

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 99-005 (MMS)
)	
vs.)	
)	
DENTSPLY INTERNATIONAL, INC.,)	
)	
Defendant.)	

**UNITED STATES' BRIEF IN RESPONSE TO DEFENDANT
DENTSPLY INTERNATIONAL, INC.'S MOTION TO COMPEL
RESPONSES TO ITS FIRST SET OF INTERROGATORIES
AND ITS SECOND REQUEST FOR DOCUMENTS**

Dated: April 29, 1999

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA

CARL SCHNEE
UNITED STATES ATTORNEY

Judith M. Kinney (DSB #3643)
Assistant United States Attorney
1201 Market Street, Suite 1100
Wilmington, DE 19801
(302) 573-6277

Mark J. Botti
William E. Berlin
Frederick S. Young
Michael S. Spector
Michael D. Farber

United States Department of Justice
Antitrust Division
325 Seventh Street, N.W., Suite 400
Washington, DC 20530

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING .	1
II. SUMMARY OF ARGUMENT	7
III. ARGUMENT	9
IV. CONCLUSION	22

TABLE OF AUTHORITIES

	<u>Page</u>
Cases:	
<u>Davis v. Federal Trade Commission</u> , 1997 WL 73671 (S.D.N.Y. February 20, 1997)	11
<u>Eoppolo v. National Railroad Passenger Corp.</u> , 108 F.R.D. 292 (E.D. Pa. 1985)	14
<u>Farran v. Johnston Equip., Inc.</u> , 1995 WL 549005 (E.D. Pa. September 12, 1995)	15
<u>Fine v. Facet Aerospace Products, Co.</u> , 133 F.R.D. 439 (S.D.N.Y. 1990)	11
<u>Frieman v. USAir Group, Inc.</u> , 1994 WL 675221 (E.D. Pa. November 23, 1994)	14
<u>Gaynor v. Atlantic Greyhound Corp.</u> , 8 F.R.D. 302 (E.D. Pa. 1948)	14,15
<u>In re Grand Jury Investigation Appeal of United States of America</u> , 599 F.2d 1224 (3d Cir. 1979)	15,19
<u>Harvey v. Eimco Corp.</u> , 28 F.R.D. 380 (E.D. Pa. 1961)	12
<u>Hickman v. Taylor</u> , 329 U.S. 495 (1947)	passim
<u>Musko v. McCandless</u> , 1995 WL 580275 (E.D. Pa. September 29, 1995)	15
<u>Perry v. United States</u> , 1997 WL 53136 (N.D. Tex. February 4, 1997)	18
<u>Shultz v. United Steelworkers of America</u> , 1970 WL 627 (W.D. Pa. June 10, 1970)	12,21
<u>Scurto v. Commonwealth Edison Company</u> , 1999 WL 35311 (N.D. Ill. January 11, 1999)	13,14
<u>Sporck v. Peil</u> , 759 F.2d 312 (3d Cir. 1985)	13,18
<u>Spruill v. Winner Ford of Dover, Ltd.</u> , 175 F.R.D. 194 (D. Del. 1997)	11,22

	<u>Page</u>
<u>Swarthmore Radiation Oncology, Inc. v. Lapes</u> , 155 F.R.D. 90 (E.D. Pa. 1994)	14
<u>Uinta Oil Refining Co. v. Continental Oil Co.</u> , 226 F.Supp. 495 (D. Utah 1964)	11
<u>United States v. Aluminum Co. of America</u> , 34 F.R.D. 241 (E.D. Mo. 1963)	12
<u>United States v. Chatham City Corp.</u> , 72 F.R.D. 640 (S.D. Ga. 1976)	20,22
<u>United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America</u> , 1992 WL 208284 (S.D.N.Y. August 18, 1992)	passim
<u>UpJohn Co. v. United States</u> , 449 U.S. 383 (1981)	1,17,19
<u>Wyly Corp. v. AT&T</u> , 1980 WL 1803 (D.D.C. February 14, 1980)	22

Statutes and Rules:

D. Del LR 7.1.1	18
Federal Rules of Civil Procedure:	
Rule 26	passim
Rule 33(d)	5

I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

On January 5, 1999, the United States filed its complaint (D.I. 1) against Defendant, Dentsply International, Inc., seeking equitable and other relief for Defendant's continuing violations of the federal antitrust laws. The Complaint alleges that Defendant has engaged, and continues to engage, in a variety of actions that unlawfully maintain its monopoly power and deny competing manufacturers of artificial teeth access to the independent distributors of most of the artificial teeth sold in the United States. On February 11, 1999, Defendant filed an amended answer (D.I. 14).

The present dispute arises from Defendant's efforts to obtain the United States' interview notes and memoranda, and the information contained therein, prepared in anticipation of this litigation by attorneys or staff under their supervision. This type of material has consistently been held by the courts to be quintessential work product, the discovery of which, absent overwhelming need, would impair attorneys' ability effectively to represent their clients. See Upjohn Co. v. United States, 449 U.S. 383, 398-401 (1981).

A. Background

On February 17, 1999, the United States and Defendant exchanged Initial Disclosures pursuant Fed.R.Civ. P. 26(a). The United States' Initial Disclosures listed 184 individuals. Defendant disclosed 45 individuals.

That day, the United States and Defendant jointly proposed a discovery period predicated on the understanding that the United States "contends that the interviews it conducted with the [] individuals [identified on its Initial Disclosures] are work

product and protected from disclosure.”¹ Joint Discovery Report (“Report”) (D.I. 11) at 4. The discovery period was extended, at Defendant’s request, in light of this assertion of work product by the United States:

Dentsply anticipates that it will need to depose a significant portion of those individuals [listed on the Initial Disclosures of the United States], all of whom are third parties, as well as other persons, and that it cannot complete by September 7, 1999 the discovery necessary to defend and rebut the extensive pre-complaint investigative record that the United States has built during the past three years.

Id. Had the Defendant contemplated obtaining all of the United States’ interview materials, and had the United States contemplated providing them, Defendant would have had no basis for seeking such an extension and the United States would not have agreed to it.

The next day, Defendant served the United States with its Second Request for Documents and First Set of Interrogatories (“Second Document Request and Interrogatory”) (Appendix B-6-12). Despite the events of the previous day, Defendant’s sole interrogatory, which is at issue in the current motion, seeks only that work product:

With regard to the 184 individuals who were interviewed by the DOJ pursuant to its CID investigation of Dentsply and subsequently identified in Plaintiff’s Rule 26(a)(1) Initial Disclosures, please identify in detail all facts known to these individuals and entities that are relevant to the DOJ’s claims against Dentsply in this matter.

Similarly, Defendant requested documents relating to only the 184 individuals

¹ The United States uses the term “interview” throughout this Brief to indicate communications it had with a third party, no matter how brief. Declaration of Mark J. Botti (“Botti Decl.”) ¶ 4 (Appendix B-1-5).

identified in the United States' Initial Disclosures.²

B. The Current Discovery Dispute

At the March 8, 1999 Discovery Conference, in responding to the Court's concern regarding streamlining discovery, Defendant raised its pending interrogatory, stating that its "task is to find out, to figure out what people the government will rely on" as "affirmative witnesses to present the facts." Transcript of March, 8, 1999 Discovery Conference ("Conf. Tr.") at 36 (D.I. 35). Defendant conceded that "the law will tell us, I believe, unless the witness adopts the writing of the lawyer and signs it, adopts it as a written statement or has given some sort of statement or declaration, a memorandum to the file by an attorney whether it's one of us or one of them, is likely to be found as work product potentially." Conf. Tr. at 37-38. Defendant later explained, "[y]our mental impressions and strategy of your case and all are work product, and that's reflected in your notes."³ Id. at 44.

The Court then ordered both parties to prioritize their witness lists in the hope that this would "prevent the necessity of having to take the 184 depositions." Id. at 51.

² Although Defendant's two document requests refer generally to statements from "third parties," Defendant, by definition of the term "third party," specifically limited the universe of third parties to the 184 individuals. Second Document Request and Interrogatory at 3.

³ Defendant also described the interrogatory as a means of identifying the individuals whom testifying "experts might talk to, and use in the expert opinion." Conf. Tr. at 37. The United States agreed at the conference that it will not assert work product as to the interview notes of a testifying expert on which the expert relies in rendering an opinion. Id. at 43. Defendant has not raised any issue in its current motion as to these notes.

Defendant's counsel seemed to agree that it had no need for extensive factual discovery "because the facts, we might be able to reach pretrial stipulations to a large number of them; that would be my hope. Because I think what you will find is the facts are not going to be substantially disputed as to what happened. The economic impact of the facts and the application of the relevant law are what this case is about." Id. at 56.

On March 15, 1999, the Court entered the Joint Discovery Plan and Order (D.I. 30), which included the witness prioritization procedure and the lengthened fact discovery schedule originally requested by Defendant. On March 22, 1999, the United States and Defendant exchanged Preliminary Witness Designations. The United States designated 31 individuals as "very likely to call" or "likely to call" (and none as "will call"). Defendant designated 30 individuals as "will call," "very likely to call," or "likely to call."

Also on March 22, 1999, the United States served its Responses and Objections to Defendant's Second Request for Documents and First Set of Interrogatories ("Responses") (Appendix B-13-29).⁴ In response to Document Request No. 1, the United States indicated that it "has no responsive documents in its possession, custody, or control, other than those that have already been produced to Defendant and those

⁴ Two weeks before the United States served its Responses, it produced 11 boxes of deposition transcripts and documents responsive to Defendant's First Document Request. Despite the First Document Request's use of ambiguous and poorly defined terms that reasonably could have justified a limited production, the United States produced, in response to that request, every non-privileged responsive document, including every transcript of a nonparty deposition and every document received from nonparties, during the pre-filing investigation. Defendant has raised no issue with the United States' response to the First Document Request.

being produced as verbatim statements of a third party in response to Request No. 2.”

In response to Document Request No. 2, the United States stated that it would produce the few responsive documents in its investigatory file other than those protected by the attorney-client privilege, the deliberative process privilege, or the work product immunity, including notes and memoranda of interviews.

The United States responded to Defendant’s interrogatory in two ways. First, the United States answered the interrogatory by referring to the responsive information contained in the third-party deposition transcripts and documents already produced to Defendant, which contain, in detail, facts known to third parties, and to Defendant’s own documents. See Fed. R. Civ. P. 33(d). Second, the United States objected to the interrogatory on work product grounds to the extent it seeks information gathered, in anticipation of this litigation, through interviews by Antitrust Division attorneys or staff under their supervision.

Between March 22 and April 8, 1999, counsel conferred a number of times on issues related to the Second Document Request and Interrogatory. Counsel for the United States confirmed on each occasion that the United States had turned over every responsive non-privileged document, other than expert materials and publically available articles, and that the United States was not withholding documents pursuant to its objections to the ambiguous and poorly defined terms in Defendant’s Request.⁵

⁵ The United States’s objection to the use of the undefined term “reflect” was reasonable, not “frivolous” (Def. Br. at 3), because a broad reading of this term, coupled with the undefined term “verbatim statements,” could call for most or all of the United States’ files, including recommendation and evaluation memoranda and

Defendant's counsel accepted these representations as satisfying any concerns Defendant may have held regarding the scope of production, and noted that the only real issue from Defendant's perspective was the work product objection of the United States to the interrogatory.⁶

On April 13, 1999, Defendant filed its Motion to Compel (D.I. 54). In its Brief ("Def. Br.") in support of the motion, Defendant makes two points. First, as to its Interrogatory, Defendant argues only that the United States should be compelled to answer because all facts developed by the attorneys for the United States in anticipation

communications among attorneys preparing the case. Defendant has not pressed the broader reading of its document requests and has not challenged the United States' claims of work product, attorney client privilege, and deliberative process privilege for internal documents other than interview notes and memoranda.

⁶ Moreover, the United States volunteered to describe expert documents that were not being produced at this time. The expert documents identified included correspondence with or attorney notes of conversations with potential testifying experts, notes of a potential testifying expert of interviews of third parties, and any other expert work product, including materials relating to a survey conducted by a potential testifying survey expert.

As to the survey materials, the United States advised Defendant that they were highly unlikely to be responsive to the pending request. Defendant's counsel was unprepared to discuss the survey or the expert materials at the final discovery conference between the parties on April 8, even though the United States previously, on more than one occasion, apprised Defendant of the survey. The United States stated that, if Defendant wanted production of survey or other expert material, the United States was willing to discuss either the survey material specifically or expert discovery generally. Defendant, however, made no attempt to confer with the United States on this issue before filing the present Motion.

The United States also told Defendant that it was not producing publically available articles (not obtained from third parties). Defendant did not request production of these documents and has not pressed any claim to them in its current Motion.

of this litigation are not work product. Def. Br. at 6. Defendant does not dispute that the information was developed in anticipation of litigation.

Second, as to its two document requests, Defendant claims that it has shown “good cause” to overcome work product protection, which, it concedes, would otherwise apply. Def. Br. at 3, 10-11. Defendant gives little explanation of its claim of “good cause” other than the bald assertion that it seeks the documents because “[it] *must* determine the scope and merit of the information that these individuals have that are relevant to the claims in this action. . . .” Def. Br. at 11 (emphasis supplied). Defendant argues that the withholding of these documents would “greatly increase the time and cost to Dentsply in preparing its defense.” Id.

II. SUMMARY OF ARGUMENT

Evaluation of claims of work product protection involves two inquiries: first, whether the material or information sought is in fact work product, and second, whether the party seeking discovery has made a sufficient showing to obtain the material or information despite the immunity from discovery granted to work product. United States v. District Council of New York City and Vicinity of the United Bhd. of Carpenters & Joiners, 1992 WL 208284, at *11 (S.D.N.Y. Aug. 18, 1992) (“District Council”)(Appendix B-30-42).

1. As to its interrogatory, Defendant has not asserted any need that justifies intrusion into the United States’ work product. Memoranda and notes of interviews are work product, however, even if they are a literal transcription of the interview. Defendant does not dispute that the only sources of information available to the United

States to answer this interrogatory are the notes and memoranda, supplemented by attorney recollections, of the interviews. Nor does Defendant dispute that the interrogatory, in essence, asks the United States to reproduce the interview notes and memoranda. Defendant makes no attempt to explain why an interrogatory calling, in substance, for the reproduction of those notes and memoranda does not intrude upon the same zone of work product protection afforded the notes and memoranda themselves.

2. Defendant's request for an order compelling production of documents should also be denied. First, the documents that Defendant seeks and described in its Brief -- "verbatim witness statements" and "statements signed or adopted by witnesses" (Def. Br. at 7) -- do not exist. To the extent, moreover, that the request is a veiled attempt to obtain notes and memoranda of the United States' interviews, the substance of which Defendant seeks through its interrogatory, the attempt should fail. Defendant concedes that these documents are work product. Conf. Tr. at 37-38, 44. In fact, the notes and memoranda of interviews are opinion work product, discoverable only in "rare situation[s]." Hickman v. Taylor, 329 U.S. 495, 513 (1947). Defendant has not even shown the substantial need and undue hardship required to justify an intrusion into the protection afforded ordinary work product, much less shown that this is the "rare situation" justifying disclosure of opinion work product.

Substantial need and undue hardship mean much more than the opportunity to save some time and money in preparing a defense. Defendant has abandoned the original reason it gave the Court for its wish to invade the United States' work product

(namely, to help it prepare to defend against the witnesses the United States might select from that list of 184 individuals). Whatever merit that argument originally had is lost now that the United States has narrowed to 31 individuals the group from which its witnesses are likely to be called. Moreover, the United States has produced to Defendant the deposition transcripts of 12 of the 31 individuals and has produced documents from the companies employing 20 of the 31 individuals. In short, Defendant has no need, much less a substantial need, to rummage through ordinary work product, and it certainly has not shown the extraordinary circumstances that might warrant intrusion into the United States' opinion work product that is at issue here.

III. ARGUMENT

A. Defendant's Interrogatory Requests Protected Work Product of the United States

Governing case law establishes that Defendant's interrogatory intrudes on the United States' opinion work product. Some of the very authority cited by Defendant makes this point, while the remaining cases on which it relies either are taken out of context or are not controlling.

As recognized by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), an interrogatory requesting facts obtained in interviews conducted by an attorney seeks the most important, and highly protected, type of work product (termed in later cases "opinion work product"). Id. at 512-13. In fact, Hickman itself involved an interrogatory directed at facts obtained by counsel through interviews. The Court held that:

as to oral statements made by witnesses to [the attorney for a party], 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 512-13 (emphasis added).⁷ Defendant does not dispute that the only source of such facts possessed by the United States that would be responsive to this interrogatory -- other than documents already produced -- are interviews conducted in anticipation of this litigation. Therefore, under Hickman, an interrogatory, such as is at issue here, requesting facts obtained by lawyers in interviews, seeks protected opinion work product.⁸

⁷ Defendant incompletely cites Hickman for the “well-established” proposition that “either party may compel the other to disgorge whatever facts he has in his possession.” Def. Br. at 4. Two sentences later, however, the Court qualified this general proposition: “But discovery, like all matters of procedure, has ultimate and necessary boundaries.” Hickman, 329 U.S. at 507. As a precursor to applying this limitation on discovery, the Court observed: “Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of adversaries or their counsel. He has sought discovery [through an interrogatory] as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired.” Id. at 508.

⁸ As discussed in the Declaration of Mark J. Botti, such interviews were conducted by Antitrust Division attorneys and, occasionally, other staff. Botti Decl. ¶ 5 The memoranda of such interviews were written by attorneys or by staff under attorney supervision. Botti Decl. ¶ 7. For purposes of determining whether work product protection applies, it does not matter whether the memoranda were, in fact,

The subsequent decisions of this and other courts confirm that the information obtained during an interview and interview notes and memoranda are work product. In Spruill v. Winner Ford of Dover, Ltd., 175 F.R.D. 194 (D. Del. 1997), this Court held that a “statement (presumably sworn) [taken by one party] with a court reporter present” and the transcript of an interview taken in the presence of a court reporter were work product. Id. at 201-02. If such word-by-word recordation of witnesses’ statements are work product, then certainly the notes, memoranda, and recollections of attorneys, at issue here, reflecting the opinions and conclusions of attorneys on such matters as to which facts bear highlighting, quoting, or omitting, are work product.

The fact that the substance of these notes, memoranda, and recollections are sought through an interrogatory rather than a document request does not affect the work product protection of the substance of these materials, any more than an interrogatory asking for “in detail” the facts in sworn witness statements would have eliminated the work product protection of the verbatim statements sought in Spruill. Quite to the contrary, the principle -- that the work product is the contents of an interview, not just the resulting document -- was clearly established in Hickman and has been repeatedly upheld by courts ever since. See District Council, supra, 1992 WL 208284, at *7, *11-12 (S.D.N.Y. Aug. 18, 1992); Uinta Oil Refining Co. v. Continental Oil Co., 226 F.Supp. 495, 499, 502 (D. Utah 1964) (sustaining work product objection to

written by attorneys or by other staff of the Antitrust Division under their supervision. See Fed. R. Civ. P. 26(b)(3); Fine v. Facet Aerospace Products, Co., 133 F.R.D. 439, 444-45 (S.D.N.Y. 1990) (paralegal notes); Davis v. FTC, 1997 WL 73671 at *3 (S.D.N.Y. Feb. 20, 1997) (economist’s memoranda) (Appendix B-43-45).

interrogatories seeking “specification of each and every detail of evidence (except the contents of written documents) upon which plaintiffs intend to rely at the trial”); Shultz v. United Steelworkers of America, 1970 WL 627 (W.D. Pa. June 10, 1970) (Appendix B-46-47) (rejecting interrogatory seeking identity of witnesses and indication whether the witness would corroborate or contradict certain facts); Harvey v. Eimco Corp., 28 F.R.D. 380, 380-81 (E.D. Pa. 1961) (“interrogatories may not be used to obtain a summary or resume of the contents” of “statements, opinions, and reports of witnesses or of experts which are gathered by an attorney in preparation for trial”); United States v. Aluminum Co. of America, 34 F.R.D. 241, 242-43 (E.D. Mo. 1963) (United States cannot be required to “describe” “‘internal memoranda written by or for attorneys in the Department of Justice in connection with investigating or preparing [the] case for trial. . . .’”).

In District Council, for example, the court held that “[w]hile it is true that the work product doctrine does not protect facts, even when such facts are learned by a witness from protected documents, a party may not secure disclosure of an adversary’s counsel’s view of the case or trial preparation by seeking disclosure of those facts or sources of facts which counsel considers more significant than others and has devoted time to pursuing.” Id. at *11 (internal citations omitted). There, defendant sought deposition testimony of an F.B.I. agent relating to communications with witnesses during the civil investigation preceding the case. Id. at *2. The court noted work product concerns because the questions “were not addressed to a party or a witness with first-hand information,” but rather to the United States as a litigant. Id. at *11.

These cases are consistent with and bolstered by the “selection and compilation” analysis that the Third Circuit Court of Appeals has applied to work product claims. In Sporck v. Peil, 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903 (1985), an attorney’s selection of documents for a deponent to review was entitled to work product protection because it “represented, as a group, counsel’s legal opinion as to the evidence relevant both to the allegations in the case and the possible legal defenses.” Id. at 313. The court held that attorney’s “selection and compilation” of documents “falls within the highly-protected category of opinion work product.” Id. at 316. Similarly, the identification of subjects to cover in an interview with a particular person, as well as the selection and compilation of facts to include in notes and memoranda of an interview, constitute opinion work product. District Council, supra, 1992 WL 208284 at *12.

In seeking to enforce its interrogatory, Defendant ignores the rationale behind this well-developed body of case law, and merely recites that facts are not protected by the work product doctrine. Def. Br. at 2. Neither Defendant’s recital nor its citation of cases supporting this unremarkable proposition suggests that it should be able to enforce its interrogatory. Indeed, three of the cases relied on by Defendant clearly protect the information sought here.

For example, Defendant cites Scurto v. Commonwealth Edison Co., 1999 WL 35311 (N.D. Ill. Jan. 11, 1999) (Appendix B-48-51), for the proposition that “work product doctrine[] do[es] not insulate factual information from discovery. . . .” Def. Br. at 4. But that court, in fact, upholds work product protection of attorney notes,

explaining that “work product protection[] appl[ies], as these notes reflect the information *that [the lawyer for the party] deemed important from this meeting. . . .*” Scurto at *3 (emphasis added). Similarly, the very passage quoted by Defendant (Def. Br. at 4) from Frieman v. USAir Group, 1994 WL 675221 (E.D.Pa. Nov. 23, 1994) (Appendix B-52-59), implies that the work product doctrine does apply to facts related to the content of work product.

In Swarthmore Radiation Oncology v. Lapes, 155 F.R.D. 90 (E.D. Pa. 1994), the court ruled that an interrogatory was permissible because it asked only whether witnesses stated certain words or words close to them. Id. at 93. Anything more, in that court’s view, would have been work product. Id. In Eoppolo v. National Railroad Passenger Corp., 108 F.R.D. 292 (E.D. Pa. 1985), the court did not require the defendant to supply “counsel’s view of the case, identify the facts which counsel considers significant, or the specific questions asked by agents of the defendant during the investigation of the accident as this type of information would fall under the category of mental impressions which are protected under Rule 26(b)(3).” Id. at 294. Because in Eoppolo the interrogatory was directed at facts in the possession of the defendant, rather than defendant’s counsel, the interrogatory was directed to be answered. In this case, however, the only source of such facts in the hands of the United States are those recorded or remembered by Antitrust Division attorneys or staff under their supervision. Accordingly as in District Council, those facts are work product.

Defendant places significant weight on the half-century-old opinion in Gaynor

v. Atlantic Greyhound Corp., 8 F.R.D. 302 (E.D. Pa. 1948). Although the opinion does not spell out the facts in detail, the Gaynor court was concerned that a party might hide facts obtained independently of the litigation by the party's employees. No similar concern is present here, because Defendant is not seeking facts possessed by the United States independently of the investigation conducted in anticipation of this litigation. Rather, the facts sought by Defendant were obtained from third parties, are still possessed by those third parties, and are readily available to Defendants through interview or deposition. To read Gaynor any more broadly would only render it in conflict with Hickman (decided by the Supreme Court the prior year) and with subsequent case law.⁹

Finally, compelling a response to this interrogatory could unnecessarily make the attorney a witness in the action, one of the concerns motivating the Supreme Court in Hickman, 329 U.S. at 513 (1947). The Third Circuit Court of Appeals has recognized this danger as a reason to treat such materials as highly protected work product, even when the attorney does not have to create, as here, a signed response that may be admissible in the action: "discovery and use of [memoranda summarizing oral interviews] creates a danger of converting the attorney from advocate to witness." In re Grand Jury Investigation Appeal of United States of America, 599 F.2d 1224, 1231

⁹ Musko v. McCandless, 1995 WL 580275 (E.D. Pa. Sept. 29, 1995) (Appendix B-60-61) and Farran v. Johnston Equipment, Inc., 1995 WL 549005 (E.D. Pa. Sept. 12, 1995) (Appendix B-62-66), fall wide of the mark. In Musko, the attorney was a "fact witness as to relevant events in [the] case." Musko at *1. In Farran, the court did not reach the issue of whether the substance of the conversations were work product. Farran at *4.

(3d Cir. 1979). See also District Council, *supra*, 1992 WL 208284 at *10.

B. Defendant's Document Requests are Redundant or Demand Protected Work Product and Defendant Has Not Met the Requirements for Obtaining Such Work Product

Just as the material responsive to Defendant's interrogatory is protected work product, the documents it seeks, to the extent that they exist, are also protected work product. Defendant concedes as much and fails to show that this is a "rare situation" in which it would be allowed access to opinion work product, or even that it has substantial need for, and would suffer undue burden absent obtaining, the materials, necessary to overcome the strong public policy favoring protection of even ordinary work product.

Document Request No. 1 seeks "[a]ll documents reflecting any statement of a third party to the DOJ and signed and/or adopted, formally or informally, by those third parties." All responsive documents have already been produced, or made available, to Defendant. The United States has no other responsive documents in its possession, custody, or control, as was made clear to Defendant before it filed its Motion. Botti Decl. ¶ 9.

Document Request No. 2 seeks "[a]ll documents reflecting any verbatim statement" of the 184 individuals listed in the United States' Initial Disclosures. To the extent Request No. 2 seeks the verbatim statements of any of these third parties in their entirety, the United States has already produced to Defendant all deposition transcripts as well as correspondence written by third parties. Botti Decl. ¶ 10. The United States does not have any other "recorded statements" or "verbatim transcripts" from

witnesses in its possession, custody, or control. Id.

To the extent that Request No. 2 seeks the notes and memoranda of interviews,¹⁰ Defendant has waived any claim to production of those documents. Defendant told the Court at the March 8 Conference that it realized it could not seek this material and asserted its lack of access to this material as the basis for its request for a longer discovery period. In response to these representations, the Court ordered prioritization of the likely witnesses and extended the discovery period.

In any event, those notes and memoranda clearly are protected by the work product doctrine as opinion work product, as discussed above. Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding that work product based on oral statements, such as interview notes and memoranda, is entitled to greater protection than ordinary work product). Defendant does not dispute that whatever documentary material it is seeking is work product, but rather claims that it has shown sufficient need to compel that

¹⁰ Although Defendant's Motion and Brief are unclear, we do not believe it is seeking every document in the United States' files, including evaluation and recommendation memoranda, although its Document Request No. 2 could be construed literally to be such an unreasonable request. The United States, accordingly, objected on the grounds of attorney client privilege, work product doctrine, and deliberative process privilege to the extent that Defendant were to assert that the request is this broad and objected to the term "reflects" to communicate our understanding of how to construe the Request in a reasonable manner. At the several discovery conferences, the United States discussed with Defendant that responsive documents would only include correspondence, deposition transcripts, affidavits (although none exists), and similar statements. Defendant was also advised that some notes and memoranda of interviews contain occasional brief quotations from a person, but Defendant has never asserted that this is the basis of its claim.

material's production.¹¹

Defendant can not obtain this opinion work product because it has not met its burden of overcoming the "almost absolute protection from discovery" afforded opinion work product. Sporck, 759 F.2d at 316. While the precise protection afforded opinion work product, such as attorney notes and memoranda of interviews, is unclear, it is clear that it is afforded much greater protection than ordinary work product. See

¹¹ Despite the brief mention of a survey in Defendant's Brief, any issues regarding discoverability of survey materials are not properly before the Court. Defendant has made no attempt to confer with the United States on this issue. See D. Del. LR 7.1.1. The Court's Order of January 25, 1999 ("January 25 Order") (D.I. 7) requires that "[n]o motions shall be filed with the Court unless a statement is filed with the Court detailing efforts made to achieve agreement on the matters set forth in the motion." January 25 Order at 1. Defendant's Motion and Brief contain no such statement with respect to the survey because Defendant made no efforts to discuss, let alone reach agreement on, issues relating to the survey.

Moreover, a motion relating to the survey is premature, as the United States has previously advised Defendant without any response. First, the survey materials are highly unlikely to contain any documents responsive to the Request. None of those materials are statements signed or adopted by the survey respondents. One could stretch Document Request No. 2 significantly and argue that the completion of a questionnaire by a survey respondent is a "verbatim statement" of the respondent, although Defendant has not made that argument. In any event, it is highly unlikely that the respondents include any of the 184 individuals disclosed under Rule 26(a)(1). Only 85 of those individuals were associated with dental laboratories. And, while the survey is of dental laboratories, documents produced by Defendant to the United States estimate that there are 8,000 to 12,000 such laboratories in the United States. The survey was conducted of a subset of those laboratories. It is highly implausible that any of these 85 individuals happen to be respondents to the survey. In any event, the United States has not attempted to ascertain whether any of the survey respondents may happen to also be one of the 85 individuals because to the extent any of the survey materials are called for by the Request, discovery of such expert materials is premature under Rule 26 and inconsistent with the Court's Scheduling Order. See Perry v. United States, 1997 WL 53136 (N.D. Tex. Feb. 4, 1997) at *3 (Appendix B-67-69). Defendant's Motion and Brief do not challenge these bases for not producing survey materials at this time.

Hickman, 329 U.S. at 512-13 (1947) (oral statements made by witnesses to attorney, whether presently in form of mental impressions or memoranda discoverable only in “a rare situation” if at all); Upjohn Co. v. United States, 449 U.S. at 401-02 (1981) (opinion work product, such as attorney notes and memoranda of witnesses’ oral statements requires a “far stronger showing of necessity and unavailability by other means” than simply a showing of substantial need and inability to obtain the equivalent without undue hardship); In re Grand Jury Investigation Appeal of United States of America, 599 F.2d at 1231 (3d Cir. 1979) (memoranda summarizing attorney interviews discoverable only in a “rare situation”).

Even if the requested material were ordinary work product, which it is not, Defendant has not met the standard for obtaining such information. Ordinary work product may be obtained “only upon a showing that the party seeking discovery has *substantial need* of the materials in the preparation of the party’s case and that the party is unable without *undue hardship* to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3) (emphasis added).

Defendant’s current argument of a “need” to rummage through the United States’ work product -- that it may be less costly and time consuming for it to defend this action if it were permitted to do so -- does not remotely satisfy the “substantial need” and “undue burden” thresholds for overcoming ordinary work product. Undoubtedly, claims such as that advanced here would be true in every case and, if upheld as a justification, would render work product protection illusory.

Moreover, Defendant has now largely abandoned the basis on which it

originally told the Court that it was seeking to intrude on the work product of the United States: to help it identify the potential witnesses of the United States and then to make a determination as to which of these witnesses to depose, in order to complete discovery without seeking an extension of the discovery period. Conf. Tr. at 37-38. That argument was, itself, an insufficient basis for piercing a party's work product. "[C]ounsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not . . . special circumstances since they are present in every case'" United States v. Chatham City Corp., 72 F.R.D. 640, 643 (S.D. Ga. 1976) (citation omitted).

In any event, the Court's Order to prioritize witnesses and to extend the discovery period obviated any concern that Defendant needed the United States' interview materials in order to identify the most knowledgeable witnesses. The United States has identified 31 likely witnesses -- only one more than the 30 individuals Defendant is likely to call. The United States has already provided Defendant with documents produced by 20 of the companies that employ those 31 individuals, as well as twelve deposition transcripts of them. The eight months of fact discovery available to Defendant from the date of identification of these individuals is ample time for Defendant to depose all of them if it so chooses. "The cost or inconvenience of taking depositions 'is not in itself sufficient showing to meet the 'undue hardship' requirements of the rule.'" Id. at 644 (citation omitted). Accordingly, this argument

no longer forms even a colorable basis for a claim of access to the United States' work product, and Defendant has abandoned it.

Defendant gives no explanation in its Brief why it has substantial need for the United States' notes and memoranda of interviews with the remaining 153 people, or the entire 184 individuals previously identified.¹² In short, Defendant has demonstrated no *substantial need* for these materials and is able without *undue hardship* to obtain evidence to defend itself. It appears to have already identified sufficient people to defend itself. It listed 45 knowledgeable individuals originally and, after telling the Court that three weeks would suffice to try this case, named 30 likely witnesses from that list. Indeed, in December, Defendant filed its own action against the United States claiming a readiness for litigation and complaining that it had not yet been sued, asserting that it had been under investigation for three years. Defendant's counsel has undoubtedly had time to become familiar with the facts and law in this area during that

¹² Defendant asserted at the March 8 hearing, and during subsequent discovery conferences among counsel, that it wanted the United States' work product to learn of helpful witnesses, if any, that exist: "That was an attempt to see, well, *maybe we can disqualify a whole host of people here because they didn't say anything favorable to the defendant, and we'll have to make our case like any other defendant.*" Conf. Tr. at 38 (emphasis added). Such an attempt to use the strategies, opinions, and conclusions of one's opponent is one of the major concerns underlying the protection of work product adopted in Hickman. 329 U.S. at 513 ("Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [opposing counsel's] professional activities.") See Shultz 1970 WL 627 at *1 ("It does not appear that persons with knowledge of an 'event'. . . are unavailable or that defendant will be unduly prejudiced in preparing its defense if the plaintiff is not required to disclose which persons are favorable or unfavorable to the 'version supplied by plaintiff in its answer to the interrogatory'").

time. Defendant, moreover, is the dominant firm in this industry with widespread contacts. Defendant thus told the Court at the March 8 conference that the facts were so well known to it that it expects to stipulate to a large number of them. Conf. Tr. at 56.

These substantial alternative avenues of developing evidence negate any claim of need to invade the United States' work product. See Hickman, 329 U.S. at 509; Spruill, 175 F.R.D. at 202; Chatham City Corp., 72 F.R.D. at 644 ('[D]iscovery of work product material will be denied if the information can be obtained by deposition); Wyly Corp. v. AT&T, 1980 WL 1803 at *2 (D.D.C. February 14, 1980) (Appendix B-70-71). "Moreover, when the information being sought is available from sources less entangled in privilege issues, a founded suspicion may arise that the seeking party is in fact attempting to exploit attorney work product." District Council, supra, 1992 WL 208284 at *12. The attempt, here, to exploit the United States' work product does not establish the substantial need and undue hardship necessary to seek discovery of ordinary work product and falls far short of demonstrating the extraordinary circumstances that might warrant intrusion into the opinion work product at issue in the current motion.

IV. CONCLUSION

Ultimately, this Court's early Discovery Conference and the meet-and-confer conferences between the parties served the purpose of narrowing the area of dispute over Defendant's Second Document Request and Interrogatory. All that remains is a naked claim by Defendant for access to the United States' opinion work product on the

grounds that reviewing it might prove helpful to Defendant in further developing a defense. That, of course, is not a basis for granting this Motion. Accordingly, for this reason, and for the reasons stated above, the United States respectfully requests that the Court deny Defendant's Motion.

Respectfully submitted,

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA

CARL SCHNEE
UNITED STATES ATTORNEY

/s/

Judith M. Kinney (DSB #3643)
Assistant United States Attorney
1201 Market Street, Suite 1100
Wilmington, DE 19801
(302) 573-6277

/s/

Mark J. Botti
William E. Berlin
Frederick S. Young
Michael S. Spector
Michael D. Farber
United States Department of Justice
Antitrust Division
325 Seventh Street, N.W., Suite 400
Washington, DC 20530
(202) 307-0827