IN THE 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*, v. DEAN FOODS COMPANY, *Defendant.*	Civil Action No. 2:10-cv-00059 (JPS)

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL A DISCOVERY RESPONSE TO THE FIRST INTERROGATORY OF DEAN FOODS COMPANY

INTRODUCTION

This Motion to Compel arises from Plaintiffs' refusal to respond to an interrogatory of Defendant Dean Foods Company ("Dean Foods") seeking relevant facts in Plaintiffs' possession. Plaintiffs mistakenly contend that because government personnel conducted an investigation into the challenged transaction at issue in this case,[1] the purely factual information Plaintiffs collected through interviews of third parties during that investigation is either (a) protected attorney work-product; (b) information protected from disclosure by the law enforcement investigatory privilege; or (c) subject to a stipulation between the parties not to seek production of copies of the Department of Justice's internal memoranda. Because Plaintiffs' objections are contrary to the law and

[1] This case involves a challenge under the antitrust laws to Dean Foods' acquisition from Foremost Farms U.S.A., Cooperative, of two milk processing plants located in De Pere and Waukesha, Wisconsin.

otherwise without merit, Dean Foods respectfully seeks an order from this Court compelling Plaintiffs to answer the First Interrogatory of Dean Foods Company.

DEAN FOODS' FIRST INTERROGATORY AND PLAINTIFFS' RESPONSE

On June 16, 2010, Dean Foods served the following First Interrogatory on Plaintiffs:

> 1. Identify 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.

Bradbury Decl. Ex. 1, Def.'s First Interrog.[2]

Plaintiffs objected and refused to provide the identities of the individuals and entities interviewed and the relevant facts obtained from those interviews. Bradbury Decl. Ex. 2, Pls.' Resp. to Def.'s First Interrrog. Plaintiffs have also notified Dean Foods that they conducted approximately "203 interviews with third parties dating 4/23/2009 through 6/30/2010" and have interview memoranda memorializing the factual information obtained from those interviews. *Id.* at 2, 4-5.

Dean Foods does not seek the production of copies of Plaintiffs' interview memoranda themselves, as portions of those memoranda likely contain attorney thoughts and mental impressions protected by the attorney work-product doctrine. Rather, Dean

[2] Appended to the accompanying Declaration of Steven G. Bradbury as Exhibit 1 is the First Interrogatory of Dean Foods Company; appended as Exhibit 2 is Plaintiffs' Objections and Response to First Interrogatory of Defendant Dean Foods Company; appended as Exhibit 3 is Dean Foods Cover Letter re: First Interrogatory of Dean Foods Company; appended as Exhibit 4 is Letter to Bradbury re: July 13 Meeting (attached appendix not included); appended as Exhibit 5 is July 22, 2010 Letter to Jon Jacobs; appended as Exhibit 6 is July 23, 2010 Letter to Bradbury; and appended as Exhibit 7 is the Stipulation Regarding Preservation and Discovery of Certain Electronically Stored Information, Draft Documents, and Privileged Materials (Dkt. Entry 31-3).

Foods only seeks facts obtained through Plaintiffs' interviews, and facts cannot be protected by the attorney work-product doctrine. Since the First Interrogatory of Dean Foods Company does not seek privileged information, Plaintiffs must provide the factual information responsive to Dean Foods' interrogatory.

In their Initial Disclosures pursuant to Fed. R. Civ. P. 26(a), Plaintiffs disclosed only those individuals and entities they interviewed who have information *helpful* to Plaintiffs' case. Plaintiffs have acknowledged, however, that they are in possession of factual information obtained through informal interviews of a large number of other market participants who were *not* named in Plaintiffs' Initial Disclosures. *See* Bradbury Decl. Ex. 2, at 4-5. The factual information obtained by Plaintiffs from those other individuals and entities is highly relevant to the issues raised by Plaintiffs' claims, and indeed, some of that information, if not all, likely undercuts Plaintiffs' case. Thus, Plaintiffs' are attempting to prevent discovery of relevant and potentially exculpatory information, and that is not allowed by the Federal Rules of Civil Procedure.

Like any civil litigant, Plaintiffs here must disclose all facts known to them, and they should not be allowed selectively to disclose only those facts that are helpful to their case. Plaintiffs have identified the factual information obtained from third parties that they believe supports their case. Now that the fact discovery phase of this case has begun, it is time for Plaintiffs to disclose "the rest of the story."

ATTEMPTS TO RESOLVE THIS DISPUTE WITHOUT THIS COURT'S INVOLVEMENT

In an effort to resolve this issue without this Court's involvement, Dean Foods sent a letter to Plaintiffs accompanying the First Interrogatory explaining that Dean Foods is seeking only factual information in Plaintiffs' possession, not Plaintiffs' work product,

and setting forth in detail the legal authorities and precedents supporting Dean Foods' request. *See* Bradbury Decl. Ex. 3, Dean Foods Cover Letter re: First Interrogatory of Dean Foods Company. Despite the weight of authority against Plaintiffs' position, Plaintiffs served their objections on July 1, 2010, stating, among other things, that Dean Foods' interrogatory sought work product and information protected by the law enforcement investigatory privilege. *See* Bradbury Decl. Ex. 2, at 2-3.

On July 13, 2010, and pursuant to Fed. R. Civ. P. 37(a) and Civil L.R. 37, the parties met to discuss Plaintiffs' response to Dean Foods' First Interrogatory. At the parties' conference, Plaintiffs suggested that they might consider disclosing a list of the third parties they contacted in connection with their investigation of the challenged transaction and possibly some very basic information about those third parties, but they made clear they would refuse to disclose the factual information they learned from third party interviews, as requested in Dean Foods' First Interrogatory. Dean Foods urged Plaintiffs to undertake an objective, good faith review of their interview memoranda to identify the factual information that may be extracted and disclosed to Dean Foods without disclosing the mental impressions and deliberations of attorneys. Such an exercise is precisely what the Antitrust Division of the Department of Justice previously did in the case of *United States v. Dentsply*, 187 F.R.D. 152 (D. Del. 1999), where the U.S. District Court for the District of Delaware granted a motion to compel very similar to the present motion.

In a letter dated July 19, 2010, Plaintiffs provided Dean Foods with the list of individuals and entities contacted by Plaintiffs, as they had suggested at the conference. *See* Bradbury Decl. Ex. 4, Letter to Bradbury re: July 13 Meeting, at 2 (attached

appendix not included). The list provided to Dean Foods comprises those individuals and entities Plaintiffs interviewed and attempted to interview, but it does not indicate which of the individuals and entities on the list were actually interviewed by Plaintiffs. *Id*. Although this information narrows the possible universe of individuals and entities interviewed by Plaintiffs, it fails to provide the identities of those actually interviewed and provides none of the purely factual information requested by Dean Foods' First Interrogatory and to which Dean Foods is entitled under the Federal Rules. In response to Dean Foods' suggestion that Plaintiffs conduct a good faith review of their memoranda, Plaintiffs stated in their July 19 letter that they had done so, and that they stood by their objections to Dean Foods' First Interrogatory. *See* Bradbury Decl. Ex. 4, at 2.

On July 22, 2010, Dean Foods gave Plaintiffs a further opportunity to provide the factual information responsive to Dean Foods' First Interrogatory. *See* Bradbury Decl. Ex. 5, July 22, 2010 Letter to Jon Jacobs. In response, Plaintiffs reasserted their belief that the facts requested by Dean Foods are privileged. *See* Bradbury Decl. Ex. 6, July 23, 2010 Letter to Steven G. Bradbury. In response to that letter, counsel for Dean Foods e-mailed counsel for Plaintiff, the United States, one more time to discuss this issue, but Plaintiffs' counsel confirmed that Plaintiffs are resolved not to respond further to Dean Foods' First Interrogatory.

Because Plaintiffs refuse to comply with Dean Foods' legitimate request for relevant factual information indisputably in Plaintiffs' possession, Dean Foods must respectfully ask this Court to compel Plaintiffs to do so.

ARGUMENT

Like all plaintiffs, Plaintiffs in this case must respond to discovery requests that seek "nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). When a plaintiff initiates a lawsuit, all nonprivileged relevant factual information in that plaintiff's possession is within the scope of discovery. Since Dean Foods' interrogatory seeks only nonprivileged relevant factual information, Plaintiffs must provide the responsive factual information in their possession.

I. FACTUAL INFORMATION IN PLAINTIFFS' POSSESSION IS NOT PROTECTED BY THE ATTORNEY WORK-PRODUCT DOCTRINE

The attorney work-product doctrine shields from discovery attorneys' legal strategies, thoughts, and mental impressions developed in anticipation of litigation. *United States v. Dentsply Int'l*, 187 F.R.D. 152, 155 (D. Del. 1999) (citing *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)). The attorney work-product doctrine does not shield from discovery the identities of third parties interviewed or facts obtained through those interviews. *E.g.*, *E.E.O.C. v. Jewel Food Stores, Inc.*, 231 F.R.D. 343, 346 (N.D. Ill. 2005); *Dentsply*, 187 F.R.D. at 155. Similarly, the attorney work-product doctrine does not protect facts obtained by attorneys during an investigation, and a party may discover facts provided to an adverse party's attorney by third parties. *See* 8 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2023 (3d ed. 2010) (noting that courts have "consistently held that the work-product concept furnished no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he or she learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery."). In addition, as codified in the Federal Rules of Civil Procedure, the

attorney work-product doctrine applies only to "documents and tangible things," and it provides no basis for withholding information responsive to an interrogatory seeking only factual information. Fed. R. Civ. P. 26(b)(3); *see* 8 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2023 (3d ed. 2010) (stating that work-product standards have not changed with the adoption of Rule 26(b)(3)).

In *United States v. Dentsply*, the court addressed the precise issue presented here—whether facts that were obtained through interviews of third parties and memorialized in interview memoranda prepared by Department of Justice staff as part of the investigation that led to the civil antitrust suit against Dentsply were protected from discovery by the attorney work-product doctrine. The court emphatically rejected Plaintiffs' position by holding that the facts contained in the Department of Justice's interview memoranda were not protected by the work-product doctrine. 187 F.R.D. at 155-57. The court reasoned that the government was not exempt from "the general rule [] that one party may discover relevant facts known or available to the other party, even though such facts are contained in documents that are not discoverable." *Id.* at 155-56 (citations omitted). The court also noted that parties to civil litigation, including the government, may not use work-product claims to hide relevant facts from the opposing party. *Id.* at 156 (citing *Hickman*, 329 U.S. at 507 ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.")).

Similarly, in *EEOC v. Jewel*, a district court in this Circuit rejected Jewel's claim that the identity of interviewees and the factual content of interviews conducted by Jewel's counsel were protected by the attorney work-product doctrine. 231 F.R.D. at 346.

There, Jewel argued that identifying those persons whom Jewel's counsel considered worthy of interviewing would reveal the attorneys' mental processes. *Id.* at 347. The court stated that without more, identities of those interviewed do not implicate the work-product doctrine. *Id.* The EEOC's interrogatories only sought "permissible factual information . . . : the identities of persons who have information or who have made statements relating to the claims or defenses in the case, the substance of the information they possess, and the statements they have made." *Id.* at 346. The court held that this type "of factual information is routinely sought in discovery, and may not be withheld from production on the basis of work-product." *Id.*

Plaintiffs in this case make the exact same claim rejected by the *Dentsply* and *Jewel* courts. *See Jewel*, 231 F.R.D. at 346; *Dentsply*, 187 F.R.D. at 155. Since the factual information responsive to the First Interrogatory of Dean Foods Company is not protected by the work-product doctrine, this Court must compel Plaintiffs to provide the factual information responsive to Dean Foods' interrogatory.

It would be entirely inconsistent with the Federal Rules to force Dean Foods to engage in needless and burdensome discovery to try to piece together the facts already in Plaintiffs' possession. Plaintiffs took over nine months to investigate these claims (with subpoena power and with no limitations on the time and extent of their investigation) prior to filing the Complaint, and now they have had another six months to develop more fully the facts that allegedly support their claims through additional third-party interviews. Dean Foods, of course, did not have subpoena power prior to the beginning of fact discovery in this case and cannot be expected to obtain the same degree of voluntary cooperation from third parties that the government received. Dean Foods will be at a

substantial disadvantage if Plaintiffs are permitted to hide the facts they have learned from interviews of third parties, and if Dean Foods is forced to try to recreate those facts solely through Rule 45 document requests and depositions of third parties that are subject to the strict hours limitations set forth in the Scheduling Order approved by the Court.

It is also important to note that Plaintiffs are selectively asserting that the facts obtained from third parties are protected by the work product doctrine. Plaintiffs have willingly identified and produced facts that support their claims in their Initial Disclosures, and have indicated their continued willingness to do so in their response to Dean Foods' Second Set of Interrogatories, which asks for facts that support certain allegations in the Complaint. *See* Bradbury Decl. Ex. 6 ("Specifically, to the extent that the principal and material facts upon which we relied for those allegations included our understanding of information we obtained from our interviews of third parties, we intend to include such information in our responses to those interrogatories."). Plaintiffs are not allowed to selectively disclose only the facts that support their claims. In response to discovery requests, Plaintiffs must disclose all responsive facts in their possession.

II. THE LAW ENFORCEMENT INVESTIGATORY PRIVILEGE DOES NOT APPLY TO FACTS GATHERED DURING AN INVESTIGATION THAT LEADS TO THE CASE BEFORE THE COURT

The law enforcement investigatory privilege does not apply to the factual information sought by the First Interrogatory of Dean Foods Company. The law enforcement investigatory privilege is a qualified privilege that limits discovery of information obtained during certain law enforcement investigations. *E.g.*, *Anderson v. Marion County Sheriff's Dept.*, 220 F.R.D. 555, 565 (S.D. Ind. 2004); *Ostrowski v. Holem*, No. 02 C 50281, 2002 WL 31956039, at *2 (N.D. Ill. Jan. 21, 2002). No district

court in the Seventh Circuit has concluded that the law enforcement investigatory privilege applies to information obtained during a government investigation that led to the civil litigation before the court.

The Seventh Circuit recognized the law enforcement investigatory privilege in *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997). In *Dellwood*, the court held that FBI videos in possession of the Department of Justice were protected from discovery by the law enforcement investigatory privilege. *Id.* at 1126. There, the Department of Justice was a third party seeking to protect the integrity of an ongoing criminal investigation. *Id.* at 1125. In upholding the Department of Justice's assertion of privilege for the FBI videos, the court reasoned:

> The plaintiffs in these civil suits, who are seeking to obtain material from the government's criminal investigation, are not criminal suspects or defendants. They thus have no definite legal right to the fruits of the FBI's investigative endeavors conducted in confidence; and it seems to us that neither should have a right to force the government to tip its hand to criminal suspects and defendants by disclosing the fruits of the surreptitious (but presumably lawful) surveillance that the FBI conducted.

Id.

Several other courts have also held that the law enforcement investigatory privilege applies where plaintiffs seek information related to an ongoing criminal investigation. *See, e.g.*, *Clark v. Powe*, Nos. 07 C 1616, 07 C 5251, 2008 WL 4686151, at *3 (N.D. Ill. May 30, 2008) (granting the privilege because allowing discovery would lead to direct interference with a criminal investigation); *Holten v. City of Geona*, No. C 50201, 2003 WL 22118941, at *3 (N.D. Ill. Sept. 12, 2003) (granting the privilege until the completion of a criminal investigation). In addition to ongoing criminal investigations, the law enforcement investigatory privilege has also been applied to

internal police investigations. *See, e.g.*, *Jones v. City of Indianapolis*, 216 F.R.D. 440, 443-49 (S.D. Ind. 2003) (applying the privilege to information related to a separate and ongoing DOJ investigation and an internal police investigation).

All of these cases upholding the privilege involve a sensitive (and usually ongoing) government investigation *other than* whatever investigation may have led up to the case currently being litigated. When the government initiates civil litigation, all relevant facts in its possession are discoverable, and the law enforcement investigative privilege offers no protection.

By asserting the privilege in this context, Plaintiffs are attempting to use the law enforcement investigatory privilege as both a sword and a shield. Plaintiffs seek to use the facts obtained during their investigation to hold Dean Foods' liable for the violations alleged in the Complaint, while at the same time blocking Dean Foods' access to additional and potentially exculpatory facts obtained during the same investigation. Plaintiffs cannot assert that some facts obtained during the investigation are protected by the law enforcement investigatory privilege while other facts obtained during that same investigation are not so protected because they supposedly support Plaintiffs' case. If Plaintiffs did not want to make themselves and all facts in their possession susceptible to discovery, they should not have initiated this civil lawsuit.

The concerns that motivated those courts that have applied the law enforcement investigatory privilege are not present in this case. The factual information responsive to Dean Foods' interrogatory does not compromise a criminal investigation or any ongoing investigation. Under the Federal Rules, a civil defendant like Dean Foods has even more right to the discovery of relevant factual information held by the government plaintiff

than does the typical criminal defendant, who has the right to receive exculpatory evidence in the government's possession. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Davis*, 131 F.R.D. 391, 395-96 (S.D.N.Y. 1990) (stating that because defendant would have access to government's interview transcript in a criminal case, there is no reason why defendant should not have it in a civil case).

The analogy to a criminal case is instructive because both Plaintiffs here and government prosecutors have no independent knowledge of the facts that form the basis of their claims and must rely on facts obtained from third parties. In criminal cases, this District applies an "open file" policy that provides defendants access to all relevant facts in the government's possession, including facts obtained from third parties. Given the Federal Rules' liberal discovery provisions in civil cases, there is no reason why Dean Foods should not have an equal right to such information in this civil case.

Once the government brings a case, it must comply with the federal rules of discovery, Fed. R. Civ. P. 26-37, and that includes responding to discovery requests that seek relevant facts in Plaintiffs' possession, Fed. R. Civ. P. 26(b)(1).

III. DEAN FOODS SEEKS THE FACTS IN PLAINTIFFS' POSSESSION AND NOT DOCUMENTS SUBJECT TO A STIPULATION BETWEEN THE PARTIES

Plaintiffs' final substantive objection to producing information responsive to the First Interrogatory of Dean Foods Company rests on a misreading of the parties' Stipulation Regarding Preservation and Discovery of Certain Electronically Stored Information, Draft Documents, and Privileged Materials (Dkt. Entry 31-3). Bradbury Decl. Ex. 7. Plaintiffs contend that paragraph 3 of the Stipulation, read in conjunction with paragraph 4, constitutes an agreement not to discover the information sought by Dean

Foods' interrogatory. Bradbury Decl. Ex. 2, at 5; Bradbury Decl. Ex. 7, at ¶¶3-4. This reading of the Stipulation is plainly incorrect.

By its express terms, Paragraph 3 of the Stipulation only covers *documents*. Bradbury Decl. Ex. 7, at ¶3. Paragraph 3 lists document categories that the parties agreed were likely privileged, such as documents containing attorney-client communications. *Id.* In paragraph 4 of the Stipulation, in turn, Dean Foods agreed that it will not seek discovery of the "items" listed in paragraph 3—i.e., the *documents* to which paragraph 3 refers. *Id.* at ¶4. Paragraph 3 read in conjunction with paragraph 4, therefore, does not limit Dean Foods' ability to seek discovery of the non-privileged *facts* contained in any of the documents listed in paragraph 3. Since the First Interrogatory of Dean Foods' Company only seeks the facts contained in these documents and not the documents themselves, the interrogatory is fully consistent with the Stipulation.

CONCLUSION

Like all plaintiffs, Plaintiffs in this case must respond to an interrogatory seeking relevant facts in their possession. The facts in Plaintiffs' possession sought by the First Interrogatory of Dean Foods Company are not protected by the attorney work-product doctrine or the law enforcement investigatory privilege. As a result, this Court must compel Plaintiffs to provide the facts responsive to Dean Foods' First Interrogatory.

Dated this 23rd day of July 2010.

Respectfully submitted,

s/ Steven G. Bradbury

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