

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,	)	
	)	
<i>Plaintiff,</i>	)	Civil Action No. 5:11-cv-00043
	)	
v.	)	
	)	
GEORGE’S FOODS, LLC,	)	
	)	Judge: Glen E. Conrad
GEORGE’S FAMILY FARMS, LLC,	)	Chief U.S. District Judge
	)	
and	)	
	)	
GEORGE’S, INC.,	)	
	)	
<i>Defendants.</i>	)	

**MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO  
DEFENDANTS’ MOTION TO COMPEL DISCOVERY**

Plaintiff, the United States of America (“the United States”), respectfully submits this memorandum in opposition to Defendants’ (“George’s”) Motion to Compel Discovery. The type of material Defendants seek – the substance of interviews the United States has had with third parties in anticipation of litigation – has consistently been held by the Supreme Court and courts in the Fourth Circuit to be quintessential attorney work product that may not be discovered absent a showing of extraordinary circumstances, or, at the least, of substantial need and an inability to obtain equivalent materials without undue hardship. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 398-401 (1981); *Chaudry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *Haga v. L.A.P. Care Servs.*, 2002 U.S. Dist. LEXIS 1605, \*5-6 (W.D. Va. Feb. 1, 2002) (explicitly holding “that the substance of oral interviews taken by plaintiff’s counsel are not discoverable because of the work product doctrine”) (attached as Exhibit 1).

Defendants make no attempt to explain why there is a substantial need in this case, and there is no conceivable basis for such a claim. The United States voluntarily provided Defendants the names, addresses, and phone numbers of all persons interviewed in connection with this matter – almost all of whom are broiler growers with ongoing business relationships with Defendants – and Defendants will have (and have had) ample opportunity to request information from them independently. Indeed, Defendants have already obtained 225 declarations from growers,<sup>1</sup> more than four times the number of growers the United States has interviewed. Defendants’ claim that the United States “may possess facts that contradict and undermine its claims” (Defendants’ Motion at 1-2) is legally insufficient to justify invasion of work product material. Thus, to compel discovery here of attorney-conducted interviews would contravene “the principle which undergirds the work product doctrine, that an attorney should be able to prepare [his case] without concern that his interviews and interrogations of potential witnesses will be subject to discovery by [opposing counsel].” *In re Grand Jury Subpoena*, 463 F. Supp. 2d 573, 576 (W.D. Va. 2006).

Moreover, even if Defendants could meet their burden of showing substantial need, which they have not, that need cannot overcome the overwhelming burden that would be imposed on the United States if it were required to disclose “facts” learned during interviews. Defendants do not simply seek production of existing materials; their motion seeks to force the United States’s attorneys to create new work product (“factual” summaries of interviews) for the Defendants’ use. There is no basis to impose such a

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<sup>1</sup> 75 declarations were submitted to the Court; the remainder were subsequently provided to the United States.

burden, particularly where Defendants have had and will continue to have free access to all of the United States's interviewees.

The motion should therefore be denied.

**I. FACTUAL BACKGROUND**

On March 18, 2011, Tyson and George's publicly announced George's intent to buy Tyson's Harrisonburg chicken processing complex (the "Transaction"). The United States subsequently opened an antitrust investigation into the Transaction, which culminated in this lawsuit. During the course of the investigation, and continuing after the filing of the complaint, attorneys for the United States, accompanied by paralegals and economists, conducted approximately 60 telephone interviews of industry participants. The United States conducted these interviews to garner evidence to enable the United States to make an informed decision whether to challenge the Transaction, and after the United States filed suit, to prepare for trial. As explained in the Declaration of Jill Ptacek, the interviews were not tape recorded, nor was any attempt made to create a verbatim statement of the information conveyed. Instead, the participants took notes of the information they believed significant, and, after each interview, an attorney or paralegal working at the direction of an attorney drafted an internal memorandum summarizing the relevant information. Attorneys participating in the interview typically reviewed and edited the drafts to ensure that they contained the information important to the legal and economic theories being investigated. The memoranda are used solely within the Antitrust Division; they have not been shown to the persons who were interviewed nor have they been produced to anyone outside the Antitrust Division. Ptacek Decl. ¶¶ 16-20.

On May 27, 2011, Defendants served upon the United States “Defendants’ Interrogatories and Request for the Production of Documents,” which included a request that the United States “identify each person interviewed by the United States pursuant to its investigation of and litigation related to the Transaction and provide . . . all factual information obtained from those persons through such interviews that is relevant to the United States’s claims in this action.” Interrogatory No. 9. The United States has already provided the names and phone numbers, and addresses where known, of all persons interviewed in connection with this matter (Ptacek Decl. Exh. A and B), but objects to the interrogatory to the extent it calls for protected attorney work product.

## II. ARGUMENT

### A. **“Factual Information” Obtained from Third-Party Interviews is Protected Work Product.**

Information conveyed to attorneys through the oral statements of witnesses is protected from disclosure as attorney work product. Some of the very authority cited by Defendants makes this point; the remaining cases on which Defendants rely either are taken out of context or are not controlling.

The seminal Supreme Court work product cases – *Hickman v. Taylor* and *Upjohn Co. v. United States* – both involved interrogatories directed at facts obtained by counsel through interviews. In *Hickman*, the Supreme Court expressly declined to “forc[e] an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary” because to do so, without the availability of verbatim transcripts, would require the attorney to reveal his protected work product in the form of “what he remembers or what he saw fit to write down regarding witnesses’ remarks.” 329 U.S. 495, 512-13 (1947). The Supreme Court affirmed and strengthened this rule in *Upjohn v.*

*United States*, 449 U.S. 383 (1981), holding that a party seeking information based on oral witness statements must meet a much more stringent standard than simply “substantial need” and “undue hardship.” 449 U.S. at 401-402.

Defendants wrongly attempt to extend the general rule from *Hickman* that “material, non-privileged facts can[not] be hidden . . .” through work product protections, (Def. Mem. at 4; 449 U.S. at 399) to reach attorney interview notes. As the Supreme Court made clear in *Upjohn*, this rule does *not* apply to oral witness statements. *Upjohn Co.*, 449 U.S. at 399 (“[the hidden facts] language from *Hickman* . . . did not apply to ‘oral statements made by witnesses . . . whether presently in the form of [the attorney’s] mental impressions or memoranda’”).

Following Supreme Court precedent, the law in this Circuit is clear: “[a]n attorney is not required to divulge, by discovery or otherwise, *facts* developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation.” *Chaudry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999) (quoting *In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981)) (emphasis added). Courts in this Circuit have consistently held that work product based on oral statements is protected from discovery. *See, e.g., Lefkoe v. Jos. A. Bank Clothiers*, 2008 U.S. Dist. LEXIS 112007 (D. Md. May 1, 2008) (finding that interrogatories asking for the substance of communications with third parties sought protected work product); *In re Grand Jury Subpoena*, 463 F. Supp. 2d 573 (W.D. Va. 2006) (declining to compel testimony of attorney regarding discussions with witnesses).

At least one court in this district has directly considered the precise issue presented by Defendants’ motion. In *Haga v. L.A.P. Care Servs.*, 2002 U.S. Dist. LEXIS

1605 (W.D. Va. Feb. 1, 2002), the court declined to compel a response to an interrogatory – nearly identical to the one in question here – asking for the substance of oral interviews taken by a party’s counsel. The court explained that in the Fourth Circuit, following *Hickman* and *Upjohn*, “oral statements made to a party’s attorney are not discoverable without a showing of ‘extraordinary circumstances.’” *Id.* at \*4 (citing *In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981)). The court stated that “[n]othing in the [Federal Rules of Civil Procedure] requires disclosure of facts and opinions learned during oral interviews by counsel in the preparation of the case. In fact, rule 26(b)(3) forbids discovery of such information absent a proper showing sufficient to pierce the work product bar.” *Id.* at \*5. Finding no extraordinary circumstances present, the court held that the information requested was not discoverable.<sup>2</sup>

Defendants seek to avoid this well-established case law by claiming that they are not requesting attorney interview notes and memoranda themselves, which concededly would be protected work product, but only “the facts in Plaintiff’s possession that are relevant to Plaintiff’s claims.” Def. Mem. at 3. As a district court in Illinois recently explained, “[t]his is a distinction without a difference.” *United States SEC v. Sentinel Mgmt. Group, Inc.*, 2010 U.S. Dist. LEXIS 127355, 20-21 (N.D. Ill. Dec. 2, 2010) (attached as Exhibit 2). In *Sentinel*, the defendant made a similar attempt to carve out a distinction between pre-existing interview memos (clearly protected work product) and a “detailed summary” of what each witness said (which it argued was not protected). The defendant argued that the interrogatory did not “seek to discover any document or

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<sup>2</sup> Defendants attempt to dismiss *Haga* by stating that “the court simply assumed that all information sought in anticipation of litigation was protected work product,” (Def. Memo. at 6, fn. 4) ignoring the fact that Judge Jones engaged in a rigorous analysis of the relevant law (properly applying *Upjohn* to *Hickman* and Rule 26) in resolving the question in that case, which is the precise question raised here.

tangible things prepared in anticipation of litigation or for trial” within the meaning of Rule 26(b)(3) but only “facts, knowledge and prior statements of witnesses” that were “communicated to the plaintiff in interviews.” The court rejected that argument, reasoning that:

Either way, [Defendant] is asking opposing counsel to produce a document prepared by counsel that divulges what counsel learned from interviewing potential witnesses in anticipation of litigation. This is classic attorney work product whether [Defendant] seeks the information by means of a document request for existing interview summaries, or an interrogatory requiring the SEC to prepare a written response summarizing those interviews. *Id.* at 21.

The distinction Defendants attempt to draw here is equally invalid. Parties cannot obtain information that would be clearly protected work product when contained in “documents and tangible things” by asking for identical information in an interrogatory. The United States does not deny that Defendants are entitled to factual information underlying the claims asserted. Defendants can interview persons disclosed by the United States or take their depositions. This broad interrogatory, however, asks for material related to any aspect of the United States’s case in a way that would necessarily reveal protected work product.<sup>3</sup>

Defendants selectively cite to three district court cases – *Dentsply*, *AMR*, and *Dean Foods* – that do not provide persuasive, much less controlling, authority in this case.<sup>4</sup> Def. Mem. at 5-6. We respectfully submit that these cases are irreconcilable with

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<sup>3</sup> In contrast, more focused “contention” interrogatories can typically be answered in a manner consistent with the work product doctrine. Defendant made a number of such interrogatories in its May 27, 2011 Request, *e.g.*, Interrogatory Requests 1 through 5, asking the United States to “identify all facts and evidentiary support in the possession of the United States that you contend substantiate” various allegations in the Complaint.

<sup>4</sup> The dicta from *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, (cited by Defendants in their June 13 letter submitted to the Court) is similarly unpersuasive. The statement that work product does not protect “actual evidence taken from the scene or facts about the scene or incident,” reflects the context of that case, in which “statements taken immediately after an accident” were not available to a party who was “disabled from making his own investigation at the time.” 967 F.2d 980, 985 (4th Cir. 1992) (citation

the controlling Supreme Court precedent established in *Hickman* and *Upjohn*, and they do not reflect the law in this Circuit. *Dean Foods*, for example, is not even followed in its own circuit. There, the court compelled disclosure of interview “facts,” yet, as discussed above, the subsequent *Sentinel* case – also from a court located in the Seventh Circuit – found, in analyzing an almost identical interrogatory, that work product protection applied, citing to *Upjohn*. There is no such ambiguity or inconsistency in the Fourth Circuit. “[F]acts developed by [an attorney’s] efforts in preparation of the case” constitute work product. *Chaudhry*, 174 F.3d at 403. Moreover, to the extent Defendants argue that there is a unique standard applicable to antitrust cases, they cite no basis for any such special treatment and ignore contrary precedent providing work product protection in similar circumstances.<sup>5</sup>

**B. Defendants Have Not Shown Any Need Sufficient to Overcome Work Product Protection.**

Defendants fall far short of making the showing necessary to pierce work product protections, regardless of whether the information requested is considered opinion work product or fact work product.<sup>6</sup> Even under the lesser standard applicable to fact work

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omitted). No similar concern is present here because there was no accident, scene, or incident for which contemporaneous statements from witnesses are needed for a full and accurate understanding of the facts. The facts sought by Defendants are still possessed by third parties and are readily available to Defendants through interview or deposition.

<sup>5</sup> In *United States v. Visa USA*, the court denied the defendant’s motion to compel disclosure of the Antitrust Division’s interview material because the defendant had “failed to make the requisite showing to overcome the qualified protection afforded such documents under the work product doctrine.” 98 Civ. 7076, Jan. 27, 1999 Order at 1 (attached as Exhibit 3). The court’s order applied to all “interview notes, summaries or transcripts.” As the *Sentinel* court, *supra*, explained, there is no meaningful difference between disclosure of interview “facts” and the interview notes themselves.

<sup>6</sup> Opinion work product “enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” *Better Gov’t Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 607 (4th Cir. 1997) (citation omitted). Defendants’ interrogatory calls for opinion work product in that any response would necessarily require the United States to divulge protected material such as the questions asked during the interviews and the facts that the attorneys deemed significant enough to write down or recall from particular interviews. Defendants certainly have not shown any “extraordinary circumstances” justifying invasion of opinion work product.



product, the seeking party must show “both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.” *United States v. Under Seal* (In re Grand Jury Proceedings #5), 401 F.3d 247, 250 (4th Cir. 2005) (citation omitted). Defendants have not put forward any arguments supporting either prong.

A party cannot demonstrate substantial need for work product if, as here, it is free to depose or otherwise interview the individuals and entities in question. 8 Wright & Miller Federal Practice & Procedure § 2025 (3d ed. 2010). The United States has already provided the names and phone numbers of all persons interviewed in connection with this matter and identified the topics for which they may have discoverable information.

Almost all of those individuals are broiler growers in the Shenandoah Valley, and most grow chickens either for the former Tyson plant in Harrisonburg, now owned by George’s, or for the George’s plant in Edinburg. If anything, those individuals are likely to be far more available to George’s than they have been to the United States.

Defendants have ongoing business relationships with these growers, including having recently negotiated extended contracts with them.<sup>7</sup> The few remaining individuals the United States has identified consist of other poultry processors. Defendants have not asserted that any of those individuals are unavailable to interview or depose – the “substantial equivalent” to obtaining information from the United States’s files.

Defendants’ only explanation for its “need” for the material – that “Plaintiff may possess facts that contradict and undermine its claims” (Def. Mot. at 1-2.) – does not come close to meeting the “substantial need” and “undue burden” thresholds for

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<sup>7</sup> Defendants have demonstrated just how easy it is for them to gather relevant facts from these individuals by obtaining declarations from over 220 broiler growers (far more than the universe of third parties interviewed by the United States) in the short time since the filing of the Complaint.

overcoming fact work product protections. The United States has identified to the Defendants all of the third parties interviewed in connection with this matter, regardless of whether they provided information helpful to the United States's case. Moreover, "the mere surmise that production might reveal impeaching matter [is] not sufficient" to pierce the factual work product protection. *United States ex rel. Carter v. Halliburton*, 266 F.R.D. 130, 133 (E.D. Va. 2010).

**C. The Burden on the United States Would be Substantial.**

Even if Defendants could show a legitimate, compelling need for disclosure of attorney witness interviews, which they cannot, the Court must still consider whether that need outweighs the burden imposed on the United States. *See* Fed. R. Civ. P. 26(b)(2)(C) (limiting discovery that can be obtained from other sources or when the burden outweighs the likely benefit); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1186 n.3 (4th Cir. 1995) (affirming district court's limitation of discovery where the burden outweighed the benefit). Here, there is no doubt that the burden imposed would be heavy and any benefit to Defendants would be slight. First, Defendants do not simply seek the production of existing materials. They explicitly acknowledge that they do not seek the actual interview notes (to which they are not entitled). Instead, they demand "facts" gathered by the United States during their interviews. These "facts" are not objects that can be turned over to Defendants with minimal effort. Rather, if the motion is granted, attorneys will be required to create new documents by culling interview notes to create "fact" summaries, a burdensome and time-consuming process. *See* Ptacek Decl. ¶ 21. Such summaries themselves, of course, reflect work product,<sup>8</sup> and their creation will

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<sup>8</sup> Even "where the attorney's summary of a witness's oral statements appears to be entirely factual, the attorney's mental processes are necessarily disclosed to some degree." *Sentinel*, 2010 U.S. Dist. LEXIS

require difficult decisions as to the identification of pure facts,<sup>9</sup> the required level of detail, and the proper separation of fact from attorney mental impressions, conclusions and opinions. The practical burdens are overwhelming, especially when compared to the limited need Defendants have for the information<sup>10</sup> and the limited use that they could possibly make of the material. The interview summaries themselves will not be evidence or admissions, and the Supreme Court counseled against their use for impeachment due to the risk of turning counsel into a potential witness. *See Hickman*, 329 U.S. at 513 (“Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.”). Thus, if Defendants seek to admit any of the “facts” summarized in the United States’s interrogatory response, they will need to seek the deposition or trial testimony of the witnesses. The “benefit” of the receiving the “fact” summaries thus pales in comparison to the burden imposed by requiring that the United States create such summaries.

#### IV. CONCLUSION

In no sense will Defendants be “unduly hindered in the preparation of [their] case, in the discovery of facts or in [their] anticipation of [their] opponents’ position” if deprived of the Government’s work product. *Hickman v. Taylor*, 329 U.S. at 513.

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127355 at \*25; *SEC v. Strauss*, 2009 WL 3459204, at \*5 (S.D.N.Y. Oct. 28, 2009) (“[S]ummaries are not verbatim copies and necessarily involve some level of judgment in deciding what to note and what not to note.”).

<sup>9</sup> For example, does a hypothetical grower’s statement that he believes George’s and Tyson used to compete against each other for growers constitute a “fact” or “opinion”? *See generally* Advisory Cmte Note to Rule 701 (discussing the “practical impossibility of determining by rule what is a ‘fact’”); *Mobil Oil Corp. v. Fed. Trade Comm’n*, 430 F. Supp. 849, 854 (S.D.N.Y. 1977) (“not practicable” to extract factual information from interview reports “since the very selection and presentation of salient facts in such notes reflect the attorney’s work”).

<sup>10</sup> As stated above, Defendants have already contacted or could easily contact all interviewees in the remaining discovery time.

Defendants' Motion to Compel Discovery should be denied.

Dated: June 14, 2011

Respectfully submitted,

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/s/

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 14, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Respectfully submitted,

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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**

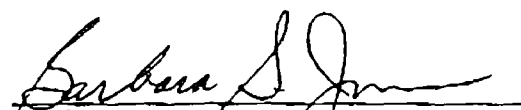
Having reviewed defendant VISA USA, Inc.'s ("VISA USA") Motion to Compel Pursuant to Fed. R. Civ. P. 37(a), the parties' memoranda and affidavits, the pertinent case law, and the pertinent Rules, the Court:

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.

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

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**

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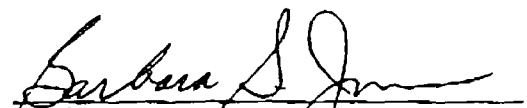
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**SO ORDERED:**

  
Barbara S. Jones  
UNITED STATES DISTRICT JUDGE

New York, New York  
January 27, 1999