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

PLAINTIFFS' SUR-REPLY IN FURTHER RESPONSE TO DEFENDANT'S MOTION TO COMPEL A DISCOVERY RESPONSE TO THE FIRST INTERROGATORY OF DEAN FOODS COMPANY

This sur-reply is in response to two newly asserted arguments raised for the first time in Dean Foods Company's Reply in support of its Motion to Compel.

First, Dean argues that, based on the text of Federal Rule of Civil Procedure 26(b)(3), there are not two types of work product protected in response to interrogatories. See Dean Reply at 8-9. This is incorrect. Rule 26(b)(3) only partially codifies the work product doctrine and the traditional doctrine continues to have vitality outside the text of the rule itself. See, e.g., United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010). The work product case law recognizes the distinction between opinion and fact work product in the context of an interrogatory and also holds that fact work product remains protected even in response to an

interrogatory. See Lamar Advertising of South Dakota, Inc. v. Kay, 2010 WL 758786, at *12 (D.S.D. Mar. 1, 2010).

Dean must attempt to narrow the scope of work product protection because otherwise it must grapple with the fact that courts have recognized that factual information learned through third-party interviews is at the very least fact work product, if not opinion work product. See, e.g., United States v. Urban Health Network Inc., Civ. No. 91-5976, 1993 WL 12811, at *3 (E.D. Pa. Jan. 19, 1993). Thus, at a minimum, the law requires that Dean demonstrate a substantial need for the information it is seeking and that it is unable to obtain this information without undue hardship. Id. Dean cannot make this showing.

Dean's extensive third-party discovery -- undertaken since Plaintiffs filed their Response to Dean's Motion to Compel -- belies any suggestion that it needs Plaintiffs' work product. On the business day after Plaintiffs filed their response to this motion, Dean began issuing subpoenas to third-parties, including 227 requests for documents with a return date of September 20, 2010. Dean served this discovery in spite of the statement in its Motion to Compel that, if its motion were granted, it would "narrow the number of third-parties subject to unwanted discovery." Dean Mot. to Compel at 2.

Second, in its reply, Dean for the first time cites several out-of-circuit cases in support of the primary argument made in its initial Motion to Compel. For example, Dean contends that Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267 (D. Neb. 1989) supports its argument that there is no work product protection for factual information. Contrary to Dean's argument, Protective Nat'l Ins., held that, in a Rule 30(b)(6) deposition, a company's designated representative could not automatically claim work product protection to withhold

factual information merely because it was conveyed to the representative by an attorney. Id. at 280-81. The Court expressly left open the possibility that, "depending upon how questions are phrased to the witness," it was possible that "such questions may tend to elicit the impressions of counsel about the relative significance of the facts." Id. at 280. Moreover, a district court in this Circuit has expressly held that Protective Natl'l Ins. has no applicability to an attempt to obtain factual information learned from an attorney-led law enforcement investigation. See S.E.C. v. Buntrock, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003) (holding that a Rule 30(b)(6) deposition seeking facts learned in investigation was merely "intended to ascertain how the SEC intends to marshal its facts, documents and testimonial evidence").

Dean also repeatedly cites Oklahoma v. Tyson Foods, Inc., 262 F.R.D. 617 (N.D. Okla. 2009). However, that opinion held that documents reflecting information learned through third-party interviews were attorney work product. Id. at 633 (citing Lamer v. Williams Comm'ns, LLC, No. 04-CV-847-TCK-PJC, 2007 WL 445511, at *2 (N.D. Okla. Feb. 6, 2007) (holding even purely factual witness statements are protected work product)). Moreover, neither Tyson nor Protective Nat'l Ins., involved interrogatories that sought *all* factual information learned from third-party interviews.

Finally, Dean also cites United States v. AMR Corp., No. 99-1180-JTM (D. Kan. Feb. 7, 2000) (order granting motion to compel), in support of its argument. This opinion is no different in its reasoning than United States v. Dentsply, 187 F.R.D. 152 (D. Del.1999), and is similarly wrongly decided. Both Dentsply and AMR suffer from the same infirmity -- they ignore the Supreme Court's holding in Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn clarifies that the language from Hickman, on which both Dentsply and AMR rely, stating that either party

may compel the other to disgorge whatever facts he has in his possession. Upjohn holds that statement simply "d[oes] not apply to oral statements made by witnesses." Upjohn, 449 U.S. at 399. Upjohn, then, makes clear that factual information learned from third-party interviews is attorney work product, and an opposing party is not entitled to discover the information conveyed absent a compelling showing of need. Defendant makes no effort in its reply to explain why this Supreme Court precedent -- specifically Upjohn's clarification of Hickman -- should not control the present dispute.

Respectfully submitted,

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