IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*, Plaintiffs, v. **STAPLES, INC.** and **OFFICE DEPOT, INC.**, Defendants.	Civil Action No. 1:15-cv-02115-EGS

Plaintiffs' Opposition to Defendants' Motion to Compel

Defendants' motion seeks to compel production of Plaintiffs' internal memoranda and notes. These are notes and memoranda written by Federal Trade Commission ("FTC") lawyers and staff regarding interviews conducted with Defendants' customers and competitors during the 2015 investigation of the proposed merger of Staples and Office Depot. Defendants already have the identities of the companies interviewed, the documents and data produced by those third parties to the FTC, and any communications between the FTC and third parties. Plaintiffs produced all such materials within a week of filing the complaint in this case—even before the deadline for initial disclosures. Since that time, Defendants have served subpoenas on more than 200 third parties, and have been actively interviewing those third parties, and seeking documents, depositions, and declarations from them.

Despite this demonstrated ability to take their own discovery, Defendants are also seeking *Plaintiffs'* internal notes and memoranda of interviews Plaintiffs' lawyers conducted, as well as an interrogatory response from Plaintiffs' counsel summarizing the information from those interviews. Production of precisely this type of information was rejected by the U.S.

Supreme Court in its seminal case on the work product doctrine, *Hickman v. Taylor*, 329 U.S. 495 (1947)—a case Defendants do not discuss or even cite in their brief. In *Hickman*, like here, a party issued an interrogatory requesting the factual information obtained from witnesses in connection with an attorney's investigation of a potential lawsuit, as well as copies of the lawyer's interview notes themselves. *Hickman*, 329 U.S. at 498-99. The Supreme Court rejected the requests as seeking protected work product, and explained that, if necessary, opposing counsel could simply go out and seek information from the same witnesses himself. *Id*. at 511-13.

Hickman requires that Defendants' motion be denied. Defendants are seeking the same types of materials and information at issue in *Hickman*, and have the same ability to obtain that information directly through discovery on the third parties. And as noted above, they have been doing so for several weeks. Defendants have the entire list of third parties that provided information to Plaintiffs, have already served over 200 subpoenas, and are actively interviewing and taking discovery from those third parties. There is no need for Defendants to invade Plaintiffs' work product to obtain such information.

BACKGROUND

This case was filed on December 8, 2015. On December 11 and 14, 2015, even before initial disclosures were due, Plaintiffs produced to Defendants all documents in their possession that they had obtained from, or sent to, third parties in the FTC's investigation of the proposed Staples/Office Depot merger, and the FTC's communications with those third parties. *See* Declaration of Stelios Xenakis, ¶ 15, and attached Ex. 2. On December 18, 2015, Plaintiffs served their initial disclosures, providing the name and contact information for each third party Plaintiffs interviewed or obtained information from in the investigation.

Defendants began serving subpoenas for documents and testimony on these and other third parties on December 17, 2015. Since then, they have served subpoenas on more than 200 companies, and are actively seeking discovery from them. Xenakis Decl. ¶ 18, and Ex. 3.

On December 17, 2015, Defendants served Document Requests, Interrogatories, and Requests for Admission on Plaintiffs. In response, Plaintiffs confirmed that they had already produced all responsive, non-privileged documents related to the current case. And Plaintiffs confirmed that they would update their productions if and when they obtained additional responsive, non-privileged information. In response to meet and confer sessions with Defendants, Plaintiffs also agreed to produce any documents sent to, or received from, third parties in connection with the FTC's 2013 investigation of the Office Depot/Office Max merger, despite Plaintiffs preserving their objections that the 2013 investigation is irrelevant to the present litigation.[1] Thus, Plaintiffs agreed to produce all non-privileged documents responsive to Defendants' document requests.

As a result, this case is unlike *United States v. AB Electrolux*—discussed at pp. 6-7 of Defendants' brief—in which Defendants refused to produce their actual communications with third parties. *United States v. AB Electrolux*, No. 15-1039 (EGS), 2015 U.S. Dist. LEXIS 162023, at *9-*11 (D.D.C. Sept. 25, 2015). Defendants in this case have all such communications. Xenakis Decl. ¶ 15, and Ex. 2. Instead, Defendants seek purely internal documents: internal notes taken of interviews conducted by FTC lawyers, internal memoranda regarding those notes, and interrogatory responses setting forth the information obtained in those

[1] Defendants' counsel have stated that they are also seeking the FTC's interview notes and interview memoranda from the FTC's investigation of the 2013 merger of Office Depot and OfficeMax. *See* Declaration of Stelios Xenakis, ¶ 7. However, Defendants' brief only specifically moves with respect to Document Request No. 4 and Interrogatory No. 2.

interviews. *See Defs' Brief* at 2-3 (quoting Defendants' Document Request No. 4 and Interrogatory No. 2).

As shown below, those materials are protected by the work product and deliberative process privileges. FTC lawyers prepared outlines of questions for the interviews that sought information relevant to the lawyers' potential theories of the case. Those interviews were conducted by lawyers. Notes were taken by lawyers, FTC economists, and paralegals working at lawyers' direction. Defendants also seek memoranda summarizing lawyers' interviews with witnesses. *Id.* Both the interview notes and memoranda are kept for internal use only; they have not been provided to witnesses or anyone else. They are solely used for purposes of investigating Plaintiffs' case, preparing the case for litigation, and making recommendations about litigation to the Commission. *See* Xenakis Decl. ¶¶ 10-17; Declaration of Deborah L. Feinstein ¶¶ 5-7, 9; Declaration of Ginger Zhe Jin ¶¶ 5, 7, 9.

Moreover, Defendants have taken the position that their own internal investigational materials and facts related to third parties are privileged and not discoverable. Xenakis Decl. ¶ 19. For example, in investigational hearings, counsel for Staples and Office Depot instructed witnesses not to answer questions regarding their efforts to reach out to customers to generate support for the merger. *Id*. (attaching pages of investigational hearing transcripts as Ex. 4). Similarly, Office Depot clawed back documents related to customer outreach efforts, asserting they were privileged materials that had been inadvertently produced. *Id*. (attaching Letter from John Goheen to Stelios Xenakis (Sept. 24, 2015), as Ex. 5).

All together, Defendants are seeking 850 items of work product. *See* Xenakis Decl. ¶ 6, Ex. 1. Under the Case Management and Scheduling Order in this case, Plaintiffs are not required to log any of these on a privilege log. *See* Dkt 54, ¶5(e). Defendants agreed to this provision—

implicitly acknowledging the inherently privileged nature of such internal work by Plaintiffs' counsel. Nonetheless, to assist the Court, Plaintiffs are providing a privilege log covering the materials at issue. *See* Xenaxis Decl. ¶ 6. Plaintiffs are also prepared to submit the documents themselves, or a sample, to the Court *in camera* if requested.

ARGUMENT

I. The Requested Documents and Information Are Protected By The Work Product Doctrine.

A. The FTC's Interview Notes and Memoranda Are Protected Work Product.

Rule 26(b)(3) provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3). The requested interview notes and memoranda at issue were all prepared by FTC staff (including attorneys, economists, and paralegals acting under attorneys' supervision) in anticipation of possible litigation and thus fall squarely within the scope of work product protection. Xenakis Decl. ¶¶ 16-17.

Defendants' brief does not dispute that the documents at issue were prepared in anticipation of litigation. Nor could they. The D.C. Circuit has explained that where an attorney for a law enforcement agency "prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product." *SafeCard Svces., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991). In *SafeCard,* for example, the SEC staff had conducted a series of investigations into potentially illegal trading in a company's stock, which involved interviewing witnesses and preparing an advisory memorandum to the Commission on whether to file an action for injunctive relief. *Id.* After the

investigation was closed, the company sought records of the SEC's investigation, including handwritten notes by staff members. The court held that these materials were protected work product, noting that "[i]f the agency in these circumstances cannot be said to have had litigation of a specific claim in mind, it is impossible to imagine when, prior to the actual filing of a complaint, it can be." *Id.; see also In re Sealed Case*, 856 F.2d 268 , 273 (D.C. Cir. 1988) (witness interviews conducted in connection with insider trading investigation were "protected attorney work product"); *Parker v. United States DOJ Exec. Office for U.S. Attys*., 78 F. Supp. 3d 238, 244 (D.D.C. 2015) ("An agency can satisfy the 'in anticipation of litigation' standard by 'demonstrating that one of its lawyers prepared a document in the course of an investigation that was undertaken with litigation in mind,' even if no specific lawsuit has begun.") (quoting *SafeCard*, 926 F.2d at 1202).

The same reasoning applies here. In 2015, and previously in 2013, FTC staff conducted an investigation into whether a specific proposed merger would violate the antitrust laws. In connection with that investigation, FTC staff interviewed potential witnesses, prepared memoranda, and conducted legal research, all with the goal of making a recommendation to the Commission as to whether it should institute legal action to block the proposed merger. Xenakis Decl. ¶¶ 9-17. All of these materials were created with the prospect of specific litigation in mind, and hence are qualify as work product.[2]

Because these internal notes and memoranda were created in anticipation of litigation, they are properly treated as attorney work product. *See In re: Sealed Case*, 124 F.3d 230, 235-36 (D.C. Cir. 1997), *rev'd on other grounds*, *Swidler & Berlin v. United States*, 524 U.S. 399

[2] The fact that no litigation was actually commenced in 2013 is irrelevant; materials relating to the investigation in *SafeCard* were also work product even though the investigation had been closed. *SafeCard*, 926 F.2d at 1200*; see also Parker*, 78 F. Supp. 3d at 244 (protection applies "even if no specific lawsuit has begun").

(1998); *Dir., Off. of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (hereinafter "*OTS*"). As such, Defendants cannot access them simply by asking. Rather, Rule 26 "distinguishes between *opinion* work product, which reveals 'the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation,' and *fact* work product, which does not. *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015). Discovery of opinion work product is prohibited absent an "extraordinary showing of necessity," *id.*at 153, and as a result such material is "virtually undiscoverable." *OTS*, 124 F.3d at 1307. By contrast, fact work product can be discovered if the requesting party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii).

Here, Defendants have not made the required showing of substantial need and undue hardship—nor could they given their ability to obtain the factual information contained in the materials in other ways. *See OTS*, 124 F.3d at 1308 (rejecting attempt to obtain attorney interview notes where information was already otherwise available). This was the issue addressed by the D.C. Circuit in *OTS*. In that case, the D.C. Circuit upheld the assertion of work product protection over lawyers' interview notes.[3] There was no showing of substantial need

[3] In *OTS*, the D.C. Circuit did not question that lawyers' notes should qualify as work product. In addressing the distinction between fact and opinion work product, the Court of Appeals observed that a lawyer's notes are not always *opinion* work product—but agreed that lawyers' interview notes *may* be opinion work product—particularly when "a lawyer's factual selection reveals his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case." *OTS*, 124 F.3d at 1307-08. Thus "[w]hen a factual document selected or requested by counsel exposes the attorney's thought processes and theories, it may be appropriate to treat the document as opinion work product, even though the document on its face contains only facts." *Boehringer Ingelheim*, 778 F.3d at 151. As in *OTS*, however, this Court need not reach this issue because at a minimum, the interview notes and memoranda are *fact* work product, and Defendants have made no showing of substantial need for the documents. Indeed, the interview notes and memoranda reflect the information that FTC lawyers sought to obtain as relevant to Plaintiffs' case, and the lawyers' mental impressions in determining what was relevant to write down. Notes of precisely this type were found to be protected work product by the Supreme Court in *Hickman v. Taylor*. *Hickman*, 329 U.S. at 510-11. And in fact, many of the memoranda and notes prepared by FTC staff in connection with their

because it was clear that the moving party could obtain the information in another way. *Id*. Indeed, the moving party had already conducted its own interviews of the same witnesses. *Id*.

The same is true here, yet Defendants do not address or even cite *OTS*. The FTC has identified the persons it obtained information from in both the current case and the 2013 Office Depot/Office Max investigation. Defendants are free to interview or depose those individuals themselves. In fact, many of the witnesses are Defendants' own customers, and they could easily interview them at any time; indeed, Defendants could interview them long before the FTC did. And if necessary, they can compel discovery from them by subpoena. In fact, Defendants are already doing so, having issued subpoenas to more than 200 third parties already. Xenakis Decl. at ¶ 18.

That is all Defendants are entitled to. *See Clemmons v. Acad. Fir Educ. Development*, 300 F.R.D. 6, 8 (D.D.C. 2013). Defendants "must undertake their own investigation of the relevant facts" and cannot "simply freeload on opposing counsel" by reviewing notes and memoranda from the FTC's investigation. *Boehringer Ingelheim*, 778 F.3d at 156. *See also Hickman*, 329 U.S. at 508-09, 511-13. Thus, whether the FTC's internal interview notes and memoranda are viewed as fact work product or opinion work product, Defendants' motion should be denied.

In fact, none of the work product cases cited by Defendants support their request for the interview notes and memoranda of Plaintiffs' lawyers. In *Boehringer Ingelheim*, the D.C. Circuit *affirmed* the district court's finding that certain materials related to a settlement of litigation were protected work product. *Boehringer Ingelheim*, 778 F.3d at 149-50. With respect

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investigations do qualify as opinion work product because they reveal the lawyer's focus, thought processes and theories—both in the nature of the questioning and in what the lawyer chooses to write down. *See U.S. v. US Airways Group*, Civ. No. 13-cv-1236 (CKK), Slip Op. at 5-7 (D.D.C. Oct. 10, 2013) (Levie, Special Master) (attached hereto as Exhibit 6 to the Declaration of Stelios Xenakis).

to other documents, the Court of Appeals determined that such documents were fact work product, but that the movant had shown "a substantial need for the materials to prepare its case and [that it] cannot, without undue hardship, obtain their substantial equivalent by other means." *Id*. at 149 (*quoting* Fed. R. Civ. P. 26((b)(3)(A)). Defendants in this case, however, have not even asserted any claim of need.

Defendants similarly cite this Court's decision in *AB Electrolux*, but in that case, Defendants withheld actual communications between their counsel and third parties. *AB Electrolux*, 2015 U.S. Dist. LEXIS 162023, at *11. Plaintiffs here have already provided such materials.

Relying on *AB Electrolux*, Defendants argue that facts that are "segregable" from attorney work product should be produced. *Defs' Brief* at 6-7. But that argument misses the point. In *AB Electrolux*, the Court was addressing whether all *communications* between defendants' counsel and third parties were protected as work product. *AB Electrolux*, 2015 U.S. Dist. LEXIS 162023, at *11, *17. The Court rightly viewed that claim with suspicion. *Id*. But that is not the issue here. As noted above, Plaintiffs have *already* produced all their communications with third parties—including all documents sent to, and received from, third parties.

Thus, unlike in *AB Electrolux*, at issue in this motion are Plaintiffs' *internal* interview notes and memoranda by lawyers and other FTC staff. Defendants appear to be suggesting that Plaintiffs should review all those interview notes and memoranda, segregate out work product from non-work product and provide redacted versions of the interview notes and memoranda. That is improper. *All* of the interview notes and memoranda are protected attorney work product. They are all comprised of facts gathered by Plaintiffs' lawyers in anticipation of

litigation. They reveal the Plaintiffs' litigation theories through the questions themselves; they reveal what areas of inquiry Plaintiffs' counsel believed were relevant and what were not. They reveal what information Plaintiffs' counsel believed was important to try to elicit and what was not. They reveal the lawyers' interpretations of that information. And the notes and memoranda reveal what information counsel believed was relevant to write down and what was not. Xenakis Decl. ¶ 17. Plaintiffs cannot separate material protected by the work product privilege from material that is not; *all* of the material is protected. *Hickman*, 329 U.S. at 510 (entire set of notes protected by work product doctrine); *OTS*, 124 F.3d at 1308; *U.S. v. US Airways Group*, Civ. No. 13-cv-1236 (CKK), Slip Op. at 5-7 (D.D.C. Oct. 10, 2013) (Levie, Special Master) (attached as Exhibit 6 to Xenakis Decl. ¶ 20).

B. The Information Requested In Interrogatory No. 2 Is Protected Work Product.

Defendants have also served an interrogatory asking Plaintiffs' counsel to write out all information obtained in Plaintiffs' interviews with potential third party witnesses. In *Hickman v. Taylor*, the Supreme Court addressed the precise issue raised by Defendants' Interrogatory No. 2. In *Hickman*, as here, the petitioner served an interrogatory asking its opponent to set forth factual information obtained during counsel's interviews with potential third party witnesses. *Hickman*, 329 U.S. at 498-99. Petitioner also requested any copies of interview notes, summaries or other memoranda. *Id*. at 499. The defendant objected, and the Supreme Court upheld the objection.

The Supreme Court was clear that information obtained by a lawyer's interviews with third parties was protected from discovery:

> Proper preparation of a client's case demands that [the lawyer] 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. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs,

> mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.

Id. at 511.

The Court acknowledged that production of relevant and non-privileged facts included in work product might have to be produced "where the witnesses are no longer available or can be reached only with difficulty." *Id*. at 511. But "as to oral statements made by witnesses to [counsel], whether presently in the form of [counsel's] 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." *Id*. at 512. Indeed, the Court noted that the petitioner "has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpeached." *Id*. at 508. In fact, "the essence of what petitioner seeks has been revealed to him already" through other discovery devices or is "readily available to him direct from the witnesses for the asking." *Id*. at 509. The Court found that "[n]o legitimate purpose is served" by requiring a production of information from an attorney's interviews with third party witnesses:

> The practice forces the attorney to testify as to what he remembers or saw fit to write down regarding witnesses' remarks. Such testimony would 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.

Id. at 513.

Former U.S. District Judge Richard Levie, acting as Special Master, followed *Hickman v. Taylor* in issuing a report and recommendation to deny a motion to compel responses to the same interrogatory served here. *US Airways*, Slip Op. (D.D.C. Oct. 10, 2013). In *US Airways*, the U.S. Department of Justice sued to block the merger of two airlines. *US Airways*, Slip. Op. at 1.

Defendants served the *same* interrogatory on the Department of Justice that Defendants served on Plaintiffs here. *See id*. at 2. Relying on *Hickman*, the Special Master upheld Plaintiffs' work product claim. As the Special Master explained, "[t]hat the interrogatory at issue in this Motion nominally seeks only 'facts' and not such 'mental impressions' is a distinction without a difference. Either way, Defendants are asking opposing counsel to produce a document prepared by counsel that divulges what counsel learned from interviewing potential witnesses in anticipation of litigation." *Id*. at 5 (internal quotations and brackets omitted). In fact, the Special Master found that the interrogatory requested opinion work product because the "questions that an attorney asks an interviewee are designed to produce useful and hopefully relevant information from that interviewee, such that the 'facts elicited necessarily reflect a focus chosen by the lawyer.'" *Id*. at 6 (*quoting In re Vitamins Antitrust Litig*., 211 F.R.D. 1, 5 (D.D.C. 2002)). Finding that Defendants could simply seek discovery from third parties on their own, the Special Master concluded that Defendants had not shown any substantial need for the requested information. *Id*. at 8. As a result, the Special Master recommended that the motion to compel be denied.

Defendants' brief does not cite the Supreme Court's controlling decision in *Hickman v. Taylor* or former Judge Levie's report and recommendation in *US Airways.* Instead, it relies on a district court opinion from the Eastern District of Wisconsin, *U.S. v. Dean Foods Co.*, No. 10-CV-59, 2010 WL 3980185 (E.D. Wisc. Oct. 8, 2010).[4] In *Dean Foods*, the district court ordered the plaintiff to answer an interrogatory requesting factual information from lawyers' interviews with third parties. *Id*. at *3. Misunderstanding *Hickman v. Taylor*, the district court stated that

[4] Former Judge Levie's report and recommendation in *US Airways* expressly rejected *Dean Foods* as inconsistent with D.C. Circuit authority. *See US Airways*, Slip. Op. at 4 n.3.

when relevant and non-privileged facts "remain hidden in an attorney's file," those facts are discoverable if they are essential to preparation of the party's case. *Id*. (*citing Hickman,* 329 U.S. at 511). But the district court ignored the very next statements in *Hickman*, in which the Supreme Court held that such an invasion of attorney work is justified *only* if the movant demonstrates a substantial need for the information. *See Hickman,* 329 U.S. at 511-12. As explained by the D.C. Circuit in *Boehringer Ingelheim*, "*Hickman* clarified that discovery of an attorney's work materials was permitted only in limited circumstances." *Boehringer*, 778 F.3d at 149. The D.C. Circuit went on to explain that "*Hickman* was later codified in substantial part in Rule 26(b)(3) of the Federal Rules," which state that discovery of work product is permitted only when a party shows a "substantial need" for the materials, and "cannot, without undue hardship, obtain their substantial equivalent by other means." *Id*. (*quoting* Fed. R. Civ. P. 26(b)(3)(A)).[5]

Unable to show any substantial need, Defendants in this case argue instead that "fairness considerations" require production of Plaintiffs' work product materials. *Defs' Brief* at 7. Thus, Defendants speculate that Plaintiffs will rely on facts from third party interviews to support their claims, and therefore it would be unfair for Plaintiffs to withhold work product from discovery. *Id*. Defendants' purported "sword and shield" argument is a red herring. Plaintiffs will support their claims with *evidence*—trial testimony, deposition testimony, declarations, and documents produced in discovery. Defendants can take discovery to obtain the same evidence, to cross examine witnesses at deposition or trial, and to interview or obtain declarations from third

[5] The district court in *Dean Foods* did not assess the defendant's need for the requested information. Instead, with no citation to any case authority, the district court found that the requested information—obtained in lawyer's interviews and memorialized in lawyer's notes—did not constitute work product at all. This conclusion cannot be squared with *Hickman*, which finds to the contrary on this precise issue. Nor is it consistent with the D.C. Circuit's opinion in *OTS*, where the information in lawyer's interview notes was *conceded* to be work product.

parties. That is all they are entitled to. *See Hickman*, 329 U.S. at 508-09, 511-13; *Boehringer Ingelheim*, 778 F.3d at 156; *Clemmons*, 300 F.R.D. at 8; *US Airways*, Slip. Op. at 5.

In fact, it is *Defendants* that are seeking to use privilege as a sword and a shield. Despite seeking production of Plaintiffs' internal investigation materials, Defendants claim privilege over their own. Thus, in investigational hearings, counsel for Staples and Office Depot instructed witnesses not to answer questions regarding Defendants' efforts to discuss the merger with customers. Xenakis Decl. ¶ 19. And Office Depot expressly clawed back as privileged documents related to such customer outreach efforts. *Id.*

Defendants' claim of privilege over their own fact gathering from third parties further demonstrates that their motion to compel such materials from Plaintiffs should be denied. Defendants cannot have it both ways.

II. The Requested Documents And Information Are Also Protected By the Deliberative Process Privilege.

The deliberative process privilege provides an independent basis to reject Defendants' motion. That privilege shields from discovery materials prepared by a government agency in connection with decisions that that are both "predecisional" and "deliberative." *E.g.*, *McKinley v. Bd. Of Governors of the Federal Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." *United States Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9, (2001); *see also Dow Jones & Co. v. DOJ*, 917 F.2d 571, 574 (D.C. Cir. 1990) ("This ancient privilege is predicated on the recognition that the

quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.") (citations and internal quotation marks omitted).

In this case, interviews with potential witnesses provided information to the FTC Bureaus of Competition and Economics that influenced the Bureaus' deliberations regarding their recommendation to the Commission on whether or not to file a lawsuit to block Defendants' proposed merger. Feinstein Decl. ¶¶ 5, 7, 9; Jin Decl. ¶¶ 5, 7, 9. As a result, the materials that led to the Bureaus' decisions—including notes of witness interviews and memoranda discussing those interviews—are part of the deliberative process and protected by deliberative process privilege. Feinstein Decl. ¶¶ 9-11; Jin Decl. ¶ 9-11. While the privilege does not generally protect purely factual matters, *see, e.g.*, *EPA v. Mink*, 410 U.S. 73, 89 (1973), the D.C. Circuit has recognized that "in some instances, the disclosure of even purely factual material may so expose the deliberative process within an agency that the material is appropriately held privileged." *Petroleum Info. Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citation and internal quotation marks omitted). Thus "[o]n several occasions," the D.C. Circuit has "permitted agencies to withhold factual material on the ground that its disclosure would expose an agency's policy deliberations to unwarranted scrutiny." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538 (1993).

For example, in *Montrose Chemical Corp, v. Train*, 491 F.3d 63 (D.C. Cir. 1974), the court held that summaries of evidence prepared for the EPA administrators' review were privileged, finding that probing the summaries would be "the same as probing the decision-making process itself," and that the "work of the assistants in separating the wheat from the chaff is surely just as much part of the deliberative process as is the later milling by running the grist through the mind of the administrator." *Id.*at 68, 71. Likewise, in *Mapother*, the court held that

most of a report about a world leader was privileged, even though much of the report could be portrayed as factual. *Mapother*, 3 F.3d at 1533; *see also Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513-14 (D.C. Cir. 2011) (factual summaries prepared by agency reflected predecisional deliberative process and were privileged); *Leopold v. CIA* , 89 F. Supp. 3d 12, 21-23 (D.D.C. 2015) (materials prepared by CIA staff summarizing key information were privileged). These cases establish that "the legitimacy of withholding does not turn on whether the material is purely factual in nature . . ., but rather on whether the selection or organization of facts is part of an agency's deliberative process." *Ancient Coin Collectors*, 641 F.2d at 513. "Where an agency claims that disclosing factual material will reveal its deliberative processes," the court must "examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *Mapother*, 3 F.3d at 1537-38. (citation and internal quotation marks omitted).

Similarly, in this case, even if memoranda and interview notes prepared by FTC staff contain some factual information, that information is still part of the deliberative process leading up to the staff's final recommendation and the Commission's ultimate decision. In preparing these documents, FTC staff members necessarily made judgment calls about what facts were potentially important to a case—whether positive or negative—and selected what information, if any, was appropriate to relay to supervisors, who, in turn, made decisions about what should be included in their recommendation to the Commission. Allowing discovery of these preliminary materials would be as invasive of the deliberative process as disclosure of the final memoranda would be. It would severely inhibit FTC staff from doing their jobs, forcing them constantly to question what information they should write down and what they should communicate to supervisors.

The facts of this case are similar to those in *Ivy Sports Medicine, LLC v. Sebelius*, No. 11-cv-1006, 2012 U.S. Dist. LEXIS 152571 (D.D.C. Oct. 24, 2012), where Judge Wilkins upheld an agency claim of deliberative process privilege. In that case, the FDA argued that notes of interviews used to prepare an agency report were protected by the deliberative process privilege. The court agreed, holding that "the interviews were part of an internal deliberative process and therefore the FDA is entitled to withhold the notes under the deliberative process privilege." *Id.* at *6. Similarly in this case, notes of interviews conducted by FTC staff and other material describing or discussing those interviews are part of the agency's deliberative process and are protected by the privilege.

The cases cited by Defendants are not to the contrary. In *Cobell v. Norton*—quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)—the Court notes that "factual information may be protected if the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policy making process." *Cobell v. Norton*, 213 F.R.D. 1, 6 (D.D.C. 2003) (internal quotations omitted). That is the case here. And in *McKinley v. F.D.I.C.*, 756 F.Supp. 2d 105, 113 (D.D.C.) the Court was addressing specific statutory exceptions to FOIA. The Court agreed that the materials at issue may be protected by deliberative process privilege, but did not have enough information in the record to make such a determination. *Id.* at 114.

Finally, although "[t]he deliberative process privilege is a qualified privilege [that] can be overcome by a sufficient showing of need, *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997), in this case Defendants cannot make such a showing. As discussed above, to the extent that Defendants seek factual information they can obtain that information through other means, *i.e.*, by conducting their own interviews or using compulsory process to depose witnesses.

Dated: January 12, 2016

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*, Plaintiffs, v. **STAPLES, INC.** and **OFFICE DEPOT, INC.**, Defendants.	Civil Action No. 1:15-cv-02115-EGS

DECLARATION OF STELIOS S. XENAKIS

I, Stelios S. Xenakis, declare as follows:

1. I am an attorney employed by the United States Federal Trade Commission ("Commission" or "FTC"). I have been employed by the FTC since 2009. During this time, I have participated in many investigations in a variety of industries, including the office supply industry.

2. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion to Compel, which was filed in the above-captioned case on January 7, 2016.

3. On December 8, 2015, Plaintiffs filed a federal complaint in the above-captioned matter alleging the proposed merger of Staples, Inc. ("Staples") and Office Depot, Inc. ("Office Depot") violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. The FTC filed an administrative complaint the previous day. I was the lead staff attorney overseeing the investigation that led to the filing of those complaints. In addition to leading the investigation that resulted in the above-captioned case, I also worked on the previous investigation of the proposed merger of Office Depot and OfficeMax, Inc. ("OfficeMax"), which was conducted in 2013.

4. On December 17, 2015, Defendants served on Plaintiffs their First Set of Requests for Production of Documents, First Set of Requests for Admissions, and First Set of Interrogatories.

5. On December 22, 2015, Plaintiffs served on Defendants their Objections and Responses to Defendants' First Set of Requests for Production of Documents.

6. Attached as Exhibit 1 to this Declaration is a privilege log indicating each third party interviewed, the date of each interview of that third party, the attendees of each interview,

and the total number of documents reflecting notes taken for that interview. In addition, the chart identifies each interview for which an internal memorandum was prepared and the date of that memorandum. As indicated in the chart, the total number of documents at issue is 850.

7. On January 7, 2016, Defendants filed a Motion to Compel Production, in which Defendants stated that they were compelling production of internal memoranda describing interviews of third parties conducted by FTC staff during the investigation of the proposed merger of Staples/Office Depot as well as internal notes from interviews of third parties conducted during the Staples/Office Depot investigation. Although Defendants' Motion did not state that Defendants were compelling production of the internal memoranda and internal notes of third-party interviews conducted during the 2013 investigation of Office Depot/OfficeMax, Defendants have since told Plaintiffs that they intend to include those 2013 memoranda and notes within the scope of their Motion to Compel.

8. In addition to these documents, Defendants requested in Interrogatory 2 of their First Set of Interrogatories that Plaintiffs identify each Person Plaintiffs interviewed during the Staples/Office Depot investigation and provide all factual information obtained from these individuals through these interviews that is relevant to Plaintiffs' claims. As part of their initial disclosures, Plaintiffs provided the identity of individuals interviewed during the investigation or from whom the FTC received information. As for the factual information obtained during those interviews, that information would have to be culled from the interview notes and interview memoranda that Defendants have requested in the First Set of Requests for Production of Documents.

Work Product Protection

9. As lead attorney on the investigation of the Staples/Office Depot proposed merger and an attorney assigned to the 2013 investigation of the proposed merger of Office Depot and OfficeMax, I am familiar with the process used to investigate both matters.

10. As part of the investigation process for both investigations, FTC staff attorneys contacted third parties who are knowledgeable about the industry in which the potentially merging parties conduct business, *i.e.*, office supplies. I attended many of these interviews and am aware of the content of the other interviews either by reading the interview notes or memoranda or being briefed on the interviews by members of the investigative staff.

11. Prior to conducting any of these interviews, attorneys drafted outlines of questions to ask the interviewees. To determine which questions to include in the outline and how to phrase the questions, the attorneys relied on their opinions of what information was relevant and needed for them to analyze the proposed mergers and evaluate any potential anticompetitive effects the proposed mergers might cause. These proposed questions were discussed and debated among lawyers on the matter who provided their opinions on what information was relevant and needed to analyze the mergers and what questions should be asked to elicit that information. Attorneys led the questioning during all of the calls.

12. These interviews were not tape recorded, nor was any attempt made to create a verbatim statement of the information conveyed. Instead, the participants synthesized the questions asked and the information provided, and took notes based on their legal analysis of the relevance of the information being provided. Because the attorneys needed to make determinations on what to include in their notes and how to phrase the responses to the questions asked, the notes include the attorneys' subjective interpretations of what was asked and what was said, and their impressions of the information provided.

13. After the interviews, a participant sometimes drafted an internal memorandum summarizing what the attorneys believed to be the relevant information. At least some attorneys participating in the interview frequently reviewed the draft memorandum to ensure that the information important to the legal and economic theories being investigated was included. In addition to summarizing the attorneys' understanding of the information conveyed during the interview, many of these interview memoranda also state the reasons the interview was conducted, characterize the importance of the information learned, evaluate the interviewee as a possible witness, or identify potential areas of further inquiry.

14. Frequently, the interviewees on these calls were unsure of the exactness of their answers to the questions posed by the FTC staff attorneys. And these interviews were not sworn statements provided under penalty of perjury. Consequently, staff attorneys verified much of the information provided through analysis of documents or data the interviewee provided voluntarily or as a result of a Civil Investigative Demand ("CID") issued to the interviewee's company by the FTC. In addition or alternatively, many interviewees were asked to attest to the information they provided by signing a declaration under penalty of perjury.

15. The FTC provided the CID responses, voluntary responses, and signed declarations from the investigation that resulted in the above-captioned case as part of its initial disclosures to Defendants. Attached as Exhibit 2 is a list identifying all the documents from third parties that the FTC obtained during its investigation and that were, subsequently, produced to Defendants. The FTC is also currently in the process of providing statutorily-required notice to companies that provided documents in response to a CID issued as part of the Office Depot/OfficeMax investigation that their responses will be produced to the Defendants unless they file an objection with this Court.

16. FTC attorneys performed the investigation processes described above in contemplation of litigation. They interviewed industry participants, and FTC staff drafted interview memoranda with the prospect of action by the FTC against the parties involved in the proposed merger being investigated. In addition, economists and researchers from the FTC's Bureau of Economics participated in the interviews to assist the Bureau of Competition to prepare for possible litigation.

17. All of the interview notes and memoranda reflect facts gathered by attorneys and other FTC staff assisting them in contemplation of litigation. As described above, the interview notes and memoranda reflect attorneys' thought processes, mental impressions, strategies, and other work in contemplation of litigation. It is not possible to segregate non-privileged facts from attorneys' thought processes, mental impressions, strategies and other work because all of

the facts were gathered by lawyers and other Commission staff in contemplation of litigation. The notes and memoranda reflect and reveal Plaintiffs' attorneys' thought processes, mental impressions, strategies and other work in determining what areas of inquiry are relevant to Plaintiffs' case, what questions should be asked to elicit information deemed relevant to Plaintiffs' case, and what information should be recorded as relevant to Plaintiffs' case.

18. Plaintiffs have provided to Defendants' counsel detailed contact information—including names, mailing addresses, telephone numbers, and email addresses—for the persons identified in the Plaintiffs' initial disclosures. In fact, as seen in Exhibit 3, attached, the Defendants have already sent subpoenas to more than 200 third parties and have ample ability to interview these parties themselves.

19. In the investigational hearing[s] of Neil Ringel and Stephen Calkins, counsel for Staples and Office Depot instructed witnesses to withhold information regarding their efforts to reach out to customers about those customers' views on the merger. Pages from those investigational hearing transcripts are attached as Exhibit 4. Counsel for Office Depot also clawed back documents related to customer outreach efforts as privileged materials that had been inadvertently produced. *See e.g.,* Letter from John Goheen to Stelios Xenakis (Sept. 24, 2015), attached as Exhibit 5.

20. Attached to this Declaration, as Exhibit 6, is a true and correct copy of the Special Master Report and Recommendation #2, filed in *United States of America, et al., v. U.S. Airways Group, Inc., et al.*, 1:13-cv-1236 (D.D.C. Oct. 10, 2013).

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed this 12th day of January, 2016, in Washington, DC.

Stelios S. Xenakis

EXHIBIT 5

Simpson Thacher & Bartlett LLP

900 G STREET, NW
WASHINGTON, D.C. 20001

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Direct Dial Number
(202) 636-5567

E-mail Address
john.goheen@stblaw.com

CONFIDENTIAL TREATMENT REQUESTED

BY E-MAIL

September 24, 2015

Re: Transaction Identification Number: 2015-0670
Office Depot, Inc.

Stelios Xenakis
Mergers IV Division
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024

Dear Stelios:

During the course of our data and document production to the Federal Trade Commission ("FTC") in response to the FTC's Request for Additional Information and Documentary Material Issued to Office Depot, Inc. (the "Second Request") dated March 30, 2015, certain privileged information was inadvertently produced. This information was generated by Office Depot, Inc. ("Office Depot") and contains privileged attorney-client communications. Below is an index of the documents over which we assert attorney-client privilege.

We respectfully request that you immediately purge the images of these documents from any review database and ask that you destroy or delete any other versions of these documents, whether electronic or hard copy, that may exist in the files of the FTC. Replacement images for these files are enclosed with this letter.

Bates # Start	Bates # End
ODP-OMX-FTC-02806724	ODP-OMX-FTC-02806743
ODP-OMX-FTC-02807242	ODP-OMX-FTC-02807244
ODP-OMX-FTC-02807590	ODP-OMX-FTC-02807591

Enclosed herewith is a replacement production which keeps the same file structure, with updated text and DAT and load files. A password will follow under separate cover.

* * *

In submitting these documents and related information, Office Depot does not intend to waive any claim of privilege to which it is entitled. Accordingly, any inadvertent submission of any privileged information does not preclude the subsequent assertion of a claim of attorney-client, work product, or any other applicable privilege in the future with respect to the information.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (2000); Section 21 of the Federal Trade Commission Act, 15 U.S.C. § 57b-2; Section 7A(h) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a(h) (2000); the applicable Commission regulations; and any other relevant law, Office Depot respectfully requests confidential treatment of this letter and the enclosed materials.

If you have any questions regarding any of the foregoing, please do not hesitate to contact me.

Very truly yours,

John L. Goheen

Enclosure

cc: Kimberly Biagioli
Amanda Lewis
Andrew M. Lacy

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-cv-1236 (CKK) (Before Special Master Levie)
US AIRWAYS GROUP, INC., et al.,	)	
Defendants.	)	

SPECIAL MASTER REPORT AND RECOMMENDATION #2

Pending before the Special Master is Defendants' Motion to Compel Production of Relevant Facts Obtained From Third-Party Interviews. For the reasons that follow, the Special Master recommends that the Court deny this motion.

I. Introduction

Defendants are two large "legacy" airlines who announced plans in early 2013 to merge. The Department of Justice ("DOJ"), six state Attorneys General[1], and the District of Columbia filed suit to challenge the merger in August 2013. [Doc. No. 1]. The Court has referred this case to the Special Master for purposes of managing discovery and adjudicating discovery disputes. [Doc. No. 69].

On August 30, 2013, Defendants served their first interrogatories on Plaintiffs. Plaintiffs objected to Defendants' Interrogatory No. 1, after which Defendants submitted the instant

[1] The Attorney General for the State of Texas has since reached a settlement agreement on these matters with Defendants and has withdrawn from the litigation. [Doc. No. 95].

motion and accompanying exhibits. Plaintiffs have served an opposition, and Defendants filed a reply. The Special Master has considered the written arguments, along with those made during oral argument on September 30, 2013. The matter is now ripe for resolution.

II. Arguments of the Parties

Defendants' Interrogatory No. 1 asks Plaintiffs to

> [i]dentify each Person interviewed by the Plaintiffs (either together or independently) pursuant to the Investigation of the challenged Transaction and provide all factual information obtained from these individuals and entities through such interviews that is relevant to Plaintiffs' claims in this case.

(Def. Mot. to Compel Production of Factual Materials and Information Regarding DOJ's Approval of Four Prior Airline Mergers Exh. B at 0042).[2]

Defendants assert that "the interrogatory seeks only routine pretrial discovery of facts – not interview memoranda, attorney notes, or other work product . . . ." (Mot. at 1) and that the interrogatory does not seek information protected by the work product doctrine. (Mot. at 1). According to Defendants, the doctrine "does not protect the identities of third parties interviewed by the opposing party's attorney or the relevant facts obtained through these interviews." (Mot. at 3).

Plaintiffs argue that this interrogatory seeks material protected by the work product doctrine because it seeks information derived from "oral statements from witnesses." [Opp. at 3 (quoting *In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988))]. Plaintiffs aver that they have provided Defendants with "the names of individuals likely to have discoverable information and all non-party documents and data received during Plaintiffs' investigations." From such disclosures, Plaintiffs assert that Defendants are in a position independently to discover any facts

[2] Defendants' proposed order essentially tracks the wording of the interrogatory.

that Plaintiffs obtained while interviewing third parties. (Opp. at 3). Plaintiffs further contend that, because they have provided the identities of persons likely to have discoverable material, the work product doctrine protects them from having to provide Defendants with a list of all people interviewed during Plaintiffs' investigation of the merger. (Opp. at 3).

III. Legal Standard

The work product doctrine protects material "prepared in anticipation of litigation or for trial" by an attorney or an attorney's agent. [Fed. R. Civ. P. 26(b)(3)(A); *Hickman v. Taylor*, 329 U.S. 495, 510-514 (1947)]. "The purpose of the work-product privilege is to ensure that 'a lawyer [can] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel,' and to permit attorneys to 'assemble information, sift what [they] consider[ ] to be relevant from the irrelevant facts, prepare [their] legal theories and plan [their[strategies[without undue and needless interference." [*Judicial Watch, Inc. v. U.S. Dep't of Homeland Security*, 926 F. Supp. 2d 121, 137 (D.D.C. 2013) (quoting *Hickman*, 329 U.S. at 510-11)].

The party invoking the work product protection, in this case Plaintiffs, bears the burden of demonstrating with "reasonable certainty" that it applies to the material at issue. [*In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n,* 439 F.3d 740, 750-51 (D.C. Cir. 2006)].

Two types of work product exist: (1) fact work product and (2) opinion work product. "To the extent that work product contains relevant, nonprivileged facts, the [work product doctrine] merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery. However, to the extent that work product reveals the opinions, judgments, and

thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification." [*In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982)].

IV. Discussion

Defendants contend that the work product doctrine is inapplicable to this matter because the contested interrogatory seeks only "facts," and not a summary of the interview or interview notes. It is true that, on its face, Rule 26(b) protects only "documents and tangible things" generated in preparation for litigation. *Hickman*, however, expressly protects not just tangible information, but an attorney's "mental impressions" and "thoughts." (*Hickman*, 239 U.S. at 511). "Thus, *Hickman* provides work-product protection for intangible work product independent of Rule 26(b)(3)." [*United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010)].[3] Facts that Plaintiffs gleaned from the interview process fall into this category.

Indeed, the information that Defendants refer to as "routine pretrial discovery of facts" was generated by DOJ attorneys, who issued questions to third parties based on the attorneys' beliefs that the particular questions asked were likely to produce information relevant to what has become the instant litigation. The situation is similar to that considered by the D.C. Circuit in *In re Sealed Case*, where the Court rejected a party's efforts to garner information in the form of attorneys' "mental impressions of witness interviews." (856 F.2d at 273). In making that ruling, the D.C. Circuit specifically noted that "[t]he work product doctrine reflects the strong public policy against invading the privacy of an attorney's course of preparation." [*Id.* (citing *Hickman*, 329 U.S. at 510)].

[3] To the extent that Defendants rely on *United States v. Dean Foods Company*, 2010 WL 3980185 at *4 (E.D. Wis. 2010) to support their contention that the material sought is not work product, the Special Master notes that, in *Dean Foods*, the court determined that only a "written and verbatim record" of witnesses statements would qualify as protected work product. By contrast, in this jurisdiction, the D.C. Circuit has expressly held that both recorded and non-recorded recollections of interviews qualifies for such protection. (*See Deloitte,* 610 F.3d at 136).

That the interrogatory at issue in this Motion nominally seeks only "facts" and not such "mental impressions" in this case is a distinction without a difference. "Either way, [Defendants are] asking opposing counsel to produce a document prepared by counsel that divulges what counsel learned from interviewing potential witnesses in anticipation of litigation." [*S.E.C. v. Sentinel Mgmt Group, Inc.*, 2010 WL 4977220 at *7 (N.D. Ill. Dec. 2, 2010)]. As the Court noted in *Sentinel*, one of the purposes of the work product doctrine is "'to limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts' " [*Id.* at *7 (citing *Sandra T.E. v. South Berwyn School District 100,* 600 F.3d 612, 622 (7th Cir. 2010)]. It cannot seriously be questioned that the act of interviewing here was undertaken for the purpose of gathering facts and information in connection with making a decision whether or not to challenge the proposed merger. In such circumstances it is still subject to work product protection.

While Defendants are correct that "[c]ounsel or litigants cannot use the work product doctrine to hide facts underlying the litigation from discovery," [*United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 156 (D. Del. 1999)], the underlying factual background for this Motion does not suggest a "hide the ball" approach by Plaintiffs. Here, Plaintiffs have provided Defendants with a list of all persons likely to have discoverable information. Using this information, Defendants may conduct their own investigation and independently obtain facts and reach their own conclusions about the utility and importance of any information.

The reality is that the interrogatory at issue ultimately is an effort by Defendants to find out what facts were important to Plaintiffs. From such factual analysis it is a very small step to looking at the facts deemed relevant to Plaintiffs' counsel and deriving insight and understanding into the legal theories and approaches of Plaintiffs. [*Chiperas v. Rubin*, 1998 WL 531845 at *1

(D.D.C. Aug. 24, 1998)]. In sum, the Special Master recommends that the Court find that the information sought in Interrogatory No. 1 qualifies for protection under the work product doctrine.

The work product doctrine, however, is a qualified protection, and factual work product is obtainable upon an adequate showing of substantial need and an inability to obtain substantially equivalent material by other means without undue hardship. [*See Upjohn Co. v. U.S.*, 449 U.S. 383, 401-02 (1981); Fed. R. Civ. P. 26(b)(3(A)(ii) (substantially the same as the version of Rule 26 cited in *Upjohn*)]. Opinion work product, on the other hand, is "virtually undiscoverable," requiring a showing of "extraordinary justification**."** [*Yeda Research & Dev. Co. v. Abbott GMBH & CO. KG*, 2013 U.S. Dist. LEXIS 84948 at *27 (D.D.C. June 17, 2013) (quoting *Director, Office of Thrift Supervision v. Vinson & Elkins LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997), and *In re Sealed Case*, 676 F.2d at 809-10].

The Special Master concludes that this material is protected opinion work product. *Hickman* notes that part of an attorney's protected duties include "sift[ing] what he [or she] considers to be the relevant from the irrelevant facts." (*Hickman*, 329 U.S. at 511). The questions that an attorney asks an interviewee are designed to produce useful and hopefully relevant information from that interviewee, such that the "facts elicited necessarily reflect a focus chosen by the lawyer." [*In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 5 (D.D.C. 2002) (internal citations omitted)].

Likewise, the information that an attorney chooses to record is almost certainly the material that he or she deems important to the case at hand. "[E]ven if it can be agreed upon that a collection of materials or statements constitute "facts," the collection of materials or statements might nonetheless reveal an attorney's thought processes and mental impressions of the case,

thereby converting the information into 'opinion' work product. … Also, the facts elicited from an investigation may be, in some cases, necessarily reflective of an attorney's focus in a case." [*U.S. v. Clemens*, 793 F. Supp. 236, 245 (D.D.C. 2011) (citing *Office of Thrift Supervision*, 124 F.3d at 1308; *In re Sealed Case*, 124 F.3d at 236)].

The record here suggests that the factual material at issue for purposes of this Motion is inextricably intertwined with the mental processes of the attorney. "Where the factual and opinion work product are so intertwined in a document that it is impossible to segregate and disclose the purely factual part, any disclosure would violate the protections afforded by the work product doctrine since, in that case, the entire document discloses the mental impression of an attorney or her agent." [*FTC v. Boehringer Ingelheim Pharms., Inc.*, 286 F.R.D. 101, 108 (D.D.C. 2012) (citing *In re Vitamins Antitrust Litig.*, 211 F.R.D. at 5)].[4]

For similar reasons, the complete list of individuals with whom Plaintiffs spoke is also protected opinion work product. Plaintiffs have provided Defendants with the names of persons having discoverable information. Requiring Plaintiffs to also disclose the names of individuals who Plaintiffs interviewed, but found not to have discoverable information, would force Plaintiffs to disclose "which individuals [Plaintiffs' counsel] consider[s] more or less valuable as witnesses and how [he or she] [is] preparing for trial." [*Tracy v. NVR, Inc.*, 250 F.R.D. 130, 132 (W.D.N.Y. 2008) (quoting *United States v. District Council of New York City and Vicinity of the Union Bhd. Of Carpenters*, 1992 WL 208284 at *10 (S.D.N.Y. Aug. 18, 1992))].

Finally, even if the material were considered to be fact, and not opinion, work product, Defendants have not put forth the requisite showing of "substantial need" and "undue hardship" necessary to overcome the doctrine. [*See* FED. R. CIV. P. 26(b)(3)]. "In evaluating whether there

[4] Requiring attorneys to use their recollection of interviews is similarly at odds with the reasons underlying the work product doctrine.

is a substantial need, courts have considered factors including: '(1) [the] importance of the materials to the party seeking them for case preparation; (2) the difficulty the party will have obtaining them by other means; and (3) the likelihood that the party, even if he [or she] obtains the information by independent means, will not have the substantial equivalent of the documents he seeks.'" [*Yeda,* 2013 U.S. Dist. LEXIS 84948 at *28-29 (quoting *MeadWestvaco Corp. v. Rexam PLC*, 2011 U.S. Dist. LEXIS 78028 at *4 (E.D. Va. July 18, 2011))].

Noting Defendants' need to prepare, Plaintiffs represent that they have provided Defendants with the "names of individuals likely to have discoverable information and all non-party documents and data received during Plaintiffs investigations." (Opp. at 3). In light of the substantial discovery already provided to Defendants, Defendants have not established that the specific information Plaintiffs obtained in the third party interviews is so significant that it would justify overcoming the very strong preference for protecting work product. (*See Deloitte*, 610 F.3d at 135). Furthermore, Defendants have not presented any evidence suggesting that they are unable to interview the individuals named by Plaintiffs or that they have any reason to believe that they would not obtain substantially similar facts from the witnesses in question.

Likewise, Defendants have not shown that obtaining the factual information sought would place an "undue burden" or undue hardship upon them. As one court has said, "[t]his case is not a story of David versus Goliath. Here, Plaintiffs and [Defendants] are both Goliath – they have equal means to obtain the information [Defendants'] interrogatories seek." [Pl. Exh. B, "Order Denying BCBS's Motion to Compel Responses to Interrogatories," *United States v. Blue Cross Blue Shield of Michigan*, Civ. No. 10-14155-DPH-MKM , Doc. No. 178 at 5 (D. Mich. 2012)].

With regard to the persons interviewed but not identified by Plaintiffs, the Special Master is not persuaded by Defendants' explanation as to why they need this information. To use the example offered by Defendants at oral argument, Plaintiffs may have interviewed two travel agents, one of whom offered an opinion indicating that the merger would hurt consumers, and another who indicated that the merger would have a positive impact. According to Defendants' argument, Plaintiffs may have only provided the name of the first agent to Defendants, and not the second, as the first would be the only witness with "useful" information. Defendants contend that this selection would deprive Defendants of information that would tend to bolster Defendants' contention that the merger will have procompetitive effects.

Nothing in the scenario posited by Defendants, however, prevents Defendants from finding their own travel agent to testify that the merger will affect consumers positively. Defendants have not explained why access to the specific agent interviewed by Plaintiffs would be a more powerful witness than an agent that Defendants independently might find and develop as a witness.

Defendants similarly have failed to show why they are unable "to procure equivalent information 'without undue hardship.'" [*United States v. ISS Marine Svcs.*, 905 F. Supp. 2d 101, 138 (D.D.C. 2012) (quoting *Deloitte*, 610 F.3d at 135)]. There is no evidence in the record suggesting that Defendants lack the resources to develop a case to rebut Plaintiffs' allegations and support Defendants' case.

For these reasons, the Special Master does not accept Defendants' contention that they have a significant need for access to this information.

V. Conclusion

For the foregoing reasons, the Special Master recommends that the Court deny Defendants' Motion to Compel Production of Interview-Related Work Product.

/s/Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. US AIRWAYS GROUP, INC., et al., Defendants.	Civil Action No. 13-cv-1236 (CKK)

Order Adopting Special Master Report and Recommendation #2

Upon consideration of Special Master Report and Recommendation #2 on Defendants' Motion to Compel Production of Relevant Facts Obtained From Third-Party Interviews from Plaintiffs and Defendants' Objections to Report and Recommendation #2, it is this _____ day of _____, 2013 hereby:

ORDERED that Defendants' objections to Report and Recommendation #2 are overruled; and it is

Further Ordered that Defendants' Motion to Compel is DENIED.

_____
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*, Plaintiffs, v. **STAPLES, INC.** and **OFFICE DEPOT, INC.**, Defendants.	Civil Action No. 1:15-cv-02115-EGS

DECLARATION OF GINGER ZHE JIN
REGARDING DELIBERATIVE PROCESS PRIVILEGE

I, Ginger Zhe Jin, declare as follows:

1. I am the Director of the Bureau of Economics of the Federal Trade Commission ("FTC" or "Commission"), a multi-member agency composed of a Chairman and up to four other Commissioners. As such, I have the authority to assert government privileges over documents in the custody and control of the Bureau of Economics.

2. I submit this declaration and formal claim of privilege to prevent the release of certain privileged documents, which are more fully described in Paragraph 8, below, and which are contained in the Commission's files. Defendants have sought to obtain these documents by way of discovery requests made on December 17, 2015.

3. The statements made herein are based upon my personal knowledge and upon the knowledge of persons who report directly or indirectly to me or on whom I rely in the ordinary course of carrying out my duties as Bureau Director.

4. The Commission is responsible for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. As part of the Commission's enforcement obligations to prevent anticompetitive mergers, FTC staff conducts investigations of proposed mergers that are subject to the requirements of the Hart-Scott-Rodino Act.

5. As part of their investigation to ascertain whether a proposed merger likely will have any anticompetitive effects, FTC staff members contact third parties who are

knowledgeable about the industry in which the potentially merging parties conduct business. The Bureau of Economics works closely with the Bureau of Competition in conducting investigations, and the FTC staff members involved in interviews include FTC economists, lawyers and paralegals acting at lawyers' direction. The calls with third parties are not tape recorded, nor is any attempt made to create a verbatim statement of the information conveyed. Instead, the participants take notes of the points they regard as being important and that should be memoralized, and, after the interview, a participant sometimes drafts an internal memorandum summarizing the relevant information. In addition to summarizing the economists and attorneys' understanding of the information conveyed during the interview, these interview memoranda typically also state the reasons the interview was conducted, characterize the importance of the information learned, evaluate the interviewee as a possible witness, or identify potential areas of further inquiry. The notes from these calls as well as the memoranda are reviewed as part of the deliberative process used to prepare the final recommendation to the Commission and aid the Commission in deciding whether to file a complaint to enjoin the parties from merging or to decline to take action.

6. In 2013, FTC staff conducted an investigation of the proposed merger of Office Depot, Inc. ("Office Depot") and OfficeMax, Inc. ("OfficeMax"). As part of that investigation, staff conducted third-party interviews and drafted memoranda of those interviews following the procedure described above. Staff of the Bureau of Economics used the interview notes and memoranda, among other materials, to draft a memorandum to the Commission describing in detail the investigation staff had conducted and detailing the reasoning supporting the staff's recommendation ("Recommendation Memo").

7. In February 2015, the FTC opened an investigation into the proposed merger of Staples, Inc. ("Staples") and Office Depot. As part of that investigation, staff conducted third-party interviews and drafted memoranda of those interviews following the procedures described above. Staff of the Bureau of Economics used those interview notes and memoranda, among other materials, to draft a Recommendation Memo to the Commission, which, like the Office Depot/OfficeMax Recommendation Memo, included a detailed description of the investigation staff had conducted and the analysis staff used to support its recommendation. The Commission ultimately authorized FTC staff to file an administrative complaint alleging the merger violated the FTC Act and the Clayton Act and a federal complaint in the above-captioned matter, both of which the FTC filed on December 7, 2015.

Deliberative Process Privilege

8. I understand that Defendants are now seeking production of the internal memoranda describing interviews of third parties conducted by FTC staff during the investigation of the current proposed merger of Staples/Office Depot and the investigation of the 2013 Office Depot/OfficeMax merger and the internal notes from interviews of third parties conducted during the Staples/Office Depot investigation and the Office Depot/OfficeMax investigation. Attached as Exhibit 1 to the Declaration of Stelios S. Xenakis is a chart indicating each third party interviewed, the date of each interview of that third party, the attendees of each

interview, and the total number of notes taken for that interview. In addition, the chart identifies each interview for which an internal memorandum was prepared and the date of that memorandum.

9. Commission economists, Commission attorneys, and paralegals acting at the direction of Commission attorneys, created the interview notes and memoranda as part of their process for determining what course of action to recommend the Commission take regarding the proposed merger of Staples/Office Depot. The Bureau of Economics assisted the Bureau of Competition to prepare for possible litigation and made a recommendation to the Commission in this matter. Because the notes and memoranda were an intricate part of the process used to determine what recommendations to present to the Commission, and the Commission then used the recommendations provided to make its decision to file the administrative complaint and complaint for preliminary injunction in this matter, these notes and memoranda cannot be separated from the deliberative process that led to this cause of action.

10. The documents described above are deliberative and communicate the authors' economic analyses, theories, opinions, conclusions, or recommendations to Commission intermediate superiors. The factual materials recited in the documents either (a) are interwoven with the author's own evaluations, analyses, and recommendations, or (b) disclose an element of the Commission staff's deliberations by revealing the specific facts that staff selected to support or explain the analysis and recommendations being discussed, as well as their interpretation and distillation of the testimony of witness interviews or documents.

11. In my judgment, the effective functioning of the Commission requires that the confidentiality of the aforementioned documents be preserved. The disclosure of these documents would inhibit the Commission staff's ability to conduct the open and frank discussion of important issues that is necessary for effective law enforcement. These documents reflect the candid and confidential economic analysis of the authors, and are a critical part of the Commission staff's pre-decisional deliberative process. These documents advise and assist the appropriate decision makers.

12. Among the Commission's responsibilities are the detection and investigation of violations of the FTC Act. Inherent in the effective discharge of these responsibilities is the ability to formulate and implement sound law enforcement strategies and policy. A requirement of this process is the assurance that the Commission staff will be able to engage in a free and candid exchange of views and deliberations over enforcement policy and its implementation. Such an exchange would be severely restricted by the disclosure of documents such as those being requested here. Exposing inter-agency deliberations to persons having interests adverse to those of the government would result in staff reducing fewer things to writing and inhibit frank and full exchange of economic advice, and would not be conducive to the formulation and implementation of sound law enforcement policy.

13. Considering the pre-decisional, internal deliberative nature of the documents described in Paragraph 8, and my personal judgment that their disclosure would be injurious to the effective discharge of the responsibilities of the Commission – and, ultimately, to the public

interest in effective and proper law enforcement – I assert a formal claim of deliberative process privilege with respect to the contents of the documents described in Paragraph 8, above.

I declare under penalty of perjury that the foregoing statements are true and correct.
Executed this 12 day of January, 2016, in Washington, DC.

Ginger Zhe Jin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*, Plaintiffs, v. **STAPLES, INC.** and **OFFICE DEPOT, INC.**, Defendants.	Civil Action No. 1:15-cv-02115-EGS

DECLARATION OF DEBORAH L. FEINSTEIN
REGARDING DELIBERATIVE PROCESS PRIVILEGE

I, Deborah L. Feinstein, declare as follows:

1. I am the Director of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission"), a multi-member agency composed of a Chair and up to four other Commissioners. As such, I have the authority to assert government privileges over documents in the custody and control of the Bureau of Competition.

2. I submit this declaration and formal claim of privilege to prevent the release of certain privileged documents, which are more fully described in Paragraph 8, below, and which are contained in the FTC's files. Defendants have sought to obtain these documents by way of discovery requests made on December 17, 2015.

3. The statements made herein are based upon my personal knowledge (including my review of many of the documents described in Paragraph 8, below) and upon the knowledge of persons who report directly or indirectly to me or on whom I rely in the ordinary course of carrying out my duties as Bureau Director.

4. The FTC is responsible for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. As part of the FTC's enforcement obligations to prevent anticompetitive mergers, FTC staff conducts investigations of proposed mergers that are subject to the requirements of the Hart-Scott-Rodino Act. The Commission must approve the use of compulsory process in any investigation. Furthermore, when FTC staff attorneys believe that enforcement is warranted, they must first make a recommendation and obtain specific authority from the Commission to file an enforcement action, such as a federal complaint enjoining the parties from consummating the merger or an administrative complaint alleging the proposed merger violates Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. §18.

5. As part of their investigation to ascertain whether a proposed merger likely will have any anticompetitive effects, FTC staff members contact third parties who are knowledgeable about the industry in which the potentially merging parties conduct business. The Bureau of Competition works closely with the Bureau of Economics in conducting investigations, and the FTC staff members involved in interviews include FTC lawyers, economists, and paralegals acting at lawyers' direction. The calls with third parties are not tape recorded, nor is any attempt made to create a verbatim statement of the information conveyed. Instead, the participants take notes of the points they regard as being important and that should be memoralized, and, after the interview, a participant sometimes drafts an internal memorandum summarizing the relevant information. In addition to summarizing the attorneys' understanding of the information conveyed during the interview, these interview memoranda typically also state the reasons the interview was conducted, characterize the importance of the information learned, evaluate the interviewee as a possible witness, or identify potential areas of further inquiry. The notes from these calls as well as the memoranda are reviewed as part of the deliberative process used to prepare the recommendation to the Commission and aid the Commission in deciding whether to file a complaint to enjoin the parties from merging or to decline to take action.

6. In 2013, FTC staff conducted an investigation of the proposed merger of Office Depot, Inc. ("Office Depot") and OfficeMax, Inc. ("OfficeMax"). As part of that investigation, staff conducted third-party interviews and drafted memoranda of those interviews following the procedure described above. Staff used the interview notes and memoranda, among other materials, to draft a memorandum to the Commission describing in detail the investigation staff had conducted and detailing the reasoning supporting the staff's recommendation ("Recommendation Memo").

7. In February 2015, the FTC opened an investigation into the proposed merger of Staples, Inc. ("Staples") and Office Depot. As part of that investigation, staff conducted third-party interviews and drafted memoranda of those interviews following the procedures described above. Staff used those interview notes and memoranda, among other materials, to draft a Recommendation Memo to the Commission, which, like the Office Depot/OfficeMax Recommendation Memo, included a detailed description of the investigation staff had conducted and the analysis staff used to support its recommendation. The Commission ultimately authorized FTC staff to file an administrative complaint alleging the merger violated the FTC Act and the Clayton Act and a federal complaint in the above-captioned matter, which the FTC filed on December 7 and 8, 2015, respectively.

Deliberative Process Privilege

8. I understand that Defendants are now seeking production of the internal memoranda describing interviews of third parties conducted by FTC staff during the investigation of the current proposed merger of Staples/Office Depot and the investigation of the 2013 Office Depot/OfficeMax merger and the internal notes from interviews of third parties conducted during the Staples/Office Depot investigation and the Office Depot/OfficeMax investigation. Attached as Exhibit 1 to the Declaration of Stelios S. Xenakis is a chart indicating

each third party interviewed, the date of each interview of that third party, the attendees of each interview, and the total number of documents reflecting notes taken for that interview. In addition, the chart identifies each interview for which an internal memorandum was prepared and the date of that memorandum. As indicated in the chart, the total number of documents at issue is 850.

9. FTC attorneys, economists, and paralegals acting at the direction of FTC attorneys, created the interview notes and memoranda as part of their process for determining what course of action to recommend the Commission take as it relates to the proposed merger of Staples/Office Depot. These notes or memoranda were also reviewed by management in the Bureau of Competition to assess whether the FTC should pursue action to prevent consummation of the proposed merger. Because the notes and memoranda were an integral part of the process used to determine what recommendations to present to the Commission, and the Commission then used the recommendations provided to make its decision to file the administrative complaint and complaint for preliminary injunction in this matter, these notes and memoranda cannot be separated from the deliberative process that led to this cause of action.

10. The documents described above are deliberative and communicate the authors' legal and economic analyses, theories, opinions, conclusions, or recommendations to FTC intermediate superiors. The factual materials recited in the documents either (a) are interwoven with the author's own evaluations, analyses, and recommendations, or (b) disclose an element of the FTC staff's deliberations by revealing the specific facts that staff selected to support or explain the analysis and recommendations being discussed, and staff's interpretation and distillation of the testimony of witness interviews or documents.

11. In my judgment, the effective functioning of the FTC requires that the confidentiality of the aforementioned documents be preserved. The disclosure of these documents would inhibit the FTC staff's ability to conduct the open and frank discussion of important issues that is necessary for effective law enforcement. These documents reflect the candid and confidential legal analysis of the authors, and are a critical part of the FTC staff's pre-decisional deliberative process. These documents advise and assist the appropriate decision makers.

12. Among the FTC's responsibilities are the detection and investigation of violations of the FTC Act. Inherent in the effective discharge of these responsibilities is the ability to formulate and implement sound law enforcement strategies and policy. A requirement of this process is the assurance that the FTC staff will be able to engage in a free and candid exchange of views and deliberations over enforcement policy and its implementation. Such an exchange would be severely restricted by the disclosure of documents such as those being requested here. Exposing intra-agency deliberations to persons having interests adverse to those of the government would result in staff reducing fewer things to writing and inhibit frank and full exchange of legal advice, and would not be conducive to the formulation and implementation of sound law enforcement policy.

13. Considering the pre-decisional, internal deliberative nature of the documents described in Paragraph 8, and my personal judgment that their disclosure would be injurious to

the effective discharge of the responsibilities of the FTC – and, ultimately, to the public interest in effective and proper law enforcement – I assert a formal claim of deliberative process privilege with respect to the contents of the documents described in Paragraph 8, above.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed this 12th day of January, 2016, in Washington, DC.

Deborah L. Feinstein.