EXHIBIT 2

EXHIBIT A

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September 10, 2012

VIA COURIER

The Honorable Denise Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: ***United States v. Apple Inc., et al.*, 12-cv-02826 (DLC)**

Dear Judge Cote:

Pursuant to Rule 2(C), we request a pre-motion conference on behalf of Apple and seek to compel the Department of Justice ("DOJ") to "[d]escribe the *factual information* provided orally to [DOJ] by AMAZON that is relevant to any claim or defense in this case, identifying the specific sources of the information described." DOJ refuses to provide this information.

Amazon is a central figure in both the government's investigation and its theory of the case. Amazon was *the* driving force behind the government's decision to litigate this matter. Amazon submitted a white paper to the DOJ urging a government investigation less than a week after Apple's January 27, 2010 *announcement* that it would open the iBookstore in April 2010. That was the beginning of a sustained effort by Amazon to push the DOJ to investigate and litigate this case – including meetings, coffees, and a two-day summit at Amazon's headquarters in Seattle, Washington. The DOJ met with at least 14 Amazon employees during the investigation (and undisclosed consultants), none of them under oath.

Amazon is also at the heart of DOJ's substantive allegations. The DOJ's Complaint mentions Amazon more than 80 times and its actions and motivations are alleged to be the central driving force behind the alleged conspiracy. The DOJ also specifically cited to its "investigation" of Amazon to address the many objections raised in the Tunney Act process. Thus, evidence about Amazon's market position, communications, business strategies, pricing rules, and contracting practices are highly relevant to the resolution of this matter on the merits. Indeed, *Amazon's* decision to switch from a wholesale model to an agency model in the span of five days between January 27 and February 1, 2010 is critical. Apple is entitled to test the truth of allegations pertaining to Amazon that lie at the heart of the DOJ's case. *See, e.g.*, Compl. ¶ 2 ("One of Amazon's most successful marketing strategies was to lower substantially the price of newly released and bestselling e-books to $9.99"); ¶ 30 ("Amazon's e-book distribution business has been consistently profitable"); ¶83 ("Amazon could not delist the books of all five Publisher Defendants"); ¶ 84 (Amazon "capitulated"

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after it "quickly came to fully appreciate that … all five Publisher Defendants had irrevocably committed themselves to the agency model").

The DOJ refuses to provide the facts that Amazon passed on about these matters on the basis that Interrogatory No. 1 "demands that the United States reveal information that constitutes protected attorney work product." But discovery of *facts* does not invade any work product protection and has been compelled in other antitrust cases brought by the DOJ. The work product doctrine cannot shield *facts* from discovery. "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." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Other courts that have considered this precise issue have concluded that "facts which form the basis of [the Government's] antitrust lawsuit" are not protected by work product privilege. *United States v. Dentsply*, Slip. Op., No. 99-5-MMS, at 2, 6 (D. Del. June 11, 1999) (Government compelled to "identify in detail all facts known to [individuals and entities interviewed by the DOJ pursuant to its CID investigation] that are relevant to the DOJ's claims . . . in this matter.") (Ex. A); *see also United States v. Dean Foods*, Slip. Op., No. 10-CV-59, 2, 5 (E.D. Wis. Oct. 8, 2010) (same) (Ex. B); *United States v. AMR Corporation*, Slip Op., No. 99-1180-JTM, at 2, 4 (D. Kan. Feb. 7, 2000) (same) (Ex. C).[1] *Hickman v. Taylor* is not to the contrary – it stands for the limited proposition that "exact copies" of witness statements and the "exact provisions" of oral statements or reports may constitute work product. 329 U.S. at 499. Apple's request is distinguishable; it "does not request that the plaintiffs' attorneys repeat or write out everything the interviewed witnesses revealed… [Apple] simply asks for …all relevant factual information" obtained from the DOJ's interviews with Amazon witnesses. *Dean Foods* at 6.

Documents produced by Amazon are no substitute for the information sought by Interrogatory No. 1. Indeed, there are very few of these to date. The DOJ appears to have sharply curtailed Amazon's pre-complaint discovery obligations, accepting a production limited to a mere few thousand documents. At any rate, the written record simply does not reveal the facts divulged during the many DOJ/Amazon meetings and telephone calls during the investigation. There is no alternative source for those facts.[2] Given Amazon's pivotal role in DOJ's allegations, Apple has a substantial need for the facts requested in Interrogatory No. 1 and respectfully requests the Court schedule a pre-motion conference.

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[1] *U.S. v. Blue Cross Blue Shield of Mich.*, No. 10-cv-14155-DPH-MKM (E.D. Mich. May 30, 2012) (Ex. D), cited by the DOJ in its objections, engages in no analysis or meaningful consideration of the cases noted above. In any event, the *Blue Cross* court's decision denying the motion to compel resulted from a case-specific determination that the defendant had failed to show substantial need (a showing made here).

[2] Amazon is also resisting the production of various documents and information highly probative of the defendants' defenses. After extended negotiations, the parties have been unable to reach a compromise and it is anticipated that, by week's end, these disputes will be ripe for presentation to the Court.

Denise Cote
Sept. 14, 2012

EXHIBIT A

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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September 13, 2012

BY E-MAIL AND HAND DELIVERY

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9/14/12

The Honorable Denise L. Cote
United States District Judge
Daniel P. Moynihan U.S. Courthouse
New York, NY 10007-1312

Re: United States v. Apple, Inc., et al., No. 12-cv-2826 (DLC)

Dear Judge Cote:

We write in response to Apple's letter of September 10. The United States objects to Apple's discovery request because it calls for the production of protected attorney work product. Specifically, Apple's Interrogatory 1 (attached as Exhibit 1) asks the United States to cull from our attorneys' notes and recollections of interviews with Amazon employees and identify the facts we now believe are "relevant" to the claims and defenses in this litigation. Apple is free to depose every one of the fourteen Amazon interviewees (all of whom we have identified for Apple), and to take additional discovery from Amazon. Apple may even ask Amazon witnesses about conversations with the government. But Apple is not entitled to invade our work product.

In *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), and *Upjohn Co. v. U.S.*, 449 U.S. 383, 401 (1981), the Supreme Court made plain that factual information obtained in attorney interviews of potential witnesses is protected work product. As *Hickman* observed: "[n]o legitimate purpose is served" by "forcing an attorney to repeat or write out all that witnesses have told him." 329 U.S. at 512-13 ("[A]s to oral statements made by witnesses to [an attorney], 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."); *see also Upjohn*, 449 U.S. at 401 (attorney memoranda created based on oral statements "reveal the attorneys' mental processes in evaluating the communications," and are considered protected work product consistent with *Hickman*).[1]

[1] The most recent cases to decide this issue held the same way. *See S.E.C. v. NIR Grp., LLC*, 2012 WL 3553416, at *6 (E.D.N.Y. Aug. 17, 2012) (protecting law enforcement agency's notes and interview memos because attorney mental impressions "cannot be adequately extricated from the facts"); *United States v. Blue Cross Blue Shield of Mich.*, No. 2:10-cv-14155-DPH-MKM, slip op. at 5 (E.D. Mich. May 30, 2012) (attached to Apple's letter).

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Apple misreads *Hickman* in arguing that it "stands for the limited proposition that 'exact copies' of witness statements and the 'exact provisions' of oral statements or reports may constitute work product." Apple Letter at 2. *Upjohn* specifically held *Hickman* was not so limited. *See* 449 U.S. at 399. In any event, parties may not get around *Hickman* and *Upjohn* by asking for facts learned in interviews rather than interview notes or memoranda themselves. That maneuver is truly "a distinction without a difference." *S.E.C. v. Sentinel Mgmt. Grp., Inc.*, 2010 WL 4977220, at *7 (N.D. Ill. Dec. 2, 2010); *accord F.T.C. v. Hope Now Modifications, LLC*, 2011 WL 2634029, at *5 (D.N.J. July 5, 2011); *cf.* Order, *United States v. Visa USA, Inc.*, No. 98 Civ. 7076 (BSJ), slip op. at 1 (S.D.N.Y. Jan. 27, 1999) (denying defendant's motion to compel disclosure of "interview notes, summaries or transcripts" from investigation) (attached as Exhibit 2); *see also Norwood v. F.A.A.*, 993 F.2d 570, 576 (6th Cir. 1993) ("The work-product privilege simply does not distinguish between factual and deliberative material . . .") (citations omitted).[2]

Read correctly, *Hickman* and *Upjohn* completely bar Apple's ability to obtain the information it seeks here, regardless of any "substantial need." *See Hickman*, 329 U.S. at 513; *Upjohn*, 449 U.S. at 401. That said, Apple has no need whatsoever for a window on the thinking of Justice Department attorneys — and its conspiracy theories about Amazon's involvement in our decision-making process do not provide one. Nonetheless, throughout these proceedings, the United States has provided Apple with non-privileged information relating to Amazon's participation in the investigation. Specifically, the United States: on June 1, voluntarily identified to Apple all fourteen Amazon employees that DOJ spoke with during the investigation; on July 3, made Rule 26(a)(1)(A)(i) disclosures identifying the five people at Amazon likely have discoverable information; and on June 21 and July 27, produced to Apple DOJ's e-mail communications with Amazon during the investigation. The United States also has produced all Amazon documents and data it received during the investigation. As a result, Apple is firmly in a position to conduct targeted discovery and take a reasonable number of depositions in order to obtain all the information to which it is entitled, without piggybacking on the United States' work product. *See Blue Cross*, slip. op. at 6.

While there are a few cases where the Antitrust Division was required to produce information from witness interviews, we respectfully submit that those district courts did not correctly apply *Hickman* and *Upjohn*.[3] In any event, the limited number of Amazon interviewees at issue here (14) distinguishes this case from those. *See U.S. v. Dentsply Int'l, Inc.*, No. 99-5-MMS, slip. op. at 2, 6 (D. Del. June 11, 1999) (184 individuals), *U.S. v. AMR Corp.*, No. 99-1180-JTM, slip. op. at 2 (D. Kan. Feb. 7, 2000) (159 third-party witnesses), and *U.S. v. Dean Foods Co.*, No. 10-CV-59, slip. op. at 2, 5 (E.D. Wis. Oct. 8, 2010) (approximately 170 interviews). In those cases, deposing all of the interviewees was highly impractical. Here, Apple can readily depose all five Amazon employees we have identified as having relevant information or all fourteen Amazon employees we interviewed.

[2] Indeed, Apple did request production of the DOJ's interview notes repeatedly and only made the current request after its prior demands were rejected.

[3] This has been acknowledged, both implicitly and explicitly, in the recent decisions in *Blue Cross*, *Sentinel Mgmt.*, and *Hope Now*.

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Respectfully submitted,

/s/ Mark W. Ryan
Mark W. Ryan

cc: All counsel of record

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America and the State of Michigan,

Plaintiffs, **Civil Action No. 10-14155**

vs. **District Judge Denise Page Hood**

Blue Cross Blue Shield of Michigan, **Magistrate Judge Mona K. Majzoub**

Defendant.
_____/

ORDER DENYING BCBS'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES [80] AND GRANTING PLAINTIFFS' MOTION TO COMPEL ANSWERS TO PLAINTIFFS' FIRST INTERROGATORY [100]

Plaintiffs United States of America and Michigan have filed this antitrust suit against Defendant Blue Cross Blue Shield of Michigan. (Dkt. 66, August 12, 2011 Order at 1.) Plaintiffs allege that BCBS used "most favored nation" clauses in its agreements with various hospitals that violate the Sherman Act, 15 U.S.C. § 1, and the Michigan Antitrust Reform Act, Michigan Compiled Law § 445.772, by unreasonably restraining trade and commerce. (*Id.*) BCBS has MFNs or similar clauses with at least 70 of Michigan's 131 general acute care hospitals. (*Id.* at 2.)

Before the Court are two of the parties' motions to compel. (Dkt. 80, 100.) The Court has been referred these motions for determination pursuant to 28 U.S.C. § 636(b)(1)(A). (Dkt. 86, 106.) The Court has reviewed the pleadings, dispenses with a hearings, and issues this order.[1]

I. BCBS's motion to compel responses to interrogatories (dkt. 80)

[1]The Court dispenses with a hearing pursuant to Eastern District of Michigan Local Rule 7.1(f)(2).

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A. The contested interrogatories

The following interrogatories are at issue in this first motion:

Interrogatory #1

> For each individual or entity interviewed by the DOJ pursuant to its [] investigation of Blue Cross related to this matter, identify in detail all facts known to these individuals and entities that are relevant to Plaintiffs' claims against Blue Cross.

Interrogatory #2

> For each individual or entity that provided information in any investigation of Blue Cross' proposed acquisition of Physicians Health Plan of Michigan, identify in detail all facts known to these individuals and entities that are relevant to Plaintiffs' claims against Blue Cross.

(Dkt. 80, BCBS's Mot. to Compel Interrog., Ex. 1.)

The parties have submitted a joint statement of resolved and unresolved issues. (Dkt. 97.) In the Joint Statement, Plaintiffs abandon their arguments that the law enforcement investigatory privilege is a proper objection to BCBS's contested interrogatories. (*Id.*) Plaintiff also state that they no longer object to the contested interrogatories on the basis that the interrogatories are vague and ambiguous. (*Id.*)

B. The parties' positions

BCBS argues that facts that the United States gathered in an investigation before it filed suit against Blue Cross are not protected by the work product doctrine and therefore discoverable. (Dkt. 97, Joint Statement at 1.) BCBS maintains that the contested interrogatories seek facts, not mental impressions or strategy; BCBS therefore argues that it does not need to show a substantial need for the requested information. (*Id*. at 3.)

The United States casts the issue differently and argues that the work product doctrine protects the information in and related to the investigation. (Dkt. 97, Joint Statement at 2.) The

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United States argues that the identities of the individuals as well as the underlying facts are protected by the work product doctrine because "[the information's] disclosure would reveal the thought processes and strategic assessments of Plaintiffs' counsel in deciding whom to interview." (*Id.* at 2-3.) The United States also argues that "facts obtained in oral interviews are work product reflecting the mental impressions of counsel, and . . . are discoverable only under extraordinary circumstances, if at all." (*Id.* at 3.) The United States adds that BCBS can show neither extraordinary circumstances nor a substantial need for the information it seeks. (*Id.*)

C. Work product doctrine

The work product doctrine's purpose is to allow an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] clients' interests." *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511) (insertion in *Roxworthy*). The work product doctrine protects "documents and tangible things prepared in anticipation of litigation by or for a party or by or for that party's representative" from discovery. *Id.* (citing Fed.R.Civ.P. 26(b)(3)).

But not "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) (quoting *Hickman*, 329 U.S. at 510-11)).

There are two types of work product–fact and opinion–only fact work product is at issue

here.[2] *Id*. Fact work product is "written or oral information transmitted to the attorney and recorded as conveyed by the client." *Id.* Courts presume that fact work product is discoverable, "upon a showing of substantial need and inability to otherwise obtain without material hardship." *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, (6th Cir. 2002) (*reh'g and reh'g en banc den.*) (citation omitted). Once the party asserting fact work product has established that the documents were prepared in anticipation of litigation, then the burden shifts to the requesting party to show "substantial need and undue hardship." *Gruenbaum v. Werner Enter., Inc.*, 270 F.R.D. 298, 303 (S.D.Ohio 2010) (citation omitted). "In considering [the substantial need issue,] 'attention is directed at alternative means of acquiring the information that are less intrusive to the lawyer's work and [at] whether or not the information might have been furnished in other ways.'" *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 19 F.3d 1432, (6th Cir. 1994) (Table) (quoting *Toledo Edison v. GA Technologies, Inc.*, 847 F.2d 335, 340 (6th Cir. 1988) (implied overruling on other grounds recognized by *Regional Airport Auth. of Louisville v. LFG, LLC.*, 460 F.3d 697, 713-14 (6th Cir. 2006)).

D. Analysis

The work product doctrine protects the information that BCBS seeks. Plaintiffs' pre-complaint investigation and facts learned are fact work product that the Court will protect. While the Court recognizes, as stated above, that fact work product is discoverable "upon a showing of substantial need and inability to other obtain [the information] without material hardship," the Court

[2]Opinion work product is "any material reflecting the attorney's mental impressions, opinions, conclusions, judgments or legal theories. *In re Antitrust Grand Jury*, 805 F.2d at 163-64 (citations omitted). Although parties can waive opinion work product protection, courts afford this type of work product almost "absolute immunity." *Id*. at 164. The Court finds that the opinion work product is not at issue, here.

finds that BCBS has not met its burden to show that it has a substantial need *and* the inability to otherwise obtain the information.[3] This case is not a story of David versus Goliath. Here, Plaintiffs and BCBS are both Goliath–they have equal means to obtain the information BCBS's interrogatories seek.

BCBS argues that it does not need to demonstrate a "substantial need" for the information the interrogatories seeks. (Dkt. 95, BCBS's Reply at 95.) The Court disagrees. The United States conducted the pre-complaint investigation in anticipation of litigation. And the United States' attorneys conducted this investigation. The investigation's results are therefore work product.

But BCBS does alternatively argue that there is a substantial need for the information the interrogatories seek–for "it is one thing for Blue Cross to request an interview with a hospital regarding negotiations in which it was on the other side of the table; it is quite another thing for the federal government to do so." (*Id.*) BCBS adds that, "[i]t is apparent that when the United States Department of Justice contacts a person or entity to request an interview . . . it elicits a certain level of cooperation that Blue Cross cannot expect." (*Id.*) BCBS further adds that "it is no solution to suggest that Blue Cross may simply interview the persons listed in Plaintiffs' Initial Disclosures to learn the same information." (*Id.*) BCBS continues, "even if [BCBS] could [interview those people,] those individuals' recollection may not be the same now as it was when DOJ interviewed them, some nearly two years ago." (*Id.*) BCBS maintains that a suggestion that it could easily

[3]BCBS has submitted several out-of-district cases in support of its position that the work product doctrine cannot shield the facts at issue from discovery requests. (BCBS's Mot. to Compel, Exs. 3-5.) While those cases do stand for BCBS's position, the Court is not persuaded by them. Those cases do not address the Sixth Circuit's standard, specifically the burden that BCBS must prove that it has a substantial need for the information and that it cannot get the information without an undue hardship to it.

depose the 288 people listed in the initial disclosures is not "legitimate" because the DOJ has "taken the position that Blue Cross should be able to take only 170 depositions, at most." (*Id.*)

The Court is not persuaded by BCBS's position. While the Court understands that BCBS will suffer a burden, all discovery must burden one party or the other. And the Court finds that, in a case of this scale, BCBS has not proven to the Court that the burden placed on it would be undue. BCBS acknowledges it can get the information it requests in its interrogatories from conducting its own discovery; the Court finds that BCBS's request, therefore, is an attempt to piggy-back on the work done by the United States. *Ross v. Abercrombie & Fitch Co.*, [] 2008 WL 821059, at *2 (S.D.Ohio Mar. 24, 2008) ("Certainly, a part of the rationale for the doctrine is to prevent opposing counsel simply from piggy-backing on the work done by other[.]").

The Court finds *Ross v. Abercrombie & Fitch Co.*, [] 2008 WL 821059, at *3-4 (S.D.Ohio Mar. 24, 2008) helpful. There, the court addressed an argument by the defendant that BCBS puts forth here.

> Abercrombie's justification for overcoming the work product privilege here is tied to its belief that without such information, it will be required to depose or interview in excess of eighty witnesses to find out what support may exist for certain allegations in the complaint. The Court does not view that as a substantial hardship in a case of this magnitude, especially when discovery is in its infancy and it is impossible even to predict when the first wave of document production will be substantially complete. Further, the allegations of the complaint about which Abercrombie has inquired are pleaded with a high degree of specificity. Presumably, many of the former Abercrombie employees whose names appear on the initial disclosures can be ruled out as sources of this information either because of dates of employment, where they were located at the time of the alleged actions, or the positions they held.
>
> The mere fact that counsel may have to do some investigative work to determine which witnesses have knowledge of which relevant facts is clearly insufficient to justify an intrusion into the particulars of how opposing counsel structured their interviews and how much credence they gave to the statements of individual witnesses.

Here, as in *Abercrombie*, the mere fact that BCBS will have to do some work to get the same information as Plaintiffs does not mean that BCBS is entitled to Plaintiffs' fact work product.

E. Conclusion

The Court therefore denies BCBS's motion compel responses to interrogatories.

II. Plaintiffs' motion to compel BCBS to answer Plaintiff's first interrogatory (dkt. 100)

Plaintiffs have filed their own motion to compel, which addresses Plaintiffs' first interrogatory.

A. Plaintiffs' first interrogatory

The first interrogatory:

> Describe in detail "the extensive factual and economic support for [BCBS's] MFNs' procompetitive effects" (Defendant Blue Cross Blue Shield of Michigan's Reply Brief in Support of its Motion to Dismiss the City of Pontiac's Complaint at 4 n.5, *City of Pontiac v. Blue Cross Blue Shield of Michigan, et al.*, No. 2:11-cv-10276 (E.D.Mich. filed Aug. 22, 2011) (Dkt. #153)), including, without limitation, separate for each subpart, identification of:
>
> (a) each and every hospital provider agreement in which a Blue Cross MFN provision has contributed, to any extent, to Blue Cross paying lower hospital reimbursement rates to (or obtaining greater discounts from) any Michigan hospital than it would have paid or obtained without the MFN provisions; and
>
> (b) each and every hospital provider agreement in which a Blue Cross MFN provision has contributed, to any extent, to Blue Cross paying lower hospital reimbursement rates to any Michigan hospital, relative to the rates Blue Cross had been paying to the hospital before the hospital lowered its rates.

(Dkt. 100, Pls.' Mot. to Compel, Ex. 2, Pls.' First Interrog. to Def.)

BCBS objected to Plaintiffs' interrogatory. (Dkt. 100, Pls.' Mot. to Compel, Ex. 3, Def.'s Objection to Pls.' First Interrog.)

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BCBS asserted various objections: overly broad and burdensome; premature contention interrogatory; work-product doctrine; seeks information relating to the anticipated testimony of BCBS's expert witnesses; and vague and ambiguous. (Dkt. 100, Pls.' Mot. to Compel, Ex. 3, Def.'s Objection to Pls.' First Interrog.)

B. Analysis

The Court finds that BCBS's objections are not warranted. The Court therefore grants Plaintiffs' motion to compel and orders BCBS to respond to the interrogatory within 45 days. The Court addresses the objections.[4]

1. The interrogatory is a contention interrogatory, but it is not impermissible

BCBS argues that Plaintiffs' first interrogatory is a contention interrogatory that it does not have to answer at the present.

> Rule 33 [] provides that "an interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact." Fed.R.Civ.P. 33(a)(2). Such interrogatories, known as "contention interrogatories," service legitimate and useful purposes, such as ferreting out unsupportable claims, narrowing the focus and extent of discovery, and clarifying the issues for trial. *Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998). A court may postpone a response to contention interrogatories until discovery is closer to completion. "[B]ut the court may order that the interrogatory need not be answered until designated discovery is complete . . ." Fed.R.Civ.P. 33(a)(2). The rule protects the responding party from being hemmed into fixing its position without adequate information. *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 233 (E.D.N.Y. 2007).

In re Dow Corning Corp., 95-2012, 2010 WL 3927728, at *12 (E.D.Mich. June 15, 2010)

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[4]The parties have submitted a joint statement of resolved and unresolved issues. (Dkt. 109.) The parties state that they have not resolved any of the issues in Plaintiffs' motion to compel (*Id.*) The parties lay out four unresolved issues–BCBS's objections to Plaintiff's first interrogatory: vagueness; premature contention interrogatory; work product; and premature disclosure of expert opinion. (*Id.*)

(Hood, J.). "Contention interrogatories may take several forms. They may ask a party to state what it contends, or whether it makes a specified contention; to state all the facts upon which it bases a contention; to state the legal or theoretical basis for a contention; and to explain or defend how the law invoked applies to facts." *Schweinfurth v. Motorola, Inc.*, 05-0024, 2007 WL 6025288, at *4 (N.D.Ohio Dec. 3, 2007).

"The party serving contention interrogatories has the burden of proving how an earlier response serves the goals of discovery." *Schweinfurth*, 2007 WL 6025288, at *5. "[T]he party 'must be able to show that there is good reason to believe that answers to its well-tailored questions will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussion, or that such answers are likely to expose a substantial basis for a motion under . . . Rule 56.'" *Id*. (citation omitted). *Cleveland Constr., Inc. v. Gilbane Bldg. Co.*, 05-471, 2006 WL 2167238, at *7 (E.D.Ky. July 31, 2006) (citation omitted) ("Defendants are expected to have, even at an early stage, some good faith basis in fact and law for such claim and defense . . . . Accordingly, Plaintiff's Interrogatories which primarily seek the basis for the defense and related counterclaim, even if they are assumed to be contention interrogatories, should be answered at this time.").

Plaintiffs argue that their first interrogatory seeks neither an opinion nor a contention. (Pls.' Mot. at 6.) Plaintiffs maintain that their interrogatory seeks a "detailed description" of "the extensive factual and economic support for the MFN's procompetitive effects" that [BCBS] told this Court exists." (*Id*. at 5-6.)

Plaintiffs argue that, "because Blue Cross started broadly employing MFN clauses

in hospital contracts in 2007, by now it should be well aware of any instances where the clauses resulted in Blue Cross paying lower hospital rates than it paid before implementing an MFN clause.' (Pls.' Mot. at 8.)

BCBS states that the interrogatory would require it "first to identify the procompetitive effects that it may assert in this litigation and then explain how the facts support those theories." (BCBS's Resp. at 1.) BCBS adds that "Plaintiffs are asking Blue Cross to provide its legal expert economic theories of this case at a point when discover[y] has barely even begun." (*Id.*)

Here, Plaintiffs' interrogatory asks for the basis of one of BCBS's defenses–that BCBS's MFN clauses caused procompetitive effects. The interrogatory, on its face, is not impermissible. The interrogatory is requesting BCBS to provide the factual basis for its assertion that its MFN clauses caused procompetitive effects. BCBS has stated that it has some of this information at its disposal–information related to whether prices increased or decreased after the MFN clauses were put into effect; BCBS should therefore have to provide this information to Plaintiffs. If BCBS finds that it cannot answer certain parts of the interrogatory, such as if certain information is in a third-party's possession, it must state so, but that is not a reason to not answer the parts of the interrogatory that it can answer. This interrogatory is not one that is best served at the end of discovery. The Court therefore finds that, although Plaintiffs' interrogatory is a contention interrogatory that seeks the factual basis for a defense, the interrogatory is permissible. The Court will order its answer.

2. BCBS has not met its burden to show that the interrogatory requests work product

The Court wholly agrees with Plaintiffs regarding BCBS's work product objection.

BCBS has not carried its burden to show that the information Plaintiffs seek was created by attorneys or representations in anticipation of litigation.

3. The interrogatory does not call for expert opinion

Plaintiffs argue that BCBS's objection that the interrogatory seeks expert opinion is incorrect. (Pls.' Mot. at 10.) Plaintiffs state that they are seeking factual support for BCBS's claim, not anything that requires for an opinion. (*Id.*)

BCBS argues that "[m]uch of this information may come from [BCBS's] economic experts, whose reports containing their economic analyses are not due until 30 days after the close of fact discovery." (BCBS's Resp. at 14-15.) BCBS adds that "[e]conomics is a subject for expert testimony[.]" (*Id.* at 15.)

> Rule 26(b)(4)(D): "Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial."

The Rule give two exceptions: one dealing with physical and mental examinations, the other exception requires "showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Fed.R.Civ.P. 26(b)(4)(D)(i), (ii). Neither of those exceptions applies here.

The Court finds that the interrogatory does not call for expert opinion or facts known only to experts. BCBS states that it "may have basic facts at its disposal now, such as whether the cost of hospital services went up or down following entry of a hospital contract that contains an MFN clause." (BCBS's Resp. at 1.)

This information is responsive to the interrogatory. The Court orders BCBS to

produce it. BCBS adds, "[b]ut other facts–such as whether an MFN clause caused the hospitals to agree to a different price with Blue Cross than they would have agreed to without the MFN–is information that resides with third-party hospitals." (*Id.*) If BCBS does not have the information, such as this third-party information, then BCBS must state so.

Either way, BCBS has not persuaded the Court that the information the interrogatory seeks is solely in the hands of experts, retained for this litigation, or that the information cannot be obtained without the experts' aid. The Court overrules this objection.

4. The interrogatory is not vague

BCBS also objected to the interrogatory, arguing that it was vague. (Pls.' Mot., Ex. 3, BCBS's Objections at 5.) BCBS argues that "MFNs" and "MFN provisions" are vague and ambiguous. (*Id.*) BCBS adds that "MFN-pluses" is misleading, inaccurate, and argumentative. (*Id.*) BCBS further adds that it "understands the term 'MFN' to refer to the most-favored-nation provisions included in some contracts between Blue Cross and certain Michigan hospitals, which provision are the subject of this litigation, but to date Plaintiffs have not specifically identified each contract provision they believe to be at issue." (*Id.*)

BCBS also argues that the interrogatory is vague and ambiguous "because the phrase 'Blue Cross paying lower hospital reimbursement rates . . . relative to the rates Blue Cross had been paying to the hospital before the hospital lowered its rates' is tautological and incomprehensible." (*Id.*)

Plaintiffs counter that the interrogatory is straightforward. (Pls.' Mot. at 10.) Plaintiffs add that "the listed subparts are merely specific examples of what Plaintiffs seek: any factual information of which Blue Cross has become aware since . . . August 2010."

(*Id.*)

The Court does not find BCBS's objection genuine. The parties know exactly what clauses, and those clauses' effects, are at issue in this case. The interrogatory is not vague.

5. Overly broad and unduly burdensome

To the extent that BCBS argues that the interrogatory is overly broad and unduly burdensome, for BCBS has not asserted that objection in the Joint Statement, the Court disagrees. This case is a large one, and providing factual and economic support for 70 alleged contracts with MFN clauses does not seem unreasonable to the Court.

C. Conclusion

Plaintiffs state, "[i]f Blue Cross has facts, it should state them . . . [i]f it has no facts, or does not know it, it should so state." (Pls.' Reply at 5.) Plaintiffs are exactly right. For the above-state reasons, the Court grants Plaintiffs' motion to compel BCBS to answer Plaintiff's first interrogatory. The Court overrules BCBS's objections. The Court therefore orders BCBS to respond to Plaintiffs' first interrogatory within 45 days of this order.

NOTICE TO THE PARTIES

Pursuant to Federal Rule of Civil Procedure 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

Dated: May 30, 2012

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

EXHIBIT B

PROOF OF SERVICE

I hereby certify that a copy of this Order was served upon Counsel of Record on this date.

Dated: May 30, 2012 s/ Lisa C. Bartlett

Case Manager

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISA USA, INC., VISA INTERNATIONAL CORP., AND MASTERCARD INTERNATIONAL, INC.,

Defendants.

98 Civ. 7076 (BSJ)

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Having reviewed defendant VISA USA, Inc.'s ("VISA USA") Motion to Compel Pursuant to Fed. R. Civ. P. 37(a), the parties' memoranda and affidavits, the pertinent case law, and the pertinent Rules, the Court:

ORDERS that the United States shall provide to the Court for its in camera review the information necessary for the Court to determine whether the identities of the four interviewees for whom the United States claims a so-called informant privilege should remain undisclosed.

DENIES defendant VISA USA's motion to compel disclosure of interview notes, summaries or transcripts taken by or for the United States because defendant VISA USA has failed to make the requisite showing to overcome the qualified protection afforded such documents under the work product doctrine.

EXHIBIT C

DENIES defendant VISA USA's motion to compel disclosure of economic analyses prepared by consultants to the United States because defendant VISA USA has failed to make the requisite showing to require disclosure of non-testifying expert materials. Disclosure of testifying expert materials shall be made in accordance with Fed. R. Civ. P. 26(b)(4)(A) and at the times specified in the parties' case management plan.

SO ORDERED:

Barbara S. Jones
UNITED STATES DISTRICT JUDGE

New York, New York
January 27, 1999