpoenas for production of documents, answers to interrogatories and oral testimony. 15 U.S.C. § 1312.

memorandum after the interview.[3] The notes and memoranda generated in connection with these interviews reflect the attorneys' choice of which questions to ask the interviewee and what answers to describe. Far from being verbatim statements, these notes and memoranda are summaries of the attorneys' understanding of information supplied during the interview. They highlight specific issues of interest to the legal analysis, and often summarize the reasons the interview was conducted; characterize the importance of the information learned; draw inferences based on that information; describe the lawyers' impressions concerning the cooperation, credibility or knowledge of the interviewee; and identify potential areas of further inquiry. In other words, the contents of the notes and memoranda provide a snapshot of the mental impressions and strategy of the DOJ's attorneys conducting and attending the interviews.[4] The memoranda are not shown to the person(s) interviewed nor to anyone else who is not an employee or agent of the DOJ. (Conrath Decl. (Ex. 1) at ¶ 5.)

Counsel conferred a number of times about American's demand for a witness-by-witness recitation of the United States' notes and memoranda. Counsel for the United States explained that such a summary inherently discloses work-product -- thought processes, selection of issues to cover, and selection of information to describe. Counsel for the United States also requested examples of interrogatories calling for information on a witness-by-witness basis that American's local counsel had answered without raising a work-product objection. No such examples have been provided. (Id. at ¶ 3.)

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[3]These memoranda themselves are classic examples of work-product that is protected from disclosure during discovery. Indeed, defendants acknowledge as much when they say "American . . . [does] not seek the 'private memoranda that the lawyers for the antitrust division prepared after their interviews.'" Defendants' Memorandum of Law ("Memo") at 5.

[4]Of course, attorney recollections of interviews also incorporate impressions and analysis.

The United States agrees that defendants are entitled to factual information underlying the claims asserted. The United States' objections to Interrogatory 2 are based on the way that American seeks disclosure of facts -- with a single interrogatory that encompasses the United States' entire case and in a format that would necessarily reveal protected work-product, for which no showing of need has been made.

ARGUMENT

I. DEFENDANTS' INTERROGATORY NO. 2 IMPERMISSIBLY SEEKS PRODUCTION OF GOVERNMENT WORK-PRODUCT AND OTHERWISE IS OVERLY BROAD AND UNDULY BURDENSOME

Defendants' interrogatory suffers from two fatal defects. First, as Hickman v. Taylor, 329 U.S. 495 (1947), and its progeny teach, because the interrogatory requires the United States "to state in substance any *facts* learned through oral statements of witnesses to [the government's attorneys]," the interrogatory impermissibly seeks disclosure of the government's work-product and should not be enforced. Id. at 509. Second, under this court's precedent, the interrogatory is overly broad and unduly burdensome because it requires the United States to create and provide the equivalent of a lengthy narrative or otherwise detailed account, witness by witness, of its entire case.

A. Tying Facts Learned To Particular Witness Interviews Reveals Classic Work-Product

Defendants do not dispute that the source of the "facts" they seek -- other than documents obtained from third parties which have already been produced -- are the interviews with third parties that the

Department's Antitrust Division conducted in anticipation of this and other litigation.[5] Hickman and numerous cases decided since then, however, establish that forcing a party to summarize the facts obtained from each person interviewed in anticipation of litigation would impermissibly reveal protected work-product. Defendants have made no showing of need, nor asserted that any of these witnesses are unavailable. Thus, American's interrogatory should not be enforced.

1. Hickman v. Taylor Does Not Support Enforcing Defendants' Interrogatory.

In Hickman, three days after a tug boat sank drowning five crew members, the tug owners retained counsel ("Fortenbaugh") to defend them in any future litigation. During his investigation of the accident, Fortenbaugh interviewed the survivors, who subsequently signed the written statements he prepared from those interviews. He also interviewed several witnesses and committed to writing what some of them told him. 329 U.S. at 498. In a subsequent Jones Act case brought on behalf of one of the deceased crew members, plaintiff served an interrogatory asking defendants to identify from whom they had received statements, and then continued: "Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports." Id. at 498-99.

After hearing defendants' objections, the district court enforced the interrogatory and ordered defendants to produce the signed witness statements, and to "state in substance any *fact* concerning this case which defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda." Id. at 499-500 (emphasis added). As the Supreme Court

[5]As discussed in greater detail in B. infra, the United States has made disclosures of documents and information relating to the investigation leading to the filing of this case, and relating to other DOJ investigations of anticompetitive practices in the airline industry.

explained, "the court simply ordered production on the theory that the facts sought were material and were not privileged." Id. at 509. Indeed, because the district court was ordering production only of non-privileged facts, "Fortenbaugh was to submit any memoranda he had made of oral statements so that the court might determine what portions should be revealed to [the plaintiff]." Id.

The Supreme Court disagreed with the trial court, noting that plaintiff had "made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel." Id. at 508. Rather, the Court continued, plaintiff had made "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh." Id. at 509.[6] Emphasizing that "[i]n performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," and that "[t]his work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways," the Court concluded that such attorney work-product "falls outside the arena of discovery." Id. at 510-11.

Because plaintiff had offered no justification for production of these materials, the Court held that the trial court improperly ordered Fortenbaugh to produce his work-product. The Court first held that Fortenbaugh did not need to produce the signed witness statements unless plaintiff had "establish[ed] adequate reasons to justify production," such as the unavailability of the witness. Id. at 511-12. It then continued:

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[6]Later, the Court described the situation in these words: "Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." Id. at. 510.

> [A]s to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, *forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.* The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Id. at 512 (emphasis added).

In 1970, the "work-product doctrine" established in Hickman was "substantially incorporated in Federal Rule of Civil Procedure 26(b)(3)." Upjohn Co. v. United States, 449 U.S. 383, 397-98 (1981). As that rule explains, the doctrine protects from discovery "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)," unless the party seeking discovery makes a showing of "substantial need." FED. R. CIV. P. 26(b)(3).

Hickman and Upjohn, however, concerned a special type of work-product -- "work-product which is based on oral statements from witnesses." Upjohn, 449 U.S. at 401. Asking an attorney to state what a witness told him is necessarily selective of the portions of the interview that the attorney concluded were important enough either to record on paper or to retain in memory. Thus, because forcing an attorney to reveal what a witness told him "tends to reveal the attorney's mental process," the Court explained, "Rule 26 and Hickman make clear [that] such work-product cannot be disclosed simply on a showing of

substantial need . . . . [Rather], a far stronger showing of necessity and unavailability by other means . . . [is] necessary to compel disclosure." Id. at 399, 401-02.[7] To that end, Rule 26(b)(3) specifically provides that when requiring production of any work-product, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Moreover, even though Rule 26(b)(3) on its face applies only to "documents and tangible things," Hickman holds that this heightened protection for work-product based on witness statements applies whether the interview is memorialized on paper or exists only in the attorney's mind as "mental impressions." 329 U.S. at 512-13; see Upjohn, 449 U.S. at 399; United States v. One Tract of Real Property, 95 F.3d 422, 428 n.10 (6th Cir. 1996) (Hickman work-product protection applies to interrogatories and depositions); Maynard v. Whirlpool Corp., 160 F.R.D. 85, 87 (S.D. W.Va. 1995) (same); Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 586 (N.D.N.Y. 1989) ("protected work-product contained in documents and tangible things cannot be obtained through less tangible methods such as . . . deposition questioning").

Despite the history of the work-product doctrine and, specifically, the facts and holding in Hickman, defendants now claim -- as of right and without any showing of need -- that they can require the government to tell what facts government attorneys learned during each of their interviews. Indeed, defendants completely ignore the facts and holding in Hickman, and instead rely on that Court's broad statement that "either party may compel the other to disgorge whatever facts he has in his possession." 329

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[7]The Upjohn Court also noted that "some courts have concluded that *no* showing of necessity can overcome protection of work-product which is based on oral statements from witnesses," and concluded that it was not necessary there to decide whether those cases were correct. Id. at 401 (emphasis in original).

U.S. at 507 (quoted in Defendants' Memorandum of Law ("Memo") at 6-7). But that passage must be read in the context of the Court's holding that the district court erred when it ordered defendant to divulge all non-privileged, material facts by "stat[ing] in substance any *fact* concerning th[e] case which defendants learned through oral statements made by witnesses to Mr. Fortenbaugh." Id. at 500, 509 (emphasis added). Thus, even though a party can force its opponent to disgorge facts, the Court refused to require an attorney to explain what facts he learned from each witness interviewed. Yet that is exactly what defendants are attempting here.

There can be no doubt that what the Court found objectionable in Hickman was plaintiff's attempt to force Fortenbaugh to couple the facts he knew with the witnesses from whom he obtained them. The Court explained that through the use of other properly worded interrogatories, plaintiff had made "the most searching inquiries of his opponents," and that the answers to those interrogatories "necessarily have *included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses*." Id. at 508-09 (emphasis added). And in explaining that under its holding a party would "not be unduly hindered in the preparation of his case [or] in the discovery of facts," the Court emphasized that, among other things, "[s]earching interrogatories directed to Fortenbaugh and the tug owners . . . *all serve to reveal the facts in Fortenbaugh's possession*." Id. at 513 (emphasis added). Since the Court foresaw that properly worded interrogatories could provide "all pertinent information gleaned by [an attorney] through his interviews," yet nonetheless refused to require the attorney to tell plaintiff what facts each witness told him, it was clearly plaintiff's attempt to couple facts with specific interviews that the Court concluded would improperly reveal work-product.

Consequently, it merely begs the question to simply claim, as defendants do, that their interrogatory

seeks only "principal or material facts." (Memo at 9); see Hickman, 329 U.S. at 509 (explaining that trial court had limited discovery to material, non-privileged facts). Instead, it is the way in which defendants attempt to force the government to state those facts that causes the problem. If the law was as defendants claim, the Hickman Court would have affirmed the district court. Rather, as one court has put it: "The issue here presented is not whether defense counsel have a right to learn the relevant factual information, but whether they have a right to that information in a particular form." In re Convergent Technologies, 122 F.R.D. 555, 558 (N.D. Cal. 1988).

2. Cases Decided Since Hickman Do Not Support Enforcement of Defendants' Interrogatory.

Since Hickman, the courts, except for the recent Dentsply[8] case on which defendants rely, consistently have held that a party is not entitled to discover facts in a way that reveals an attorney's work-product. The United States is not aware of any decision, except Dentsply, that has condoned the form in which defendants seek discovery here -- a summary of the facts learned from each person who was interviewed by a party's counsel during the course of trial preparation.

United States v. District Counsel, No. 90 Civ. 5722 (CSH) (S.D.N.Y. Aug. 18, 1992) (Ex. 2) , is instructive. The District Counsel had noticed a deposition seeking the testimony of a representative of the United States Attorney's office concerning the facts and circumstances surrounding the allegations in the complaint. In arguing that the FBI agent designated to testify had to identify witnesses and documents known to her that possessed or contained facts supporting the allegations in the complaint, the District

[8]United States v. Dentsply Int'l Inc., 187 F.R.D. 152 (D. Del. 1999).

Counsel contended -- as American does -- that "facts relevant to the case . . . do not constitute work-product and are clearly discoverable." Id. at *4. The government argued that the defendant could not require individual government agents to identify people they spoke with or documents they reviewed, or what they learned in the course of their investigation. Id.

The court agreed with the government, explaining that while "facts are not protected by the work-product doctrine," it was "the context in which this information [was] sought [that] raise[d] work-product concerns." Id. at *11. Thus, because the FBI agent was not a party or otherwise "the repository of all of the information the Government possesse[d] that [was] relevant to th[e] case," her answers would be selective because what she knew was either learned through her own investigation or told to her by counsel. Id. at *12. The court concluded that "her selective revelation of information will no doubt indicate particular documents or witnesses to which she and her supervising attorneys attach the greatest significance." Id. As to revealing the facts she learned from any particular witness during her investigation, the court held that "information is classic work-product." Id. at *11.

Requiring the United States in this case to summarize what its attorneys learned during each interview would produce the same result found unacceptable in District Counsel. If the United States had to tell defendants what "principal or material facts" each person supplied, defendants could distill "particular . . . witnesses to which [government counsel] attach[es] the greatest significance." Id. at *12. Moreover, by learning what type of information was sought from particular individuals, defendants could discern the investigatory techniques and trial strategies of the United States, including its counsel's tactical or strategic thoughts.

In re Convergent Technologies, 122 F.R.D. 555 (N.D. Cal. 1988), is also on point. There the

court refused to require an attorney to produce purely factual interview notes that the witnesses had subsequently adopted. In "emphatically reject[ing]" the defendants' claim "that witness statements fall outside the work-product doctrine when they contain only facts," the court noted that even in Hickman "there is no reason to believe that the witness statements at issue . . . were anything but factual." Id. at 558.[9]

In holding that production of the notes would impermissibly reveal work-product, the court explained that the true purpose for acquiring a witness statement from another lawyer is "to learn the version of the facts that is set forth in the statement" -- i.e., to learn what specific facts were obtained with each interview. Id. at 558. And there is no difference between forcing an attorney to produce his purely factual interview notes or forcing him to write out those same facts as an answer to an interrogatory in a way that nonetheless provides "the version of the facts that is set forth in the [interview notes]." See Niagara Mohawk, 125 F.R.D. at 586 ("protected work-product contained in documents . . . cannot be obtained through less tangible methods such as . . . depositions [or interrogatories]").

Indeed, in rejecting that same ploy, the Hickman Court noted that plaintiff's counsel had already obtained all the relevant facts through other discovery (329 U.S. at 508-09), and wanted, as does American, to learn specifically what each witness knew "only to help prepare himself to examine [those] witnesses." Id. at 513. See Memo at 4, n.4. (explaining that American's interrogatory is intended to provide it "the opportunity to make informed decisions about which of the more than 161 potential

[9]Indeed, given that the Hickman trial court's production order was limited to providing facts only, Convergent Technologies appears eminently correct. See Hickman v. Taylor, 329 U.S. 495, 500, 509 (1947).

witnesses it should depose"). What was found unacceptable in Hickman has not become any more acceptable with the passage of time. As in Hickman, if defendants want that factual information about particular witnesses, it "is readily available to [defendants] direct from the witnesses for the asking." Id. at 513; accord id. at 508-09 (same), 518 (Jackson, J., concurring).[10] To this end, defendants' citation to Eoppolo v. Nat'l R.R. Passenger Corp., 108 F.R.D. 292 (E.D. Pa. 1985) (Memo at 8), while misplaced, is certainly instructive. In Eoppolo, the court enforced an interrogatory that provided: "State in detail the information you or any of your representatives have or are aware of relating to the accident." As the court noted, the interrogatory "essentially ask[ed] for all information that defendant has obtained relating to plaintiff's case." Id. at 293.[11] Significantly, the interrogatory did not require the defendant to link specific facts to specific interviews. Rather, it allowed the defendant to provide facts in a way that would not reveal counsel's thought process, strategy, or evaluation of the evidence in the case. Thus, rather than supporting defendants, Eoppolo demonstrates the fatal error in the interrogatory here at issue.[12]

In short, a party cannot be forced to produce "facts" in a way that reveals the attorney's investigatory techniques, thoughts, opinions, conclusions, strategy or tactics. Such strategy and tactics include identifying topics to cover in any particular interview. Such thoughts and opinions include deciding

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[10]As discussed in greater detail below, the United States has provided defendants with several lists of persons and entities, together with affiliations, addresses, and telephone numbers, as part of its Rule 26(a) Disclosures and in response to Defendants' Interrogatory No. 1.

[11]As noted in Argument C infra, to the extent the Eoppolo interrogatory required the defendant to provide a narrative of its entire case, it was objectionable under this court's precedent.

[12]Defendants' reliance on Gaynor v. Atlantic Greyhound Corp., 8 F.R.D. 302 (E.D. Pa. 1948) (Memo at 7), is similarly misplaced because, as in Eoppolo, the court merely required defendant to "stat[e] any relevant fact known to it whether obtained from statements taken by its attorney or otherwise," without coupling facts to specific interviews. Id. at 303.

what information is important enough to record and to remember. Because defendants' interrogatory seeks that exact result, it cannot be enforced.[13] See In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973) (holding that a lawyer could not be compelled to tell a grand jury his "interviewees' assertions of fact"); Shultz v. United Steelworkers, Civ. Action No. 69-919 (W.D. Pa. June 10, 1970)(rejecting an interrogatory that required plaintiff to tie specific facts to specific witnesses)(Ex. 3); Uinta Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495, 498-502 (D. Utah 1964) (rejecting interrogatories that would reveal "the substance of numerous conversations which would be known only through interviews of counsel"); Harvey v. Eimco Corp., 28 F.R.D. 380 (E.D. Pa. 1961) (noting that interrogatories cannot be used to obtain, in substance, a summary of statements obtained in preparation for trial).

In addition to violating "the general policy against invading the privacy of an attorney's course of preparation," defendants' interrogatory presents other problems. Hickman v. Taylor, 329 U.S. at 512. Indeed, the Hickman Court noted several potential dangers with requiring an attorney to divulge what he learned during an oral interview. First, it would "force[] the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks." Id. at 513. This, of course, "gives rise to grave dangers of inaccuracy and untrustworthiness." Id. Moreover, such a statement "could not qualify as evidence; [and] to use it for impeachment or corroborative purposes would" be improper and problematic. Id.

3. Dentsply Is Inconsistent With Hickman and Its Progeny.

[13]Under defendants' narrow view of the work-product privilege, nothing would bar an interrogatory requiring attorneys to deliver periodically to opposing counsel a summary report of each witness interview they conduct as they prepare for trial.

Finally, the United States respectfully submits that the ruling in Dentsply is inconsistent with Hickman and its progeny. While Dentsply enforced an interrogatory that required the government to state the facts provided by each person it interviewed, as defendants seek here, none of the cases cited by the court -- or indeed cited by defendants in their motion to compel -- enforced or support enforcing such an interrogatory. And we know of no such case.

Thus, although Dentsply cites Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984), Bogosian dealt specifically with "the interaction between Fed. R. Civ. P. 26(b)(3) [work-product] and 26(b)(4) [expert witnesses]." Id. at 589. The court there merely decided that plaintiffs were entitled to a copy of the documents given to defendants' expert witnesses to use in preparing their opinions. The court was careful to note, however, that the discoverable "facts" did not include any of defense counsel's thoughts and opinions that were contained in the documents. It therefore ordered the district court to examine the documents *in camera* "to redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialetic." Id. at 595. Nothing there supports enforcing the interrogatory here.

Farran v. Johnson Equip., Inc., Civ. No. 93-6148 (E.D. Pa. Sept. 12, 1995)(Ex. 4)(quoted in Memo at 8), concerned only enforcement of interrogatories in which "plaintiff request[ed] factual information regarding whether conversations took place and among whom. However, in those particular [interrogatories], defendant [was] not being asked to give the substance of those statements." Id. at *3 With respect to other interrogatories that did "request the substance of any of the conversations," the court noted that defendant had provided absolutely no information to allow it to evaluate whether any conversation was either privileged or protected as work-product. It therefore gave the defendant an

opportunity to do so. Id. at *4.

The other cases cited in Dentsply similarly provide no support for compelling the creation and production of a witness-by-witness summary. Eoppolo, as noted above, did not concern an interrogatory that required tying facts to specific interviews. Similarly, in In re Dayco Corp., 99 F.R.D. 616 (S.D. Ohio 1983), the court enforced interrogatories that merely asked plaintiffs to identify the people with knowledge of the events alleged in the complaint, and to state the grounds of the allegations. Indeed, the court specifically noted that what was being ordered produced were the names of people from whom counsel obtained information, that it likened to "a list of 'occurrence witnesses,' which are discoverable at any time." Id. at 624. The United States has already produced the names, addresses, and telephone numbers of such people.

Dentsply's (and defendants') citation to Musko v. McCandless, Civ. No. 94-3938 (E.D. Pa. Sept. 29, 1995)(Ex. 5)(cited in Memo at 8), is truly curious, because that case does not apply the work-product doctrine at all. Indeed, it is not even clear that any of the information at issue was prepared or obtained "in anticipation of litigation." Rather, the case involved the plaintiff's attorney's conduct -- when plaintiff was involuntarily committed, the attorney allegedly told the committing physician-defendant "that plaintiff was 'eccentric,' 'manic' and 'depressed.'" Finding that the attorney was a "fact witness," the court refused to issue a protective order preventing his deposition. Id. at *1. Finally, as noted above, the last two cases cited in Dentsply, Convergent Technologies, supra, and Laxalt v. McClatchy,[14] actually prohibited any

[14]Laxalt v. McClatchy, 116 F.R.D. 438 (D. Nev. 1987), concerned the depositions of two private investigators who possessed relevant information from before and after their retention by the defendants. While the court held that the investigators could be questioned about facts relevant to the case, it recognized that the form of a question could cause the deponent to "reveal counsel's tactical or

discovery that would have linked specific information to individual interviews.

The additional citations offered by American similarly provide no support for enforcing its interrogatory. Resolution Trust Corp. v. Dabney, 73 F.3d 262 (10th Cir. 1995) (cited in Memo at 7), is a sanctions case in which government counsel instructed a deposition witness not to answer *any* questions unless government counsel first allowed him to answer. The court merely held that counsel's "blanket work-product objection" was improper because counsel "did not meet his burden of proving that *each* question he instructed [the witness] not to answer called for work-product." Id. at 266 (emphasis added). In Starlight Int'l, Inc. v. Herlihy, 186 F.R.D. 626 (D. Kan. 1999) (cited in Memo at 7), the court merely held that the work-product doctrine does not protect discussions between co-defendants "which occurred outside the presence of counsel and without direction by an attorney." Id. at 645-46.

In Swarthmore Radiation Oncology, Inc. v. Lapes, 155 F.R.D. 90 (E.D. Pa. 1994) (cited in Memo at 7), the court enforced an interrogatory that stated five specific facts and asked for the names of any person who had stated any of those facts to the plaintiffs. Id. at 92. To prevent plaintiffs from revealing counsel's inferences drawn from any particular interview, however, the court cautioned that plaintiffs only had to disclose those instances where a witness' "explicit statement" matched the fact set forth in the interrogatory. Id. at 93. That interrogatory in no way resembled defendants' Interrogatory No. 2 at issue

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strategic thoughts." Id. at 442-43. It therefore ordered the questioning attorney to "carefully tailor his questions in the deposition, so as to elicit specific factual material, and avoid [questions] which could lead to the disclosure of trial strategies." Id. at 443. As in District Counsel, the court also held that the investigators could not be forced to identify the particular witnesses they had interviewed or the documents they had reviewed, since that information tends to reveal which sources or evidence are considered important and, therefore, counsel's tactical or strategic thoughts. Id. at 443-44.

here. In Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86 (W.D. Okla. 1980) (cited in Memo at 7-8), the court held that the work-product doctrine did not apply to three deposition questions asking for very specific factual material -- such as the names of people who attended a particular meeting, and whether "Plaintiffs' Exhibit 22" contained the "'copies of certain General Ledger entries'" referred to in a particular letter. Id. at 89. Again, the interrogatory at issue here cannot be described as seeking very specific factual material.

Finally, American can find no solace in Mike v. Dymon, Inc., Civ. No. 95-2405-EEO (D. Kan. Nov. 14, 1996)(Ex. 6) (cited in Memo at 7). There the court specifically found that defendant had provided no information to establish the applicability of the work-product doctrine, as required by Federal Rule of Civil Procedure 26(b)(5). Id. at *9. It therefore concluded that the interrogatory at issue "does not ask for the content of a work-product document." Id. Indeed, it would be pure speculation to conclude that any attorney-witness interview was even at issue in that case. Here, all of the information defendants seek was obtained during attorney-witness interviews. And that information is possessed by the United States only in the form of the attorneys' interview notes or memoranda, or in the attorneys' minds. As such, it is "classic work-product." United States v District Counsel, supra at *10 (Ex. 2). Thus, by asking for the facts as provided by each person interviewed, defendants are attempting an "impermissible inquiry as to the content of [work-product documents]." Starlight Int'l, 186 F.R.D. at 646.

In sum, other than stating the general proposition announced in Hickman itself -- i.e., a party is entitled to discover facts -- the cases cited by American and Dentsply do not support an order that attorneys' interviews conducted in anticipation of litigation be produced in a form that links each piece of information with each witness who provided it. As explained above, merely stating the general proposition

simply begs the real question -- would the *form* in which the facts are sought impermissibly reveal attorney work-product? The answer in Dentsply was "yes" so the court should not have ordered production. Similarly, enforcing defendants' interrogatory here would erroneously result in production of work-product.

B. American Has Made No Showing of Need to Justify Discovery of Work-Product

A party seeking another party's work-product must show both a substantial need for the information and that it would suffer undue hardship to obtain the substantial equivalent of the materials by other means. FED. R. CIV. P. 26(b)(3). As noted above, to obtain work product based on attorneys' witness interviews, a much stronger showing of necessity and witness unavailability is required, if it is producible at all. See supra at p. 8. A party cannot demonstrate undue hardship if that party can depose or otherwise interview the witnesses itself. Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984).

American claims that it needs the witness-by-witness summaries of the United States' interview notes and memoranda to make "informed decisions about which of the more than 161 potential witnesses it should depose" but does not assert that any witnesses are unavailable for an interview or a deposition. The United States has provided the last known addresses and phone numbers of these individuals, and American is free to contact every one.

American seems to be suggesting that, because the DOJ conducted a pre-complaint investigation that included third party interviews to which American was not privy, the United States must now make available its work product so that American can "catch up." This is not only an inadequate basis to overcome the work product doctrine, but it is specious.

When the parties to this litigation met to discuss case scheduling, both sides expressed a desire to

get to trial as quickly as possible. At no time during that meeting or subsequently, however, did counsel for the United States indicate that it would waive its work-product protection, or that it would produce witness-by-witness summaries as ordered in Dentsply as a *quid pro quo* for what American describes as an "aggressive pre-trial schedule." Memo at 4;. (Conrath Decl. (Ex. 1) at ¶ 7). On the other hand, the United States agreed to disclose, at American's request, information relating to its *other* investigations of anticompetitive conduct in the airline industry, as well as information relating to the investigation that led to the filing of this case. (Id. at ¶6.) Accordingly, the United States' Rule 26(a) Disclosure identified 180 persons and/or entities who supplied information to the Antitrust Division in connection with the investigation of American *and* with now closed investigations (open at any time since January of 1993, the earliest date alleged with particularity in the United States' complaint) where those investigations encompassed an issue similar to any issues alleged in this case. See Ex. B to Memo. To help focus American's discovery, the United States identified the 47 persons and entities who supplied information in connection with the investigation leading to the filing of this case against American on a separate list. (Conrath Decl. (Ex. 1) at ¶ 8.) On August 26, 1999, American served its First Set of Interrogatories, which the United States answered on September 27, 1999. In its answers to Interrogatories 3-9, the United States provided substantial additional detail about the basis for its case. The United States' answer to Interrogatory No. 1 identified 159 individuals, each of whom had already been disclosed in the Rule 26(a) Disclosure. (Ex. 7).

Having insisted on an overbroad disclosure reaching beyond the investigation that preceded the filing of this case, American now argues that it must assess every one of these 159 persons for their knowledge of issues relevant to this case, even though only 47 of them supplied information in connection

with the investigation of American. With no showing that these individuals will not speak to its counsel voluntarily,[15] American then complains that the current 50-deposition limit makes such an assessment impossible. Hence, American contends, the United States' must make available its work-product. This does not constitute a showing of need within the meaning of the case law. To the extent that American's motion to compel suggests a perceived imbalance in access to evidence, there is no such imbalance nor could it justify the order that American seeks.

C. Defendants' Blockbuster Interrogatory Is Overly Broad and Unduly Burdensome Because It Requires a Narrative Account of the United States' Entire Case

If defendants' Interrogatory No. 2 asked for the principal and material facts that support *a single allegation*, the United States would not have objected that the interrogatory is overly broad and unduly burdensome. However, Interrogatory No. 2 asks the United States to "identify in detail all material or principal facts" relevant to the claims that American monopolized or attempted to monopolize any relevant market for air service. This single interrogatory encompasses virtually all of the allegations in the United States' 57-paragraph complaint (Ex. 8), which charges defendants with monopolization and attempted monopolization of various DFW markets. Specifically, except for Paragraphs 8-12, which describe the defendants and allege jurisdiction, 52 paragraphs of the complaint contain the allegations supporting those

[15]Such a claim would be surprising, given that American is the nation's largest air carrier and should be more familiar with persons and companies knowledgeable about the airline industry and *its* conduct, which is at issue in this case, than is the DOJ. For many of the people identified, such as representatives of airports and travel agents, American has employees dedicated to developing and maintaining relationships with them.

two claims.[16]

Of course a party may seek by interrogatory the factual basis of the opposing party's allegations. Continental Illinois Nat'l Bank & Trust Co. v. Caton, 136 F.R.D. 682, 684 (D. Kan. 1991). However, the party must limit each interrogatory to a discrete issue. See Lawrence v. First Kansas Bank & Trust Co., 169 F.R.D. 657, 662-64 (D. Kan. 1996)(a party need not respond to an interrogatory addressing 58 of 79 total paragraphs of the complaint). An interrogatory that encompasses multiple issues requires the opposing party to provide a detailed "narrative or description of the entire case." Hilt v. SFC Inc., 170 F.R.D. 182, 188 (D. Kan. 1997). Such "blunderbuss interrogatories" are overly broad and unduly burdensome. Lawrence, 169 F.R.D. at 663-64 (quoting WILLIAM W. SCHWARZER ET AL., CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE, 4-10 to 4-11 (2d ed. 1994))("Schwarzer"). For example, in Hilt, the court sustained objections to four "blockbuster" interrogatories that asked for all facts supporting all of the allegations of four counts of the complaint. 170 F.R.D. at 186-87. The court found the interrogatories overly broad and unduly burdensome because they "would require plaintiff to provide the equivalent of a narrative or otherwise detailed account of her entire case in chief, together with identification of virtually all supporting evidence for each fact." Id. at 186.

Defendants attempt to distinguish Interrogatory No. 2 from those in Lawrence and Hilt by limiting their request to only the "material or principal" facts relevant to the United States' two claims. This

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[16]Thus, American's single interrogatory could be construed as literally dozens of interrogatories. See Hilt v SFC, Inc. 170 F.R.D. 182, 188 (D. Kan. 1997); Lawrence v. First Kansas Bank & Trust Co., 169 F.R.D. 657, 661 (D. Kan. 1996). Moreover, given that American wants summaries of what 161 people told DOJ attorneys, its interrogatory looks even less like it should be counted as only one interrogatory. Where the parties have agreed to limit the number of interrogatories, as is true here, such an interrogatory is especially improper.

argument is without merit -- not because their interrogatory excludes facts of lesser importance, but because the interrogatory covers too many issues. Given the number of people for whom defendants seek a summary of information supplied, an answer to Interrogatory No. 2 would run dozens of pages. A comprehensive interrogatory remains overbroad despite the insertion of the "material or principal" language. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404-05 (D. Kan. 1998)("Interrogatories *which do not encompass every allegation, or a significant number of allegations, of the Complaint*, reasonably place upon the answering party 'the duty to answer them by setting forth the material or principal facts'")(emphasis added); IBP, Inc. v. Mercantile Bank , 179 F.R.D. 316, 321 (D. Kan. 1998)(distinguishing interrogatories from those in Lawrence and Hilt because they did not "simply sweep the entire complaint" and were limited to specific, discrete issues). The Hilt Court did not attempt to cure the objectionable interrogatories by limiting them to the "material or principal" facts sought. Instead, it simply held that the party "need not respond to them." 170 F.R.D. at 188.

Interrogatory No. 2 is also distinguishable from the more limited interrogatories propounded in In re Savitt/Adler Litig., 176 F.R.D. 44 (N.D.N.Y. 1997)(cited in Memo at 10), where defendant sought facts supporting specific allegations that (1) each named defendant participated in certain employment decisions; and (2) each named defendant made employment decisions based on endorsements of a political party. Id. at 46, 48. Those interrogatories each related to discrete issues. Moreover, the court's use of the term "narrative" is inapposite to the United States' objection. There the court used the term in the narrow context of explaining that the "[t]he interrogatories seek facts, not documents or tangible objects, and the proper form of response is a narrative answer, not a reference to documents or objects where the answers might be found." Id. at 48

Defendants' interrogatory reflects a continuing litigation problem. In Lawrence and Hilt, this Court noted that "blockbuster interrogatories" such as American's Interrogatory No. 2 "represent a type of excess which in the opinion of the Court has become too common in recent years." 169 F.R.D. at 662; 170 F.R.D. at 186. In each case, this Court attempted to discourage the use of such interrogatories. See Lawrence, 169 F.R.D. at 663. In fact in Hilt, this Court expounded:

> Indiscriminate use of blockbuster interrogatories, such as these, do not comport with the just, speedy, and inexpensive determination of the action. . . .
>
> The nature of the federal discovery rules themselves suggests they are intended to facilitate reasonable discovery, not unduly burdensome, but selected by each party to fit the needs of the particular case. . . .This requires counsel in any given case to exercise professional judgment and determine the priorities of discovery.
>
> . . . . If the drafters of the rules had intended to authorize interrogatories with an impact as wide as the entire case, they could more realistically and easily have adopted a simple rule to require every pleading to be accompanied by a statement of all the facts supporting every allegation and the identifications of every knowledgeable person and supporting document. The rules, of course, contain no such requirement. They contemplate instead that discovery in each case be sensibly organized and managed -- and often limited -- to provide each party with reasonable opportunity to learn information essential to a fair resolution of the case.

170 F.R.D. at 187. Then, this Court explained how proper interrogatories should be drafted:

> *Each interrogatory should consist of a brief, simple, direct, and unambiguous question, dealing with one point only*. The question should be objective and nonargumentative. *They should not seek narrative answers* or attempt to argue, cross-examine, or impeach. . . . .*Interrogatories should be targeted at discrete issues, rather than blanketing the case*, and should be few in number.

Id. (quoting Schwarzer)(emphasis added).

Finally, any suggestion that the United States is arguing form over substance -- because American could have addressed a separate but identical interrogatory to each paragraph, or a few paragraphs, of the complaint -- is dispelled by Lawrence. There, plaintiff submitted eight interrogatories, one of which addressed 14 paragraphs, a second which addressed 8 paragraphs, and six others that each addressed 6 paragraphs (58 total) of defendant's 79-paragraph answer. See 169 F.R.D. at 660-61. The Court found these eight interrogatories overly broad and unduly burdensome. In so finding, the Court distinguished the defendant's "similar" eight interrogatories for the sole reason that defendant's interrogatories "relate[d] to allegations in only seven of the 79 paragraphs of the complaint." Id. at 663. In short, when propounding interrogatories, this district requires each party "to exercise professional judgment and determine priorities of discovery," so that interrogatories are drafted to "'consist of a brief, simple, direct, and unambiguous question, dealing with one point only'." Hilt, 170 F.R.D. at 187 (quoting Schwarzer, supra.).

II. CONCLUSION

American has not identified any reason for departure from the well-settled practice of this district, or from other well-settled procedural holdings that overbroad interrogatories seeking work-product material will not be enforced. Accordingly, the United States respectfully requests that this Court deny American's motion for an order compelling an answer to Interrogatory No. 2.

Dated this 8th day of December, 1999.

Respectfully submitted,

Plaintiff United States

By: "/s/"

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via Federal Express this 8th day of December 1999, to:

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EXHIBITS

1. Declaration of Craig W. Conrath

2. United States v. District Counsel, No. 90 CIV. 5722 (CSH), (S.D.N.Y. Aug. 18, 1992)

3. Shultz v. United Steelworkers, No. 69-919 (W.D. Pa. June 10, 1970)

4. Farran v. Johnson Equip. Inc., No. 93-6148 (E.D. Pa. Sept. 12, 1995)

5. Musko v. McCandless, No. 94-3938 (E.D. Pa. Sept. 29, 1995)

6. Mike v. Dymon, Inc., No. 95-2405-EEO (D. Kan. Nov. 14, 1996)

7. Complaint in United States v. AMR Corporation, American Airlines, Inc., and AMR Eagle Holding Corporation, No. 99-1180-JTM

8. Plaintiff's Response to Defendants' Interrogatory No. 1 & Appendix A