UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
STATE OF WISCONSIN,	)	
	)	
STATE OF ILLINOIS, and	)	
	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:10-cv-00059-JPS
	)	
	)	
v.	)	
	)	
DEAN FOODS COMPANY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' RESPONSE TO MOTION TO COMPEL A DISCOVERY RESPONSE TO THE FIRST INTERROGATORY OF DEAN FOODS COMPANY

Dean Foods Company's Motion to Compel a response to its First Interrogatory should be denied because it seeks protected attorney work product. In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court held that an interrogatory like Dean's, requesting all facts an attorney had obtained from third-party interviews, improperly sought production of work product. This principle was affirmed and strengthened in Upjohn v. United States, 449 U.S. 383 (1981). Under this controlling precedent, factual information obtained from an attorney's interviews of third-party witnesses whether recorded in an attorney's notes, memoranda, or recollections is opinion work product entitled to special protection. Ignoring this Supreme Court precedent, Dean does no more than cite two opinions that are non-binding on this Court and are inconsistent with Hickman and Upjohn. And even if what Dean seeks is considered "fact" work product,

Dean is entitled to such information only by showing both a substantial need and an inability to obtain equivalent materials without undue hardship. Dean has not attempted to make such a showing. A movant cannot demonstrate a substantial need for work product materials if, like Dean, it is free to depose or otherwise interview the individuals and entities in question. This Court's Scheduling Order provides Dean with more than enough time (a nine-month fact discovery period) and deposition hours (225) for its own discovery.

FACTUAL BACKGROUND

On April 1, 2009, Dean acquired the two fluid-milk processing plants owned by Foremost Farms USA ("Foremost"). Compl. ¶ 1. The acquisition was not required to be reported to federal antitrust authorities. Compl. ¶ 22. The United States opened an antitrust investigation into this transaction on April 20, 2009. Declaration of Karl D. Knutsen ("Knutsen Decl.") ¶ 3. That investigation culminated in this lawsuit, in which Plaintiffs assert that the acquisition violates Section 7 of the Clayton Act. 15 U.S.C. § 18.

The United States investigated the competitive effects of the acquisition over several months. The United States issued Civil Investigative Demands ("CIDs") for documents or deposition testimony to Dean and 20 third parties. Other third parties also provided documents voluntarily. The vast majority of material obtained during the investigation came from Dean. For example, Dean produced 79,021 documents (approximately 1.1 million pages), compared to the 9,985 documents (49,859 pages) produced by third parties. The United States deposed ten Dean employees, compared to four depositions of third-party employees. Knutsen Decl. ¶¶ 4, 5;

Ex. 1.[1] In its Initial Disclosures dated May 27, 2010, the United States produced to Dean all third-party documents, data, transcripts, and declarations gathered during its investigation that are relevant to the claims in this case, regardless of whether they supported the allegations of Plaintiffs' Complaint. Knutsen Decl. ¶ 6; Ex. 2.

The United States also conducted approximately 170 interviews with third parties during its pre-Complaint investigation.[2] These interviews, typically conducted by telephone, are an important method by which the United States collects information to make a decision whether to challenge an acquisition under the Clayton Act. Declaration of Joshua H. Soven ("Soven Decl.) ¶ 5." The participants in these interviews usually included attorneys and economists employed by the United States. One attorney typically led the questioning with others in attendance asking follow-up questions as necessary.

The interviews were not tape recorded, nor was any attempt made to create a verbatim statement of the information conveyed. Instead, the participants took notes of the information they believed significant, and, after the interview, an attorney or paralegal working at the direction of an attorney, drafted an internal memorandum summarizing the relevant information. Knutsen Decl. ¶¶ 7-8. One or more of the attorneys participating in the interview typically reviewed and edited the draft memorandum before broader circulation to ensure that the information important to the legal and economic theories being investigated was recorded. In

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[1] The United States is following Federal Local Rule 26 regarding the sequential numbering of exhibits, starting at Exhibit 1. In this brief, "Dean Mem. Ex. " refers to Defendant's exhibits attached to the Declaration of Steven G. Bradbury on July 23, 2010.

[2] Since the filing of the Complaint, the United States has conducted approximately 45 additional interviews. Knutsen Decl. ¶ 10. The Plaintiff States did not conduct any interviews in which the United States did not also participate. Knutsen Decl. ¶ 7.

addition to summarizing the attorneys' understanding of the information conveyed during the interview, many of these interview memoranda state the reasons the interview was conducted, characterize the importance of the information learned, evaluate the interviewee as a possible witness for litigation purposes, or identify potential areas of further inquiry. Knutsen Decl. ¶ 8.

The notes and memoranda at issue were drafted in anticipation of litigation with Defendant because they were part of the investigation into whether Dean's acquisition of Foremost's fluid milk processing plants violated Section 7 of the Clayton Act. See SafeCard Servs. Inc. v. S.E.C., 926 F.2d 1197, 1203 (D.C. Cir. 1991) (when an "attorney prepares a document in the course of an active investigation focusing on specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product"). The United States treats these internal interview memoranda and interview notes as confidential attorney work product. They have not been shown to the persons who were interviewed nor have they been produced to any of the Plaintiff States or any consulting or testifying expert retained by Plaintiffs. Knutsen Decl. ¶ 9.

Soon after the Complaint was filed, Dean began requesting all of the factual information obtained by the United States from third-party interviews, claiming it needed to "catch up" with Plaintiffs after their pre-Complaint investigation. Knutsen Decl. ¶¶ 11-14. The United States disagreed with Dean's premise that its investigation justified this request. Dean is the largest dairy processor in the area and thus very knowledgeable about the competitive conditions in the region at issue. In its Initial Disclosures, Dean listed 25 of its own employees who work in the relevant geographic market, many of whom are dedicated to developing and maintaining relationships with the individuals and entities Plaintiffs interviewed. Knutsen Decl. ¶ 16.

Further, Dean evaluated this acquisition's antitrust consequences beginning in at least April 2008. Knutsen Decl. ¶ 17. Dean had every reason to do so because Foremost refused to sell its assets to Dean unless Dean agreed to accept the financial risk that the deal might be dissolved on antitrust grounds a risk that Dean ultimately accepted. Knutsen Decl. ¶ 18; Ex. 3. During Plaintiffs' investigation, Dean submitted several hundred pages of position papers and related documents addressing various legal and economic issues, demonstrating that it had collected and analyzed a large amount of factual information concerning the acquisition's effect on the market. Knutsen Decl. ¶ 19.

Nonetheless, Plaintiffs made substantial efforts to address Dean's asserted need to "catch up" and gather additional third-party information. Plaintiffs:

- agreed to a nine-month fact discovery period, equal in length to the United States's pre-Complaint investigation;
- agreed to provide Dean with 225 hours of deposition time the equivalent of over 32 full, seven-hour deposition days;
- agreed to provide Dean with an early list of Plaintiffs' tentative fact witnesses for trial (which was provided three days ago, on August 10);
- narrowed its list of fluid milk purchasers (such as retailers, cooperatives, and distributors) possessing information that Plaintiffs may use to support their claims to 44 retailers and 10 distributors, after Dean complained to Plaintiffs that there are 4,000 such purchasers in the market and that it needed Plaintiffs to narrow their focus; and
- provided Dean with a list of persons that Plaintiffs either interviewed or tried to interview, after Dean complained that what it really wanted to know were the identities of persons who do not support Plaintiffs' claims.

Knutsen Decl. ¶¶ 15, 20-22.

On June 16, 2010, Dean served its First Interrogatory. It asks Plaintiffs to "[i]dentify each of the individuals and entities interviewed by each of the Plaintiffs (either together or

independently) pursuant to the Investigation of the challenged Transaction and provide all factual information obtained from these individuals and entities through such interviews that is relevant to Plaintiffs' claims in this case."[3]

The definitions and instructions to this interrogatory underscore its breadth: it calls for any factual information recorded in interview memoranda and attorney notes, or that still exist in the recollections of attorneys or others who participated in such interviews;[4] its definition of "interviews" includes all verbal communications of any kind not reflected in deposition transcripts or declarations already produced to Dean;[5] and it requests facts from interviews occurring both before and after the filing of the Complaint.[6] In short, Dean's interrogatory would require Plaintiffs to search not only their interview notes and memoranda but also the memories of every attorney and other participants in any interview, phone call, or other verbal communication with a third party. And it would require Plaintiffs to do so on an ongoing basis throughout discovery.

Dean initially contended that the disclosure of such material is routine in civil litigation, but has been unable to identify any examples of it occurring in this District. See Dean Mem. Exs. 4, 5. Instead, Dean now asserts that the more appropriate analogy to this civil case is this

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[3] Memorandum in Support of Motion to Compel a Discovery Response to the First Interrogatory of Dean Foods Company ("Dean Mem.") at 2.

[4] Dean Mem. Ex. 1 at 4 (Instruction 7, "responses should reflect all knowledge, information, and documents in the possession, custody or control of Plaintiffs").

[5] Id. at 2-3 (Definition 7).

[6] Id. at 3 (Instructions 2-3, seeking all information since April 1, 2009 and stating that the interrogatory is "continuing in character, so as to require you to file supplemental responses if you obtain different information after the date upon which you provided your Response.").

District's "open file" disclosure policy in criminal prosecutions, id. or, in the alternative, the constitutional obligation to disclose exculpatory material to a criminal defendant. See Dean Mem. at 12.

On July 23, 2010, Plaintiffs informed Dean that it would provide some third-party information in its responses to Dean's Second Set of Interrogatories, which are more focused interrogatories seeking factual support for certain allegations in the Complaint. Plaintiffs advised Dean that those contention interrogatories could be answered in ways consistent with the work product doctrine, as expressly discussed in Hickman v. Taylor, 329 U.S. 495 (1947). See Dean Mem. Ex. 6. Nonetheless, Dean filed its Motion to compel later that day.

ARGUMENT

DEAN'S INTERROGATORY WOULD COMPEL PLAINTIFFS TO PRODUCE PROTECTED WORK PRODUCT.

A. Hickman and its progeny hold that interrogatories seeking all "facts" obtained from third-party interviews are impermissible attempts to obtain opinion work product.

In Hickman v. Taylor, the Supreme Court held that an interrogatory requesting all facts that an attorney had obtained from third-party interviews improperly sought production of protected work product. In that case, a civil action arising out of the sinking of a tugboat, an attorney (Fortenbaugh) had conducted several pre-complaint interviews with potential witnesses. Id. at 498. The district court ordered Mr. Fortenbaugh to produce all statements, oral or written, that he had obtained through third-party interviews. Id. at 498-99. It also compelled an answer to an interrogatory nearly identical to the interrogatory at issue in this case, requiring Fortenbaugh 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 500 (emphasis added).

The Supreme Court disagreed. It held that the interrogatory was not simply a request for "relevant, non-privileged facts in the possession of his adversaries or their counsel." Id. at 508. Instead, the Supreme Court described the interrogatory as a naked "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. The Court ruled that signed witness statements were protected as work product but could be turned over where the requesting party made a showing of necessity justifying production. Id. at 512-13.[7] In contrast:

> as 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). The Hickman Court observed that where, as here, information learned from third parties is not in the form of a verbatim statement, but rather is filtered through the thoughts and impressions of an attorney, it is far more reliable for the opposing counsel to conduct its own investigation, instead of relying on the efforts of the other side. See id. at 513

[7] Plaintiffs have already disclosed to Dean all such sworn third-party witness statements in its possession, whether in the form of deposition testimony or written declaration. Knutsen Decl. ¶¶ 4-6.

(instead of relying on attorney recollections of witness statements, petitioner should conduct its own "direct interviews with the witnesses themselves").

The Court in Hickman did recognize that discovery of materials obtained by an opposing counsel could be justified in very limited instances where, for example, "relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case," or "where the witnesses are no longer available or can be reached only with difficulty." Hickman, 329 U.S. at 512. But this was not a holding that "facts" in an attorney's interview notes, memoranda, or recollections are not work product. Rather, this was the beginning of the modern-day differentiation between fact work product, which is discoverable only upon a showing of substantial need, and opinion work product, which deserves special protection. Compare Fed. R. Civ. P. 26 (b)(3)(A) (fact work product) with Fed. R. Civ. P. 26 (b)(3)(B) (opinion work product).

This very issue was addressed in Upjohn v. United States, 449 U.S. 383 (1981), where the Supreme Court discussed Hickman and clarified that facts obtained from third-party interviews and recorded in an attorney's notes or memoranda are opinion work product. Id. at 399-400. In that case, the Internal Revenue Service sought the production of notes and memoranda of a corporate general counsel's internal investigation of wrongdoing. Id. at 387-88. The IRS argued that disclosure was justified by its substantial need for the material, relying on the same language from Hickman that Dean cites in its brief. Dean Mem. at 7; 449 U.S. at 399.

The Court rejected this argument. It first stated that the language discussing the obligation to disclose "facts" from Hickman did *not* apply to oral witness statements. Upjohn Co., 449 U.S. at 399 ("[the hidden facts] language from Hickman . . . does not apply to oral

statements made by witnesses . . . whether in the form of [the attorney's] mental impressions or memoranda"). Instead, for oral witness statements, only a "far stronger showing of necessity [than even substantial need]" could justify disclosure. Id. at 401. And as the Seventh Circuit more recently noted, "[d]isclosure of witness interviews and *related documents* . . . is particularly disfavored because it tends to reveal the attorney's mental processes." Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2010) (emphasis added).[8]

B. Dean's broad request for a witness-by-witness account of all facts obtained in past and future witness interviews would necessarily reveal opinion work product.

Dean's attempt to justify its interrogatory by asking for "just the facts" obtained from third-party interviews is unavailing for the following three reasons. Dean Mem. at 2.

First, as stated above, Dean ignores the controlling precedent in Hickman, which denied a motion to compel a response to an interrogatory that, like Dean's interrogatory, sought all facts learned from third-party interviews. Subsequent to Hickman, courts have repeatedly held that the information elicited in third-party interviews, whether factual or otherwise, is itself attorney work product. See Upjohn, 449 U.S. at 400; S. Berwyn Sch. Dist. 100, 600 F.3d at 622.

Second, as the Court in Hickman recognized, a sweeping request for all factual information in Plaintiffs' interview notes and memoranda is simply a *de facto* request for those notes and memoranda. Hickman, 329 U.S. at 510 (characterizing such an interrogatory as an

[8] Dean's argument that the work product doctrine, now that it has been codified in the Federal Rules, only protects documents and tangible things, Dean Mem. at 6-7, is incorrect. See e.g., United States v. Deloitte LLP, --- F.3d ----, 2010 WL 2572965, at *4 (D.C. Cir. June 29, 2010) (holding that Rule 26(b)(3) "only partially codifies the work product doctrine" and that Hickman "provides work product protection for intangible work product"). Further, an attorney's recollection of interviews is itself protected work product. In re Sealed Case, 856 F.2d 268, 273 (D.C. Cir. 1988).

"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"). This is because requiring attorneys to produce, on a witness-by-witness basis, all of the facts obtained from third-party witnesses would vitiate the "special protection" afforded opinion work product. See, e.g., In re Convergent Tech. Second Half 1984 Sec. Litig., 122 F.R.D. 555, 558 (N.D. Cal. 1988) ("[A] rule that purported to protect only the non-factual portions of witness statements, or that offered no protection to purely factual witness statements, would simultaneously eviscerate Hickman and create a nightmare for courts and counsel.").

Third, several courts have held that the facts contained in protected attorney notes and memoranda of witness interviews are so inextricably intertwined with opinion work product that they cannot effectively be segregated. For example, in S.E.C. v. Roberts, 254 F.R.D. 371 (N.D. Cal. 2008), the court ruled upon the defendant's request for the disclosure of factual information contained in interview notes taken by lawyers conducting an internal investigation. The court viewed such a request as "essentially indistinguishable" from the Hickman case and held that disclosure of the facts from such attorney notes would necessarily reveal work product:

> Indeed, the facts contained within the notes are likely inextricably tied with the attorneys' mental thoughts and impressions. The court is aware that revelation of all the purely factual assertions elicited from an interviewee may reveal the questions asked and therefore the attorneys' mental impressions and conclusions.

Id. at 382-83. See also Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 372 (D.C. Cir. 2005) ("[F]actual elements can seldom be segregated from attorney work product."); In re Linerboard Antitrust Litig., 237 F.R.D. 373, 385-86 (E.D. Pa. 2006) (finding it "hard to conceive of a circumstance in which an attorney's mental impressions would be more thoroughly

intertwined with facts than recollection of [witness interviews]"). In the same way, an answer to Dean's broad interrogatory would reveal aspects of Plaintiffs' investigative and litigation strategy as well as other protected areas such as the questions asked during those interviews[9] and the facts that the attorneys deemed significant enough to write down or recall from particular interviews.[10]

In contrast to Dean's sweeping First Interrogatory, more focused contention interrogatories can typically be answered in a manner consistent with the work product doctrine. Earlier this week, as promised to Dean's counsel before they filed its motion to compel, Plaintiffs included some information in their 63-page responses to Dean's Second Set of Interrogatories, which request facts supporting certain allegations in the Complaint. See Dean Mem. at 9 (referring to Plaintiffs' expectation that those answers would include such information); Knutsen Decl. ¶ 23.

In Hickman, the Supreme Court made this same distinction between interrogatories improperly requesting attorney work product and more focused contention interrogatories. The plaintiff there had already made "the most searching inquiries of his opponents as to the

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[9] Roberts, 254 F.R.D. at 383; 1100 West, LLC v. Red Spot Paint and Varnish Co., Inc., No. 1:05-cv-1670, 2007 WL 2904073, at *2 (S.D. Ind., May 18, 2007) (questions asked in interview are "classic work product").

[10] Upjohn, 449 U.S. at 400 n.8 (attorney's characterization of notes as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions"); In re Micron Technologies, 264 F.R.D. 7,11 (D.D.C. 2010) (noting Antitrust Division interview memoranda "are not verbatim transcripts, which would be factual in nature" and instead reflect only "what the investigators found to be significant"); Mobil Oil Corp. v. Fed. Trade Comm'n, 430 F. Supp. 849, 854 (S.D.N.Y. 1977) ("not practicable" to extract factual information from interview reports "since the very selection and presentation of salient facts in such notes reflect the attorney's work").

circumstances surrounding the fatal accident" and the responses to those interrogatories would "necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses." 329 U.S. at 508-09. Importantly, the Court assumed defendant had provided "[f]ull and honest answers" (id. at 508) to the contention interrogatories, and then held that plaintiff's broader interrogatory, asking for a complete witness-by-witness account of everything defense counsel had learned from his interviews, would reveal his work product. Id. at 510. Despite having served more appropriate contention interrogatories, Dean persists in seeking all factual information contained in Plaintiffs' interview notes and memoranda, precisely the sort of request Hickman rejected.

Dean's interpretation of the parties' stipulation on Electronically Stored Information, ("ESI"), Dkt. Entry 31-3, illustrates this same error. Dean Mem. at 12-13. Pursuant to the stipulation, neither party may seek interview notes and memoranda relating to individuals and entities not listed on their opposing party's Initial Disclosures. Nonetheless, Dean now argues that it is still free to discover the "facts" contained in those documents. This argument ignores that those documents were also not required to be preserved.[11] Thus, if Dean's argument is correct, the parties were not required to preserve memoranda and notes of interviews, *but they were required to segregate and save the facts in those memoranda and notes*. This makes no sense because the only place most of the "facts" reside is in the documents themselves.

[11] Plaintiffs have maintained all memoranda of third-party interviews, regardless of whether they were required to do so under the stipulation.

C. Both Jewel and Dentsply are inconsistent with Hickman and its progeny.

Dean principally relies on two cases: E.E.O.C. v. Jewel Food Stores, Inc., 231 F.R.D. 343 (N.D. Ill. 2005); and United States v. Dentsply, 187 F.R.D. 152 (D. Del. 1999). This Court should rely on neither because both are inconsistent with Hickman and its progeny, and Jewel is distinguishable.

In Jewel, the Equal Employment Opportunity Commission moved to compel the defendant Jewel Food Stores to answer an interrogatory identifying each person who may have knowledge of the allegations in the case "and for each person describe in detail what knowledge or information each person is believed to have." 231 F.R.D. at 345. The Magistrate Judge found that interrogatory (and the others subject to the motion) did not seek information protected by the work product doctrine because:

> the interrogatories themselves *do not seek to discover the persons whom Jewel's attorneys interviewed and what they said*. The interrogatories asked only for disclosure of persons with knowledge (and a description of what they know) and of persons whom Jewel communicated with or took statements from in connection with the claims or defenses in this case. The interrogatories did not ask that Jewel distinguish between those persons who were interviewed by counsel, and those who were interviewed by others at Jewel . . . .

Id. at 347 (emphasis added). Dean's interrogatory is different. It *does* ask Plaintiffs to identify "each of the individuals and entities interviewed by each of the Plaintiffs" and to state what each individual said. Dean Mem. at 2. And unlike the witness interviews in Jewel, some of which were conducted by lawyers and others by non-lawyers, id. at 345, all of the interviews conducted by Plaintiffs involved attorneys or others working under their direction. Knutsen Decl. ¶ 7. Should this Court, however, view the interrogatories in Jewel as indistinguishable from Dean's,

then the Magistrate Judge's ruling in Jewel cannot be reconciled with Hickman and Upjohn, and should not be relied on by this Court.

Not only is Dentsply's holding inconsistent with Hickman and Upjohn, but the cases relied on by the Court in Dentsply do not support its ruling or its application to this case.[12] In fact, one of those cases actually supports Plaintiffs' argument here. In In re Convergent Tech., 122 F.R.D. at 558, the Court *refused* to force an attorney to turn over interview notes that were purely factual. In rejecting defense counsel's argument that his opposing counsel's notes were discoverable because they contained only "facts," the court stated:

> More fundamentally, the court is disturbed that defense counsel could purport to seriously argue that witness statements fall outside the work product doctrine when they contain only facts. Presumably most witness statements consist largely or exclusively of facts. A witness' non-factual assertions or speculations are of little value as evidence, and any opinions or theories of an attorney that happened to work their way into a witness' statement would receive even greater protection from discovery than the witness statement itself.

Id.

D. Even if the facts in Plaintiffs' interview memoranda are fact work product, Dean has not made the required showing of substantial need.

Even if Dean's interrogatory does not seek opinion work product, it plainly requests ordinary, or fact, work product. See In re Columbia/HCA Healthcare Corp. Billing Practices

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[12] Some of the opinions have different factual scenarios that are not on point, see, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (work product shared with expert); Farran v. Johnston Equip., Inc., No. 93-6148, 1995 WL 549005, at *3 (E.D. Pa. Sept. 12, 1995) (interrogatories asked *whether* conversations took place); Musko v. McCandless, No. 94-4948, 1995 WL 580275 (E.D. Pa. Sept. 29, 1995) (work product not at issue); In re Dayco, 99 F.R.D. 616, 624 (S.D. Ohio 1983) (interrogatories sought facts learned in interviews *supporting particular allegations in the complaint*) (emphasis added). The others actually have holdings that are directly contrary to the decision reached in Dentsply: Laxalt v. McClatchy, 116 F.R.D. 438, 443-44 (D. Nev. 1987) (identity of witnesses interviewed by a party protected work product); Eoppolo v. Nat'l R.R. Passenger Corp., 108 F.R.D. 292, 294-95 (E.D. Pa. 1985) (witness statements attorney work product).

Litig., 293 F.3d 289, 294 (6th Cir. 2002) (fact work product is "written or oral information transmitted to the attorney and recorded as conveyed");[13] Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) (attorney interview notes opinion work product or, at the very least, fact work product). Fact work product is protected from discovery unless the movant shows a "substantial need [for the information] and cannot obtain equivalent materials without undue hardship." S. Berwyn Sch. Dist. 100, 600 F.3d at 622. Dean has not even attempted to make such a showing.

A party cannot demonstrate substantial need for work product if it is free to depose or otherwise interview the individuals and entities in question. Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984); United States v. American Optical Co., 37 F.R.D. 233, 239 (E.D. Wis. 1965); 8 Wright & Miller Federal Practice & Procedure § 2025 n.22 (3d ed. 2010). Plaintiffs have provided Dean with its tentative fact witnesses for trial as well as a list of persons they interviewed or attempted to interview. Knutsen Decl. ¶¶ 21-22. To the extent Dean hopes to find third-party witnesses to support its case, Dean has more than adequate time (a nine-month discovery period) and deposition hours (225 hours in total) for its own interviews or depositions. It is no surprise that Dean never explains why it has a substantial need for Plaintiffs' work product or is unable to obtain equivalent materials without an undue hardship.

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[13] Dean's interrogatory requires the production of opinion work product because the information is not recorded "as conveyed." See In re Micron Technologies, 264 F.R.D. at 11 (noting Antitrust Division interview memoranda "are not verbatim transcripts, which would be factual in nature" and instead reflect only "what the investigators found to be significant"). Nonetheless, recognizing that the line between "opinion" and "fact" work product is often "difficult" to discern, In re Sealed Case, 129 F.3d 637, 638 (D.C. Cir. 1997) (Tatel, J., dissenting from denial of rehearing en banc), Plaintiffs brief this issue should the Court deem some or all of the information sought to be fact work product. Regardless, Defendant seeks attorney work product, whether of the opinion or fact variety.

Dean's only justification is "needless and burdensome" discovery. However, the burden of deposing witnesses, which Dean has not contended it is unable to do, "plainly falls short" of the required showing. See S.E.C. v. Downe, No. 92 Civ. 4092, 1994 WL 23141 at *3 (S.D.N.Y. Jan. 27, 1994); see also S. Berwyn Sch. Dist. 100, 600 F.3d at 622-23; United States v. Cinergy Corp., No. 1:99-cv-1693, 2008 WL 5424007, at *3 (S.D. Ind. Dec. 30, 2008). Moreover, now that Dean has successfully negotiated the right to engage in extensive third-party discovery under the Scheduling Order, it should not be permitted to obtain Plaintiffs' work product by contending that exercising those rights amounts to an excessive burden.

To the extent that Dean's brief suggests that it needs this information because Plaintiffs have selectively disclosed only those facts supportive of their case, Dean Mem. at 3, 9, such an argument is incorrect. In their Initial Disclosures, Plaintiffs produced to Dean all of the documents, data, transcripts, and declarations it had obtained from third parties that are relevant to its claims, regardless of whether they were helpful to Plaintiffs' case. Knutsen Decl. ¶¶ 4-6; Exs. 1, 2.

E. Policy Considerations Support Denying Dean's Motion to Compel.

The purpose of the work product doctrine is to both "protect an attorney's thought processes and mental impressions" and "limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts." S. Berwyn Sch. Dist. 100, 600 F.3d at 622. Yet piggybacking is exactly what Dean is trying to do here, by contending it needs Plaintiffs' work product to learn "the rest of the story" and to find "potentially exculpatory" information to support its defenses. Dean Mem. at 3. As the Seventh Circuit has recently held, "[a] court is not justified in ordering a litigant to permit his adversary to

inspect witness statements, which he has procured in preparing for trial, upon the adversary's mere surmise or suspicion that he might find impeaching material in the statements." Id., at 622-23 (quoting Hauger v. Chi. Rock Island & Pac. R.R. Co., 216 F.2d 501, 508 (7th Cir. 1954)).

The extent to which Dean seeks to piggyback on Plaintiffs' work product is best exemplified by its request for the factual information from Plaintiffs' interviews with third-party witnesses after the filing of the Complaint. Compelling Plaintiffs to respond to Dean's interrogatory as written would force them to disclose all facts learned from any third-party witness throughout the discovery period. In effect, Dean would be Plaintiffs' "silent partner" in each of their third-party interviews, occupying an extra chair in the room and reaping the benefits of the facts learned during the interview without any effort of its own. Dean would gain a roadmap of Plaintiffs' trial strategy as it evolves throughout discovery. This is the same type of free riding and "piggybacking" that the work product doctrine is designed to prevent. S. Berwyn Sch. Dist.100, 600 F.3d at 622.

Further, Dean's interrogatory is contrary to the important policy consideration set out by the Court in Hickman of promoting efficiency in legal practice. As the Supreme Court observed in Hickman:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511. Indeed, "such a rule [that offered no work product protection to factual statements from third-party witnesses] would seriously discourage counsel from doing the

investigative homework that Hickman sought to encourage." In re Convergent Tech., 122 F.R.D. at 558. In this case, it is important not to deter attorneys charged with enforcing the antitrust laws from gathering and recording the information necessary to make decisions whether to challenge mergers or close investigations without further action. Soven Decl. ¶¶ 5-6. See S.E.C. v. Cavanagh, No. 98 Civ. 1818, 1998 WL 132842, at *2 (S.D.N.Y. Mar. 23, 1998) (notes "taken by SEC attorneys during interviews that . . . were conducted in order to provide the Commission with information so that it could make the determination whether to proceed with litigation" protected as "classic work-product").

Moreover, the routine disclosure, on a witness-by-witness basis, of all of the information obtained through interviews would likely deter many persons from providing Plaintiffs with information on a voluntary basis. EduCap Inc. v. I.R.S., No. 07-2106, 2009 WL 416428, at *6 (D.D.C. Feb. 18, 2009) (stating that disclosure of interview notes from civil investigation could deter other parties from voluntarily providing information in the future); Soven Decl. ¶ 6; Knutsen Decl. ¶¶ 24-27. It is very common for third-parties to agree to be interviewed only after assurances that Plaintiffs will protect the confidentiality of their information to the fullest extent possible. Knutsen Decl. ¶ 25. Such concerns were frequently expressed by persons in this investigation. Knutsen Decl. ¶ 26.[14] And because many of these interviews occur before

[14] For example, many customers with ongoing relationships with Dean were concerned about sharing strategic and other information voluntarily; competitors of Defendants may share trade secrets and other information they would like to keep confidential. Knutsen Decl. ¶ 26.

litigation ensues, Plaintiffs can never guarantee third parties that a protective order with a scope that addresses all of their concerns will be entered in the event a Complaint is filed.[15]

Dean makes an inapt analogy to both Brady v. Maryland, 373 U.S. 83 (1963), and this District's "open file" policy in criminal prosecutions as reasons why it is entitled to the purportedly exculpatory information in Plaintiffs' interview memoranda. Dean Mem. at 11-12. There is no Brady discovery obligation in civil cases. Millspaugh v. County Dept. of Public Welfare, 937 F.2d 1172, 1175 (7th Cir. 1991). As to the District's "open file" policy, as codified in this Court's Local Criminal Rules, it expressly exempts the disclosure of "reports of interviews with witnesses who will not be called in the government's case-in-chief" (Criminal L.R. 16(a)(2)) the vast bulk of material that Dean seeks in this motion.[16] To the extent that this District's "open file" policy in criminal cases is instructive here, it supports Plaintiffs' view that there is no obligation to turn over the information in question.

CONCLUSION

For the foregoing reasons, Dean's Motion to Compel should be denied.

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[15] It was this concern that led Plaintiffs initially to object to Dean's interrogatory based on the law enforcement privilege, which protects information if its disclosure would discourage citizens from giving the government information. Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7th Cir. 1997). Plaintiffs do not address this objection here as independent grounds for resisting Dean's interrogatory, because the interests at stake will be fully protected if the Court sustains the work product objection.

[16] It also exempts "government attorney work product" like the notes, memoranda, and recollections at issue here. Id.

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