

An order compelling Plaintiffs to reveal the relevant factual information they learned from third-party interviews here, as required by the ordinary rules governing discovery in civil litigation, will in no way dissuade third parties from cooperating with the Department of Justice in future antitrust investigations. This policy concern raised by Plaintiffs fails for multiple reasons, including the robust protection provided for confidential business information by the protective order previously entered by this Court, and the fact that Plaintiffs themselves already put cooperating third parties on notice that materials they provide in antitrust investigations might be disclosed in court filings in the event of litigation.

ARGUMENT

I. THE CASE LAW IS CLEAR THAT THE RELEVANT FACTUAL INFORMATION SOUGHT IN DEAN FOODS' FIRST INTERROGATORY IS NOT PROTECTED FROM DISCOVERY BY THE WORK-PRODUCT DOCTRINE

Like all parties to civil litigation, Plaintiffs here must answer interrogatories, like Dean Foods' First Interrogatory, that seek relevant, non-privileged factual information in their possession. *See* Fed. R. Civ. P. 26; Fed R. Civ. P. 33. *See also Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“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.”).

The case law amply establishes that in response to an interrogatory, a party must disclose the responsive underlying facts contained in documents that are themselves protected from disclosure based on the work-product doctrine, regardless of whether those facts are collected by the party's attorneys through interviews with third parties and memorialized, as here, in interview memoranda prepared by or under the supervision of

attorneys. *See* 6 James W. Moore, et al., Moore’s Federal Practice § 26.70[2][a] (3d ed. 2009) (“Facts Contained in Work Product Are Freely Discoverable”; “facts are not protected from disclosure by virtue of having been gathered by an attorney”) (citing cases); 8 Charles Alan Wright, et al., Federal Practice and Procedure § 2023 (3d ed. 2010) (courts have “consistently held that the work product concept furnishes no shield against facts that the adverse party’s lawyer has learned, or the persons from whom he learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery”) (citing cases). *See* Fed. R. Civ. P. 26(b)(3), Advisory Committee Notes (1970) (“No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.”).

This clear rule is exemplified by the two cases Dean Foods discussed extensively in its opening brief: *E.E.O.C. v. Jewel Food Stores, Inc.*, 231 F.R.D. 343, 346 (N.D. Ill. 2005) (holding that factual information collected by a party through attorney interviews may not be withheld from disclosure as work product in response to an interrogatory), and *United States v. Dentsply Int’l*, 187 F.R.D. 152, 155-57 (D. Del. 1999) (ruling that the Department of Justice must answer an interrogatory—virtually identical to Dean Foods’ First Interrogatory here—that sought factual information memorialized in interview memoranda prepared by Antitrust Division attorneys in their investigation of the antitrust case at hand).

The very same principle is also exemplified by another ruling, only recently discovered by counsel for Dean Foods in the preparation of this Reply, in which a district

court, just like the court in *Dentsply*, once again required the Department of Justice to disclose facts collected by Antitrust Division attorneys in investigatory interviews of third parties conducted in preparation of an antitrust case. See *United States v. AMR Corp.*, Case No. 99-1180-JTM, at 3-6 (D. Kan. Feb. 7, 2000) (appended to this Reply as Exhibit 8). The district court's memorandum and order in *AMR Corp.* is unreported and is not available on LEXIS or Westlaw, but it can be found on the Antitrust Division's own Web site at <http://www.justice.gov/atr/cases/f217100/217141.htm>.

In *AMR Corp.*, the court granted the defendant's motion to compel a response from the Department of Justice to the following interrogatory: "With respect to the persons identified in response to Interrogatory No. 1, identify in detail all material or principal facts supplied to you by these persons that are relevant to your claims that American monopolized or attempted to monopolize any relevant market for air service." *Id.* at 2-3. The defendant sought a witness-by-witness description of the principal facts obtained through the Antitrust Division's interviews with 159 third-party witnesses. *Id.* at 2, 4. In granting the motion to compel, the court held that "[t]he work product privilege protects against disclosure of the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation,'" but "it does not protect facts concerning the creation of work product or *facts contained within work product.*" *Id.* at 3-4 (quoting *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995)) (emphasis added). The court further stated that "[i]nterrogatories asking for witness names and facts they possess are standard discovery questions and routinely employed to assist a party in determining which witnesses to depose," and it

found “no persuasive authority to support plaintiff’s argument that listing the witnesses’ name with the facts they possess violates the work product doctrine.” *Id.* at 5 & n.2.

There are numerous other cases with similar holdings, reflecting the rule stated in the Moore’s and Wright & Miller treatises quoted above. *See, e.g., Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617, 624-37 (N.D. Okla. 2009) (factual information learned from third-party interviews is not work product and must be disclosed in response to an interrogatory); *State Farm Fire & Casualty Co. v. Nokes*, 263 F.R.D. 518, 523-24 (N.D. Ind. 2009) (work-product protection does not extend to underlying facts in work-product documents and plaintiff could not rely on work-product doctrine to avoid answering an interrogatory seeking such facts); *Starlight Int’l Inc. v. Herlihy*, 186 F.R.D. 626, 646 (D. Kan. 1999) (work-product doctrine provides no protection for “facts contained within work product.”) (citation omitted); *Protective Nat’l Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 279-80 (D. Neb. 1989) (“where a document may be insulated from discovery because of the work product doctrine, the facts contained therein must be disclosed in response to a properly worded interrogatory or deposition question”); *Eopollo v. Nat’l R.R. Passenger Corp.*, 108 F.R.D. 292, 294 (E.D. Pa. 1985) (“The work product doctrine furnishes no shield against discovery by interrogatories or by depositions of the facts that the adverse party has learned or the persons from whom such were learned.”).

Plaintiffs strain to confuse the issue by claiming that there is no clear distinction in the law between a request for production of work-product documents that reveal the opinions and mental impressions of a party’s attorney and an interrogatory asking only for the facts learned by a party’s attorney that may be memorialized in work-product

documents. In so claiming, Plaintiffs rely heavily on *Hickman v. Taylor*, 329 U.S. 495 (1947), but this reliance is misplaced.

Hickman involved a discovery request nominally styled an “interrogatory” but that asked the opposing party to attach “exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.” *Id.* at 499. In essence, the discovery request at issue in *Hickman* sought transcripts of the verbatim Q&A between attorneys and witnesses. *Hickman* did *not* address an interrogatory like Dean Foods’ First Interrogatory, which asks only for relevant facts in Plaintiffs’ possession and not for the work-product documents containing those facts or for the disclosure of the mental impressions, opinions, legal theories, or deliberations of Plaintiffs’ attorneys. Dean Foods does not seek an exact report or verbatim transcript of the Q&A between Plaintiffs’ counsel and third-party witnesses.

Unlike in *Hickman*, therefore, Plaintiffs can readily answer Dean Foods’ First Interrogatory by extracting from their interview memoranda only the relevant factual information without revealing the mental processes and strategy of the attorneys who conducted the interviews or prepared the memoranda. *See Eopollo v. Nat’l R.R. Passenger Corp.*, 108 F.R.D. at 293-94 (requiring a party to answer an interrogatory seeking facts learned during an investigation of the case because the interrogatory “does not, on its face, elicit information that goes beyond the underlying facts” and the responding party “is not required to supply counsel’s view of the case, identify the facts which counsel considers significant, or the specific questions asked by the agents of the [party] during the investigation”). That is precisely what the Department of Justice was able to do in response to the courts’ rulings in *Dentsply* and *AMR Corp.* Plaintiffs can do

the same in answering the First Interrogatory, and they have no justification for refusing to do so.

Moreover, while *Hickman* may have been the first word on the work-product doctrine, it was by no means the last. As illustrated by the cases discussed above, in the 63 years since *Hickman*, the lower courts have further developed and applied the work-product doctrine and have established the clear principle that the doctrine does not excuse a party from answering interrogatories that ask only for the facts memorialized in attorney work-product documents. *See* 8 Charles Alan Wright, et al., *Federal Practice and Procedure* §§ 2022-2023 (3d ed. 2010) (recognizing that the Supreme Court’s decision in *Hickman* was not the end of work-product analysis and that the doctrine has been further refined and clarified in the lower courts).

Beyond *Hickman*, Plaintiffs do not cite a single case in support of their position that even nominally involved an interrogatory, let alone one like Dean Foods’ First Interrogatory that is expressly limited to the underlying factual information contained in Plaintiffs’ interview memoranda. Plaintiffs rely on two Seventh Circuit opinions discussing the work-product doctrine as applied to requests for the production of documents, *see Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612 (7th Cir. 2010); *Hauger v. Chicago, Rock Island & Pacific R.R. Co.*, 216 F.2d 501 (7th Cir. 1954), but their reliance on these two cases only underscores Plaintiffs’ failure to distinguish between requests for documents and interrogatories.

In *Sandra T.E.*, the defendant school district hired outside counsel to conduct an investigation into allegations that a school teacher sexually abused multiple students. 600 F.3d at 615. As part of discovery, “the plaintiffs issued a subpoena for the *documents* in

[the outside counsel's] possession relating to [the] investigation.” *Id.* (emphasis added). The court stated, “The work-product doctrine protects *documents* prepared by attorneys in anticipation of litigation for the purpose of analyzing and preparing a client’s case.” *Id.* at 618 (emphasis added). The case did not involve an interrogatory.

Likewise, in *Hauger*, the “[p]laintiff filed a motion under *Rule 34* . . . requiring [the defendant] to produce . . . ‘all statements, either signed or unsigned.’” 216 F.2d at 502 (emphasis added). The court in *Hauger* held that the plaintiffs had not shown the required substantial need to overcome work-product protection for the production of documents sought pursuant to Rule 34. *Id.* at 508.

In another case relied upon by Plaintiffs, *In re Convergent Techs. Second Half 1984 Sec. Litig.*, 122 F.R.D. 555 (N.D. Cal. 1988), the magistrate judge recognized the significant difference between requests for production of work-product documents and an interrogatory asking for purely factual information:

It must be emphasized that the law does not permit counsel or litigants to use the work product doctrine to hide the facts themselves. Defense counsel can learn those facts by deposing the witnesses, by acquiring unprivileged documents related to this case from the witnesses, and by posing interrogatories to plaintiffs’ counsel that would compel disclosure of the substance of relevant information plaintiffs’ counsel has learned from non-party witnesses. The issue here presented is not whether defense counsel have a right to learn the relevant factual information, but whether they have a right to that information in a particular form, namely, a piece of paper prepared by plaintiffs’ counsel and signed by a non-party witness.

Id. at 558. As recognized in *Covergent Technologies*, documents containing factual information may be protected as attorney work product, but the underlying facts contained in those documents cannot be withheld based on the work-product doctrine.

Finally, Plaintiffs also try to draw a distinction between “opinion” and “fact” work product based on the different treatment accorded work-product documents

generally under Fed. R. Civ. P. 26(b)(3)(A) and attorneys’ “mental impressions, conclusions, opinions, or legal theories” under Fed. R. Civ. P. 26(b)(3)(B). *See* Pl. Resp. at 9. Rule 26(b)(3)(B) applies a heightened level of protection for “mental impressions, conclusions, opinions, or legal theories” contained in documents already required to be produced under Rule 26(b)(3)(A). *See* Fed. R. Civ. P. 26(b)(3)(B). Rather than signifying that there are two types of work product, Rule 26(b)(3)(B) reminds courts of the heightened protection afforded to the mental processes of attorneys and that all documents produced under Rule 26(b)(3)(A) should be redacted to exclude such information. *See* Fed. R. Civ. P. 26(b)(3), Advisory Committee Notes (1970) (“In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.”).

The requirement codified in Rule 26(b)(3)(B) provides no support for Plaintiffs’ position that the facts memorialized in work-product protected documents (as distinct from the documents themselves) are shielded from discovery in their own right in response to interrogatories or deposition questions. In fact, the Advisory Committee specifically rejects Plaintiffs’ position: “[O]ne party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.” Since Dean Foods’ First Interrogatory does not seek documents, Rule 26(b)(3)(A)’s standard for production does not apply here. In addition, since Dean Foods specifically avoids requesting mental impressions, analyses, deliberations, opinions, or legal theories, any heightened protection that might be inferred from Rule 26(b)(3)(B) similarly does not apply. *See Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. at 629 n.14:

It is important to distinguish between facts learned by a lawyer, a memorandum or document containing those facts prepared by the lawyer, and the lawyer's mental impressions of the facts. *The facts are discoverable if relevant.* The document prepared by the lawyer stating the facts is not discoverable absent a showing required by Federal Rule of Civil Procedure 23(b)(3). Mental impressions of the lawyer regarding the facts enjoy nearly absolute immunity.

(Emphasis added.)

As the court noted in *Tyson Foods*, contrary to Plaintiffs' argument here, the preferred method of discovering such relevant factual information contained in attorney work-product documents is through interrogatories, because interrogatories allow the responsive facts to be stated precisely without disclosure of attorney opinion and mental impressions:

Attorneys often refuse to disclose during discovery those facts that they have acquired through their investigative efforts and assert, as the basis for their refusal, the protections of the work product doctrine. Where such facts are concerned, as opposed to the documents containing them or the impressions and conclusions drawn from them, they must be disclosed to the opposing party in response to a proper request for discovery. Otherwise, discovery would be a meaningless tool and we would be back to the era before the advent of the Federal Rules of Civil Procedure when "mutual knowledge of all the relevant facts" was far from the guiding principle of the federal litigation process.

Id. at 630 n.15 (citation omitted). *See Hickman*, 329 U.S. at 504 ("A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.")¹

¹ Plaintiffs acknowledge that they have conducted 215 informal interviews of third parties in connection with their investigation of this case and that they do and will maintain in their possession all of the detailed interview memoranda memorializing the facts learned through these interviews. *See* Pl. Resp. at 3 & n.2, 13 n.11. (Plaintiff United States routinely preserves such investigatory memoranda in all open cases pursuant to federal records requirements, in any event. *See* U.S. Dep't of Justice Directive ATR 2710.1, Procedures for Handling Antitrust Division Documents, 1992 WL 739938 (D.O.J. Apr. 17, 1992).) Because Dean Foods is asking only for relevant factual

II. PLAINTIFFS' POLICY ARGUMENT IS MERITLESS AND UNPERSUASIVE

Plaintiffs claim that if the work-product doctrine does not shield discovery of the relevant factual information sought in the First Interrogatory, Plaintiffs' attorneys will no longer be able to gather the factual "information necessary to make decisions whether to challenge mergers or close investigations without further action." Pl. Resp. at 19; Seven Decl. ¶¶ 4-6. They assert that routine disclosure of factual "information obtained through interviews would likely deter many persons from providing Plaintiffs with information on a voluntary basis." Pl. Resp. at 19.

This policy argument fails for five separate reasons.

First, this Court's protective order strictly prevents disclosure of confidential discovery information to Dean Foods employees or any other market participant, *see* Protective Order (May 20, 2010) (Dkt. Entry 30), and the existence of the protective order can be expected to ameliorate the concerns of third parties raised by Plaintiffs. It is unreasonable for Plaintiffs to believe that other courts will not issue similar protective orders. *See* Pl. Resp. at 20. Plaintiffs can always seek a similarly restrictive protective order in future antitrust cases, and it will typically be in the interest of the private antitrust defendant to agree to such an order, so that its own confidential business information is protected from release to other market participants. Since it would be an unusual occurrence for a court to deny a joint protective order in an antitrust case similar to this

information, not for production of the interview memoranda themselves, and because Plaintiffs continue to preserve copies of the documents containing the factual information sought by Dean Foods, the parties' Electronically Stored Information stipulation (Dkt. Entry 31-3) raised by Plaintiffs (*see* Pl. Resp. at 13) has no relevance to this Motion to Compel. *See* Dean Foods' Mem. at 12-13.

one, Plaintiffs cannot reasonably assert that answering Dean Foods' First Interrogatory would compromise Plaintiffs' ability to conduct antitrust investigations.

Second, as one would expect, third parties who voluntarily provide information to Plaintiffs in antitrust investigations are already on notice that the information they convey may be disclosed in litigation on the rare occasion when Plaintiffs bring a contested antitrust case in court. Indeed, the Antitrust Division of the Department of Justice sends a form letter to third parties clearly stating upfront that "the Department cannot provide an absolute assurance that sensitive information [provided to the Department] will not be included in [complaints and other publicly available court] papers" in the event of litigation. *See* U.S. Dep't of Justice, Antitrust Division, Voluntary Production Letter, available at http://www.justice.gov/atr/public/divisionmanual/supporting_documents/206430.pdf (copy appended to this Reply as Exhibit 9). Thus, an order compelling disclosure of relevant factual information in this litigation would only confirm the expectations that Plaintiffs already communicate to cooperating third parties in antitrust investigations.

Third, Plaintiffs have already lost twice on the precise issue raised in this Motion, in the *Dentsply* and *AMR Corp.* cases discussed above, yet Plaintiffs make no declaration that they are unable to investigate antitrust cases effectively today because of those two defeats. To the contrary, Plaintiffs acknowledge that in this case they have interviewed hundreds of third parties on a voluntary basis. Pl. Resp. at 3 & n.2. Plaintiffs' declarations are understandably devoid of any indication that the *Dentsply* and *AMR Corp.* decisions factored into the willingness of any third parties to cooperate with Plaintiffs during their investigation. As such, Plaintiffs have no basis to assert that the impact on

third parties of an order compelling disclosure in this case will be any different from those issued in *Dentsply* and *AMR Corp.*

Fourth, Plaintiffs' pre-litigation compulsory process authority effectively "encourages" third parties to cooperate with Plaintiffs' antitrust investigations. For example, Plaintiff United States has the authority to issue Civil Investigative Demands ("CIDs"), *see* 15 U.S.C. §§ 1311-1314, and using CIDs, the Department of Justice can compel testimony, interrogatory responses, or document productions from any person the Department of Justice has reason to believe has information relevant to a civil antitrust investigation, *see id.* § 1312(a). Plaintiffs insist that voluntary interviews are more efficient than using formal process, *Soven Decl.* ¶ 4, but the mere possession of such compulsory process authority will quite obviously facilitate voluntary cooperation from third parties, the great majority of whom will want to avoid becoming the object of formal process.²

And fifth, Plaintiffs in this case have already provided Dean Foods' attorneys with the information that Plaintiffs claim is the most sensitive. Plaintiffs claim that "[m]any third-party witnesses . . . note that they fear retaliation from the party or parties which the United States is investigating." *Knutsen Decl.* ¶ 25. Presumably, the interviewees who would be the most fearful of retaliation would be the ones that provide information helpful to Plaintiffs' case. Here, however, Plaintiffs have already provided Dean Foods with information from third-party interviews that supports Plaintiffs' case,

² In addition, Plaintiffs' preference to investigate potential antitrust violations with the least administrative burden does not override Fed. R. Civ. P. 26(b)(1), which allows for the discovery of all "nonprivileged matter that is relevant to any party's claim or defense." That Plaintiffs may be "forced" to exercise their pre-litigation subpoena authority is not a sufficient basis to allow them to withhold relevant factual information.

see Bradbury Decl. Ex. 6, and yet they are unwilling to provide the relevant information potentially helpful to Dean Foods' case. Plaintiffs are willing to disclose information from those they claim have the most to fear, while hiding the information provided by those they assert have the least to fear. Thus, Plaintiffs' own actions undermine their asserted rationale for withholding additional facts.

Rather than aiding Plaintiffs' suppression of relevant facts in their possession, this Court should ensure that both Dean Foods and Plaintiffs have "mutual knowledge of all the relevant facts gathered by both parties" and that neither party can keep the facts hidden from disclosure. *Hickman*, 329 U.S. at 501, 507.

CONCLUSION

Dean Foods' First Interrogatory seeks only factual information, not attorney opinions, analyses, deliberations, legal theories, or mental impressions. Since factual information sought by an interrogatory is not protected by the attorney work-product doctrine, Dean Foods requests that this Court order Plaintiffs to answer the First Interrogatory of Dean Foods Company.

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Respectfully submitted,

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