

STATEMENT OF THE ISSUE PRESENTED

- 1) Do Defendant's first two interrogatories, which are naked general demands as of right for all facts obtained by the United States in investigative oral interviews, impermissibly seek the United States' work product, in light of the Supreme Court's decisions in *Upjohn Co. v. United States* and *Hickman v. Taylor*, holding that such information is entitled to "special protection" and is discoverable only in exceptional circumstances?

TABLE OF AUTHORITIES***=Controlling or Most Appropriate Authority****Cases**

| | |
|--|---------------|
| <i>Allen v. Sears, Roebuck and Co.</i> , 2009 WL 57038 (E.D. Mich. Jan. 8, 2009)..... | 13 |
| <i>Arkwright v. Nat’l Union Fire Ins.</i> , 19 F.3d 1432 (6th Cir. 1994) | 13 |
| <i>Baker v. General Motors Corp.</i> , 209 F.3d 1051 (8th Cir. 2000) | 7, 9 |
| <i>Beaumont Hosp. v. Medtronic, Inc.</i> , No. 09-CV-11941, 2010 WL 2534207 (E.D. Mich. June 18, 2010) | 13 |
| <i>Cason-Merenda v. Detroit Medical Center</i> , 2008 WL 659647 | 11 |
| <i>Commonwealth of Massachusetts v. First Nat’l Supermarkets, Inc.</i> , 112 F.R.D. 149 (D. Mass. 1986)* | 11 |
| <i>F.T.C. v. Grolier</i> , 462 U.S. 19 (1983)..... | 6 |
| <i>F.T.C. v. Hope Now Modifications, LLC</i> , 2011 WL 2634029 (D.N.J. July 5, 2011)* | 9 |
| <i>Ford Motor Co. v. U.S. Customs and Border Protection</i> , 2008 WL 4899402 (E.D. Mich. Aug. 1, 2008) | 10 |
| <i>Haga v. L.A.P. Care Servs. Inc.</i> , 2002 U.S. Dist. LEXIS 1605 (W.D. Va. Feb. 1, 2002)..... | 8 |
| <i>Hickman v. Taylor</i> , 329 U.S. 495 (1947)* | <i>passim</i> |
| <i>In re Columbia/HCA Healthcare Corp. Billing Practices Litig.</i> , 293 F.3d 289 (6th Cir. 2002) | 9 |
| <i>In re Convergent Tech.</i> , 122 F.R.D. 555 (N.D. Cal. 1988)..... | 7,8 |
| <i>In re Grand Jury Subpoena Dated November 8, 1979</i> , 622 F. 2d 933 (6th Cir. 1980)..... | 6, 10 |
| <i>In re Linerboard Antitrust Litig.</i> , 237 F.R.D. 373 (E.D. Pa. 2006) | 8 |
| <i>In re Sealed Case</i> , 856 F.2d 268 (D.C. Cir. 1988)..... | 7 |
| <i>Infosystems, Inc. v. Ceridian Corp.</i> , 197 F.R.D. 303 (E.D. Mich. 2000) | 7, 12, 13 |
| <i>Martin v Office of Special Counsel</i> , 819 F.2d 1181 (D.C. Cir. 1987) | 7 |
| <i>Miller Oil Co. v. Smith Indus.</i> , 1990 U.S. Dist. LEXIS 17176 (W.D. Mich. Dec. 13, 1990)*. 7, 11 | |
| <i>Norwood v. FAA</i> , 993 F.2d 570 (6th Cir. 1993)* | 1,11 |
| <i>Ross v. Abercrombie & Fitch Co.</i> , 2008 WL 821059, at *2 (S.D. Ohio Mar. 24, 2008)..... | 10 |
| <i>S.E.C. v. Roberts</i> , 254 F.R.D. 371 (N.D. Cal. 2008) | 8 |
| <i>S.E.C. v. Sentinel Mgmt</i> , 2010 U.S. Dist. LEXIS 127355 (N.D. Ill. Dec. 2, 2010)* | 8, 9 |
| <i>SafeCard Servs., Inc. v. S.E.C.</i> , 926 F.2d 1197, 1202 (D.C. Cir. 1991) | 6 |
| <i>Sandra T.E. v. South Berwyn Sch. Dist.</i> , 600 F.3d 612, 622 (7th Cir. 2010)..... | 2 |
| <i>Strauss v. Credit Lyonnais, S.A.</i> , 242 F.R.D. 199 (E.D.N.Y. 2007) | 11 |
| <i>Taylor v. Temple & Cutter</i> , 192 F.R.D. 552 (E.D. Mich. 1999)* | 14 |
| <i>Tracy v. NVR, Inc.</i> , 250 F.R.D. 130 (W.D.N.Y. 2008)..... | 11 |
| <i>United States v. AMR Corp.</i> , No. 99-1180 (D. Kan. Feb. 7, 2000) | 11 |
| <i>United States v. Dean Foods Co.</i> , 2010 WL 3980185 (E.D. Wis. 2010) | 11 |
| <i>United States v. Dentsply Int’l, Inc.</i> , 187 F.R.D. 152 (D. Del. 1999) | 11 |
| <i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981)* | <i>passim</i> |

INTRODUCTION

Defendant Blue Cross's motion to compel responses to two interrogatories that demand "all facts known" by all persons interviewed by Plaintiff the United States (Dkt. 80) should be denied. The Supreme Court has squarely held that the "facts" Defendant seeks – the substance of non-parties' oral statements made during interviews Plaintiffs have conducted in anticipation of litigation – are attorney work product that may not be discovered absent a showing of at least a substantial need. *Hickman v. Taylor*, 329 U.S. 495, 508-13 (1947). Relying on *Hickman*, the Sixth Circuit has expressly held that the work-product doctrine "protect[s] statements of fact in an attorney's memoranda of interviews with witnesses." *Norwood v. FAA*, 993 F.2d 570, 576 (6th Cir. 1993).

In *Hickman*, the seminal case on the work product doctrine, the Supreme Court held that an interrogatory constituting a "naked, general demand" for all facts learned in non-party oral interviews – the very interrogatories Defendant propounds here – would necessarily reveal the opinions and mental processes of counsel, and therefore is improper. 329 U.S. at 512-13. The Supreme Court reaffirmed this holding in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). It reemphasized that, although *Hickman* had observed that, upon showing substantial need, a party might discover relevant and non-privileged *written* witness statements in an attorney's file, that observation "*did not apply to oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda.*" *Id.* at 399 (emphasis added). Thus, the "facts" gathered by an attorney in oral witness interviews are protected work product. Any distinction between a document demand for an attorney's interview notes, as in *Upjohn*, and an interrogatory seeking facts learned in interviews, as in *Hickman* and here, is a distinction without

a difference. Defendant, and the three out-of-circuit decisions on which Defendant relies, misread *Hickman* and ignore *Upjohn*.

Defendant's interrogatories also impermissibly seek the *identity* of those individuals the government has interviewed in preparing for litigation. This information is also protected attorney work product because it would threaten to disclose the thought processes and strategic assessments of Plaintiffs' counsel in deciding whom to interview.

Defendant makes no attempt to explain why it has a substantial need, let alone the extraordinary circumstances suggested by *Upjohn*, 449 U.S. at 399-402, that would allow it to obtain Plaintiffs' work product. The United States has already answered Defendant's other interrogatories, which broadly sought facts supporting Plaintiffs' allegations, and has provided Defendant with all of the documents and data that Plaintiffs have received from non-parties. Plaintiffs' Initial Disclosures provided Defendants with the names of the individuals and entities they believe are likely to have information supporting Plaintiffs' claims. Many of these individuals either are Defendant's own employees or are employed by hospitals that have ongoing business relationships with Defendant. Defendant has had, and will continue to have, ample opportunity to seek information from them directly.

Defendant's demand "as of right" for classic work product, *Hickman*, 329 U.S. at 512, seeks solely to "piggyback on [Plaintiffs'] fact-finding investigation." *Sandra T.E. v. South Berwyn Sch. Dist.* 100, 600 F.3d 612, 622 (7th Cir. 2009). But "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.'" *Upjohn*, 449 U.S. at 396 (quoting *Hickman*, 329 U.S. at 516 (Jackson, J., concurring)). Defendant's motion should be denied.

I. BACKGROUND

On October 18, 2010, the United States and the State of Michigan filed a Complaint (Dkt. 1) challenging Defendant's use of Most Favored Nation ("MFN") clauses in its contracts with hospitals in Michigan. The Complaint alleges that Defendant's MFN clauses have denied its competitors access to competitively priced hospital contracts, thereby (1) deterring or preventing competitive entry and expansion in health insurance markets in Michigan, and (2) likely increasing prices for health insurance sold by Defendant and its competitors and prices for hospital services paid by insureds and self-insured employers.

The United States learned about Defendant's MFNs during its investigation of Defendant's proposed acquisition of Physicians Health Plan of Mid-Michigan ("PHP"), based in Lansing. Ex. 1 at ¶ 4.¹ In view of Defendant's dominant share of commercial health insurance markets in Michigan, and of the potential for MFN clauses imposed by an insurer with a high market share to cause hospitals to raise competitors' rates, the Antitrust Division opened an investigation of Defendant's use of MFN clauses in hospital contracts in March 2010. *Id.* at ¶¶ 6-7. The Division actively investigated Defendant's MFNs in anticipation of litigation until the Complaint was filed in October 2010. *Id.* at ¶ 7.

In the investigation of Defendant's MFNs, Division attorneys, assisted by Division economists and paralegals, conducted voluntary oral interviews of about 75 persons employed primarily by hospitals, health insurers, or group purchasers of health insurance. *Id.* at ¶¶ 5, 8.

The Division conducted these interviews to obtain evidence that would enable the United States

¹ Defendant's proposed acquisition of PHP raised substantial competitive concerns, because it would have given Defendant approximately 90% of commercial health insurance sales in Lansing. The Antitrust Division's investigation focused on preparing a potential challenge to block the proposed acquisition. *Id.* at ¶ 3. In preparation for litigation, Division attorneys, assisted by Division economists and paralegals, interviewed approximately 75 individuals employed by hospitals, health insurers, group purchasers of health insurance, insurance brokers, and others. *Id.* at ¶ 4. The Division actively pursued the investigation until March 2010, when it informed the merging parties that the United States would bring suit to block the acquisition, and the merging parties decided to abandon the acquisition. *Id.* at ¶ 3.

to make an informed decision whether to challenge in litigation Defendant's use of MFN clauses, and to develop evidence from potential witnesses should the matter go to trial. These oral interviews were not tape recorded, nor was any attempt made to create a verbatim transcript. Ex. 1 at ¶ 11. Instead, Division participants took notes of the information they believed significant, and after each interview an attorney or paralegal (working at the direction of an attorney) drafted an internal memorandum summarizing the relevant information and attorney impressions. *Id.* at ¶ 9. These memoranda are used solely within the Division; they have not been disclosed to anyone outside the Division. *Id.* at ¶ 12.

After the Court denied Defendant's motion to dismiss the Complaint on June 7, 2011, the parties exchanged their Rule 26(a)(1) Initial Disclosures on July 15, 2011.² Plaintiffs' disclosures included names of the individuals and entities they believe are likely to have information supporting their claims. In addition, the United States has produced the documents that the United States obtained from more than 60 non-parties during its investigations, and all signed statements and deposition transcripts it had obtained. Ex. 1 at ¶ 13.

Within a week after the Initial Disclosures were exchanged, Defendant served its First Set of Interrogatories, which includes Interrogatories 1 and 2 at issue here, on July 21, 2011. Those interrogatories seek "all facts known" by "each individual or entity interviewed by the DOJ" in its investigations leading to this action and of Defendant's aborted PHP acquisition that are relevant to Plaintiffs' claims against Defendant. The United States objected to these interrogatories because, among other things, they request "production of protected attorney work product that conveys attorneys' mental impressions, conclusions, opinions, and legal theories concerning this litigation." (Dkt. 80, Ex. 3 at 10, 12.).

² Plaintiffs were ready to exchange their Rule 26(a)(1) disclosures within the requisite 14 days following the parties' Rule 26(f) conference on January 10, 2011, but agreed to Defendant's request to postpone the exchange until after the Court ruled on Defendant's then-pending motion to dismiss. *See* Dkt. 19 at 3.

Other interrogatories in Blue Cross's First Set of Interrogatories, particularly Nos. 3 and 7, sought the factual basis for the markets pled in the Complaint and the anticompetitive effects alleged in those markets. Here, as in *Hickman*, 329 U.S. at 508-09, Plaintiffs have provided Defendant with full responses, including, when applicable, information that was obtained in the first instance in Plaintiffs' investigative interviews. Ex. 2 at 13-34, and 45-84. Thus, far from attempting to manipulate the timing of disclosure of the facts, as Defendant argues (Dkt. 80, BC Mem. at 5-6) the United States has supplied the facts that support its allegations, including those learned in interviews.

In the meet-and-confer process, the United States made clear that it viewed Defendant's three cases as neither controlling nor persuasive authority (rather than "ignor[ing]" these cases, as Defendant claims, BC Mem. at 1), and that *Hickman*, "properly applied, is controlling and persuasive concerning interrogatories of the type at issue." Ex. 3 at 1.

II. ARGUMENT

A. Requiring the United States to Provide Defendant With All Facts Learned Through Non-party Oral Interviews Would Constitute Disclosure of Protected Work Product

The facts learned by the United States in its oral interviews of non-parties are protected work product, whether sought by an interrogatory demanding "all facts" learned in interviews or by a document demand for interview notes or memoranda. Defendant's attempt to avoid *Hickman*, *Upjohn*, and controlling Circuit precedent is unavailing.

The seminal Supreme Court work-product case – *Hickman v. Taylor* – is directly on point and establishes that Blue Cross's interrogatories seek classic, protected work product. *Hickman* addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for

possible litigation.” 329 U.S. at 497. Relying on “the general policy against invading the privacy of an attorney’s course of preparation,” the Supreme Court declined to “forc[e] an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary.” *Id.* at 512-13. The Court explained that “[n]o legitimate purpose is served by” forcing an attorney to disclose his protected work product in the form of “what he remembers or what he saw fit to write down regarding witnesses’ remarks.” *Id.* at 513.

The Supreme Court reaffirmed and strengthened *Hickman* in *Upjohn*, 449 U.S. at 399-401, holding that “[t]he notes and memoranda sought . . . are work product based on oral interviews” that “reveal the attorneys’ mental processes in evaluating the communications.” *Id.* at 401. Accordingly, *Upjohn* held that a party seeking notes and memoranda of oral witness statements must, at minimum, meet a more stringent standard than “substantial need” and “undue hardship.” *Id.* at 401-402. Under *Hickman* and *Upjohn* it is well established that notes, memoranda, and attorney recollections of oral witness interview statements, prepared in anticipation of litigation,³ are protected from discovery by the work-product doctrine and are entitled to almost absolute immunity as opinion work product. *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F. 2d 933, 935 (6th Cir. 1980) (memoranda of interviews have been “uniformly classified as work product”).⁴ Indeed, *Hickman* itself “held that attorney notes taken during witness interviews are, for all practical purposes, always privileged.” *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1185 (D.C. Cir. 1987); *accord Infosystems, Inc. v.*

³ The United States conducted the relevant interviews as part of active pre-complaint investigations – into Blue Cross’s MFN clauses and its proposed acquisition of PHP – that were undertaken with litigation in mind. Ex. 1 at ¶¶ 7-8. *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (government agency demonstrates document prepared in anticipation of litigation when prepared pursuant to “an investigation that was undertaken with litigation in mind”); *see also F.T.C. v. Grolier*, 462 U.S. 19, 28 (1983) (work product protection applies “without regard to the status of the litigation for which it was prepared,” including matters that are now closed). Defendant does not argue that Plaintiffs’ interviews were not conducted in anticipation of litigation.

⁴ *See also Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000) (attorney notes); *In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988) (attorney recollections of oral interviews) (citing *Upjohn*).

Ceridian Corp., 197 F.R.D. 303, 307 n.4 (E.D. Mich. 2000) (counsel's notes of a witness interview "typically are not disclosed") (cited BC Mem. at 6). Thus, most courts recognize that these notes, memoranda, and recollections of interviews are properly treated as opinion work product, because when taking notes "an attorney often focuses on those facts that she deems legally significant." *In re Green Grand Jury Proceedings*, 492 F.3d 976, 982 (8th Cir. 2007); *see also, e.g., Director of Office of Thrift Supervision v. Vinson & Elkins, L.L.P.*, 168 F.R.D. 445, 446-47 (D.D.C. 1996) ("Interview notes . . . are properly treated as opinion work product because, in choosing what to write down and what to omit, a lawyer necessarily reveals his mental processes.").

Moreover, work-product protection for oral interview statements of non-parties includes protection for the facts conveyed in those interviews. *Hickman*, 329 U.S. at 497-513; *Miller Oil Co. v. Smith Indus.*, 1990 U.S. Dist. LEXIS 17176, at *14-16 (W.D. Mich. Dec. 13, 1990) (holding facts learned through non-party interviews are protected attorney work product) (citing *In re Grand Jury Subpoena*, 622 F.2d at 935).⁵ Indeed, "most witness statements consist largely or exclusively of facts . . . 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." *In re Convergent Tech.*, 122 F.R.D. 555, 558 (N.D. Cal. 1988). Limiting work-product protection to the nonfactual parts of witness statements, then, would eviscerate the "special protection" the Supreme Court intended oral witness interviews to receive. *Upjohn*, 449 U.S. at 401.

⁵ The Sixth Circuit has also observed that "[a]lthough courts most commonly apply the work product privilege to documents and things, the Supreme Court in *Hickman* made clear that disclosure of the opinions or mental processes of counsel may occur when nontangible work product is sought through depositions, interrogatories [as are at issue here], and requests for admissions." *United States v. One Tract of Real Property*, 95 F.3d 422, 428 n. 10 (6th Cir. 1996).

Defendant attempts an end run around this well established case law by seeking the same information through interrogatories that purport to seek only “the facts” conveyed during Plaintiffs’ oral interviews. BC Mem. at 2. Defendant’s effort is foreclosed by *Hickman*, which specifically denied enforcement of such interrogatories, and which was reinforced by *Upjohn*.⁶ *See Haga v. L.A.P. Care Servs. Inc.*, 2002 U.S. Dist. LEXIS 1605, at *5 (W.D. Va. Feb. 1, 2002) (relying on *Upjohn* in holding that “[n]othing in the [federal] rules requires disclosure of facts and opinions learned during oral interviews by counsel in the preparation of the case” in response to an interrogatory). Although Defendant’s interrogatories purport to seek only “facts,” *Hickman* and *Upjohn* establish that a response would necessarily require the United States to disclose its opinion work product.⁷

Thus, the distinction between a request for notes and memoranda of oral witness interviews, which are clearly protected work product, and a naked interrogatory seeking all facts learned in those interviews, is, as two different district courts have recently explained, “a distinction without a difference.” *S.E.C. v. Sentinel Mgmt.*, 2010 U.S. Dist. LEXIS 127355, at *20-21 (N.D. Ill. Dec. 2, 2010) (citing *Upjohn*, 449 U.S. at 399); *accord F.T.C. v. Hope Now Modifications, LLC*, 2011 WL 2634029, at *5 (D.N.J. July 5, 2011). Either type of discovery would force the United States to share its protected work-product with Defendants.

⁶ Other courts have also observed that a lawyer’s notes of an interview of a non-party “is classic work product” even though it contains both “facts and mental impressions of the lawyer.” *Martin*, 819 F.2d at 1185; *Institute for Development of Earth Awareness v. People for Ethical Treatment of Animals*, 272 F.R.D. 124, 125 (S.D.N.Y. 2011) (“A lawyer’s notes of an interview of a non-party witness is classic work product” and “may contain both facts and mental impressions of the lawyer”). Indeed, “there is no reason to believe that the witness statements at issue [in *Hickman*] were anything but factual.” *In re Convergent Tech.* 122 F.R.D. at 558.

⁷ *S.E.C. v. Roberts*, 254 F.R.D. 371, 382-83 (N.D. Cal. 2008) (facts contained in attorneys’ notes of interviews “are likely inextricably tied with the attorneys’ mental thoughts and impressions”); *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]”); *Miller Oil*, 1990 U.S. Dist. LEXIS 17176, at *13 (“questions asked [] and the responses the witnesses elicited are intertwined with the mental impressions, conclusions, opinions, or legal theories of [] attorneys”).

In *Sentinel*, the Defendant sought “facts, knowledge and prior statements of witnesses” that were “communicated to the plaintiff in interviews.” 2010 U.S. Dist. LEXIS 127355, at *21.

The court held this request sought protected work product because the Defendant was:

[a]sking opposing counsel to produce a document prepared by counsel that divulges what counsel learned from interviewing potential witnesses in anticipation of litigation. This is classic attorney work product whether [Defendant] seeks the information by means of a document request for existing interview summaries, or an interrogatory requiring the SEC to prepare a written response summarizing those interviews.

Id. at *20.

Similarly, in *Hope Now*, the defendant urged the court to segregate factual information contained in notes of a non-party interview from a pre-complaint government investigation. The defendant argued, similar to Blue Cross’s argument here, that it was only “interested in the facts contained in [the interview notes] not the mental impressions of any investigator or counsel.”

Hope Now, 2011 WL 2634029, at *5. Echoing *Hickman*, the Court rejected this purported distinction, holding that “factual elements can seldom be segregated from attorney work product” and that “even where the attorney’s summary of a witness’s oral statements appears to be entirely factual, the attorneys’ mental processes are *necessarily* disclosed to some degree.”

Id. (emphasis added).

Even if facts contained in interview notes, memoranda, and recollections of oral interviews are not opinion work product, they are, at a minimum, fact work product. *See Baker*, 209 F.3d at 1054 (attorney interview notes are at the very least fact work product). Judicial recognition and protection of fact work product refutes Defendant’s contention (BC Mem. at 6) that the work-product doctrine does not extend to facts. The Sixth Circuit, and courts within it, recognize that, under *Hickman* and *Upjohn*, the work-product doctrine clearly protects factual material that is the fruit of attorney work product. *Norwood*, 993 F.2d at 576 (work-product

protection extends to “statements of fact in an attorney’s memoranda of interviews with witnesses”); *Ford Motor Co. v. U.S. Customs and Border Protection*, 2008 WL 4899402, at *14 (E.D. Mich. Aug. 1, 2008) (“factual material is itself privileged when it appears within documents that are attorney work product”).

Defendants are entitled to factual information underlying the claims alleged and, as the Court observed in *Hickman*, they can obtain it through various means, including proper interrogatories, and by directly interviewing or deposing persons initially disclosed by the United States. *Hickman*, 329 U.S. at 513. But requiring answers to the interrogatories at issue, demanding “as of right” all facts that the United States obtained during oral interviews of third parties, would necessarily reveal protected work product.

B. The Identity of the Individuals and Entities the United States has Selected to Interview is also Protected Attorney Work Product

Defendant’s interrogatories also impermissibly seek protected work-product by requiring the United States to identify whom it has selected to interview. The Sixth Circuit has held that the names of interviewees are protected attorney work product. *In re Grand Jury Subpoena*, 622 F.2d at 935-37. Courts have regularly distinguished interrogatories that seek identification of persons who have knowledge of a subject matter from those that request the identity of individuals interviewed. Although the former are permissible, the latter are not. *E.g.*, *Ross v. Abercrombie & Fitch Co.*, 2008 WL 821059, at *2 (S.D. Ohio Mar. 24, 2008) (interrogatory seeking “those persons the opponent interviewed” would “unnecessarily intrude on the work product process”).⁸

⁸ *Accord*, e.g., *Massachusetts v. First Nat’l Supermarkets, Inc.*, 112 F.R.D. 149, 153 (D. Mass. 1986); *see also Tracy v. NVR, Inc.*, 250 F.R.D. 130, 132-33 (W.D.N.Y. 2008) (interrogatory seeking “identification of individuals whom counsel has interviewed” impermissibly sought work-product where requesting party had list of individuals likely to have discoverable information); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 230-32 (E.D.N.Y. 2007)

In a case decided by this Court, and relied on by Defendant, “a list of the individuals who Plaintiffs’ counsel selected for interview in the investigation leading up to th[e] suit” was found to “implicate the work-product doctrine, as it would threaten to disclose the thought processes and strategic assessments of Plaintiffs’ counsel in deciding who to interview.” *Cason-Merenda v. Detroit Medical Center*, 2008 WL 659647, at *2 (cited BC Mem. at 6). That is exactly what requiring responses to Defendant’s interrogatories would do here.

C. The Out-of-Circuit Case Law Defendant Relies on Conflicts With Controlling Authority and Should Not be Followed Here

Defendant’s brief ignores controlling Supreme Court and Circuit precedent. Instead, it urges this Court to follow three decisions by out-of-circuit district courts.⁹ The United States respectfully submits that those decisions are against the weight of authority, and are wrongly decided because they misapply *Hickman*, and ignore *Upjohn*, and its progeny. Courts in the Sixth Circuit correctly apply *Upjohn* and *Hickman* in recognizing that “statements of fact contained in an attorney’s memoranda of interviews with witnesses” are protected attorney work product. *Norwood*, 993 F.2d at 576; *see also Miller Oil*, at *16 (facts learned in non-party oral interviews are work product).

The three cases relied on by Defendant incorrectly extend *Hickman*’s observation that an attorney’s work product in the form of *written* witness statements (such as declarations) containing “material, non-privileged facts can[not] be hidden . . .” when there is a showing of a substantial need for the material. 329 U.S. at 511-12. But *Hickman* nonetheless refused to compel responses to interrogatories that requested all “facts” from attorneys’ notes and

(“Defendant is free to ask for names of persons with knowledge of the facts, but it is not entitled, through plaintiffs, to the identification of who among such knowledgeable individuals have been interviewed by plaintiffs’ attorney.”).
⁹ *United States v. Dean Foods Co.*, 2010 WL 3980185 (E.D. Wis. 2010) (BC Mem. Ex. 4); *United States v. AMR Corp.*, No. 99-1180 (D. Kan. Feb. 7, 2000) (BC Mem. Ex. 2); *United States v. Dentsply Int’l, Inc.*, 187 F.R.D. 152 (D. Del. 1999).

memoranda of *oral* interviews. *Id.* at 512-13. In *Upjohn*, the Supreme Court reemphasized that the “hidden” facts “language from *Hickman* . . . did not apply to ‘oral statements made by witnesses . . . whether presently in the form of [the attorney’s] mental impressions or memoranda.’” *Upjohn Co.*, 449 U.S. at 399. Therefore, the “facts” Defendant’s interrogatories nakedly demand from oral interview statements obtained by Plaintiff are protected work product, *id.*, and the cases Defendant relies on are incorrectly decided.

Defendant’s contention that the logic of its three cases has been followed in this Court (BC Mem. at 6) is also incorrect. As discussed earlier, *Cason-Merenda* states that the identity of interviewees *is* attorney work product. 2008 WL 659647, at *3-*4. Contrary to Defendant’s contention, BC Mem. at 6-7, *Cason-Merenda* did not even adjudicate whether – much less hold that – an interrogatory seeking facts uncovered in pre-filing *interviews* would be permissible. Indeed, the opinion makes no mention of *Hickman*, *Upjohn*, or *Norwood*, the Supreme Court and Sixth Circuit controlling authority on that issue.

None of the other Michigan district court cases involve non-party interviews conducted by attorneys. *Infosystems* deals with a wholly distinct issue: whether a non-party affidavit should be considered work product. 197 F.R.D. at 306-07. Contrary to Defendant’s contention, *Infosystems* goes out of its way to distinguish the affidavit at issue from “notes of a witness interview,” because notes “are accorded full work-product protection.” *Id.* at 307 n.4. Finally, *Beaumont Hosp. v. Medtronic, Inc.*, No. 09-CV-11941, 2010 WL 2534207, at *7 (E.D. Mich. June 18, 2010), involved a Rule 30(b)(6) deposition that sought to learn information about a specific business decision where the defendant interjected an untimely work product objection. It has no relevance here.

D. Defendant Has Not Shown Any Need Sufficient to Overcome Work-Product Protection

Defendant does not claim that it has any substantial need for the United States' work product – much less the extraordinary circumstances suggested by *Upjohn*, 449 U.S. at 399-402. Even if Defendant's interrogatories are found to seek only *fact* work product – contrary to *Hickman* and *Upjohn*'s holdings that facts learned in attorney interviews of witnesses are *opinion* work product – Defendant would still be required to show a “substantial need for the [information] covered . . . and [that it is] unable, without undue hardship, to obtain these documents, or their substantial equivalent, by any other means.” *Allen v. Sears, Roebuck and Co.*, 2009 WL 57038, at *1 (E.D. Mich. Jan. 8, 2009) (Majzoub, M.J.) (citing *Arkwright v. Nat'l Union Fire Ins.*, 19 F.3d 1432 (6th Cir. 1994)). Defendant makes no argument to overcome either form of work-product protection, and the facts demonstrate that such a showing could not be made.

A party cannot show a substantial need for work product if, as here, it is free to depose or otherwise interview the individuals and entities in question.¹⁰ *Taylor v. Temple & Cutter*, 192 F.R.D. 552, 557-58 (E.D. Mich. 1999); *accord*, *Hickman*, 329 U.S. at 513; 8 Wright & Miller *Federal Practice & Procedure* § 2025 (3d ed. 2010) (collecting cases). Defendant has given no reason why it cannot conduct its own interviews and/or depose the non-party individuals whom the United States has disclosed to Defendant as part of its initial disclosures. If anything, those individuals are likely to be far better known to Defendant than they are to the United States. Most of the individuals interviewed are employees of companies with which Defendant has

¹⁰ In meet-and-confer discussions, Defendant claimed “these two interrogatories are important for numerous reasons, including helping Blue Cross identify those individuals for whom depositions will be necessary.” (Ex. 4). Defendant's claim ignores Plaintiff's identification of individuals with knowledge in its initial disclosures on July 15, Plaintiff's interrogatory responses detailing anticompetitive effects by market (Ex. 2), and the Court's Scheduling Order (Dkt. 67), which schedules the parties' exchange of preliminary witness lists several months before the close of discovery.

ongoing business relationships. The few remaining individuals are largely competitors of Defendant. Defendant has not asserted that its outside counsel could not interview these individuals, nor has it noticed a single deposition in the year since this case was brought.¹¹

Nor is there any significance to the fact that Defendant did not attend the United States' pre-complaint interviews.¹² Indeed, this argument reveals the true intent of Defendant's interrogatories. These interrogatories seek to allow Defendant, in effect, to attend each of the United States' non-party interviews, reaping the benefits of Plaintiffs' work product without any effort of its own. This is precisely the free-riding "on wits borrowed from the adversary," *Upjohn*, 449 U.S. at 396, that the Supreme Court and Sixth Circuit have sought to prevent.

CONCLUSION

Because Defendant's interrogatories seek protected attorney work product entitled to special protection under both Supreme Court and Sixth Circuit precedent, the United States respectfully requests that this Court deny Defendant's motion to compel responses to Blue Cross's Interrogatories 1 and 2.

¹¹ Defendant suggests that the oral interviews in question were conducted pursuant to civil process. BC Mem. at 2. This suggestion is incorrect. There is no such thing as a "CID interview." Every interview the United States conducted in its investigations was voluntary. Defendant has cited no reason why it cannot conduct its own interviews, particularly when it can compel a deposition under Rule 45 as the alternative.

¹² Presumably, Defendant has conducted and intends to conduct non-party interviews outside the presence of counsel for the United States.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Peter Caplan
Assistant United States Attorney
United States Attorney's Office
Eastern District of Michigan
211 W. Fort Street
Suite 2001
Detroit, Michigan 48226
(313) 226-9784
P-30643
peter.caplan@usdoj.gov

November 4, 2011

Ryan Danks
Amy Fitzpatrick
David Z. Gringer
Barry J. Joyce
Michael Koenig
Steven Kramer
Richard Liebeskind
Trial Attorneys

By:
s/David Z. Gringer
Trial Attorney
Antitrust Division
U.S. Department of Justice
450 Fifth Street N.W., Ste 4100
Washington, D.C. 20530
(202) 532-4537
David.gringer@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 2:10-cv-14155-DPH-MKM, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

s/David Gringer
Trial Attorney
Antitrust Division
U.S. Department of Justice
450 Fifth Street N.W., Suite 4100
Washington, D.C. 20530
(202) 532-4537
David.Gringer@usdoj.gov