

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

_____)	
In the Matter of)	
HomeAdvisor, Inc., a corporation,)	
d/b/a Angi Leads,)	Docket No. 9407
d/b/a HomeAdvisor Powered By Angi,)	
Respondent.)	
_____)	

**ORDER DENYING RESPONDENT’S MOTION TO
COMPEL DEPOSITION TESTIMONY**

I.

On August 1, 2022, Respondent HomeAdvisor, Inc. (“Respondent” or “HomeAdvisor”) filed a motion to reopen and compel deposition testimony of a Federal Trade Commission (“FTC”) investigator, Amy Brannon-Quale (“Motion”). FTC Complaint Counsel filed an opposition on August 9, 2022 (“Opposition”). For the reasons set forth below, the Motion is DENIED.

II.

On April 7, 2022, Complaint Counsel filed a motion for summary decision, which attached declarations it obtained from 18 HomeAdvisor service professionals, homeowner users, and former employees (“nonparty declarants”). Complaint Counsel also produced its written communications with those nonparty declarants in discovery. With its motion for summary decision, Complaint Counsel attached a 42-paragraph declaration from Amy Brannon-Quale, an FTC investigator (“Brannon-Quale declaration”). The Brannon-Quale declaration detailed her investigative activities in this case and attached over 150 pages of materials collected during the course of her investigation.

Respondent deposed the majority of the nonparty declarants following submission of Complaint Counsel’s motion for summary decision and the nonparty declarants testified about their interactions with FTC staff, including their interactions with Brannon-Quale. Respondent asserts that some of the nonparty declarants testified in their depositions: that they could not recall submitting a declaration to the FTC; that they could not remember details contained in their declaration; or that Brannon-Quale had drafted their declaration.

Respondent deposed Brannon-Quale on May 19, 2022. Respondent contends that Brannon-Quale appears to have been the primary drafter of most of the declarations in this action. During the deposition of Brannon-Quale, Respondent sought to question Brannon-Quale on her memory of third-party witnesses with whom she interacted, the substance of any communications with non parties, and the documents she reviewed or drafted in her investigative work. Complaint Counsel asserted work product objections to this line of questioning.

Respondent asserts: (1) Brannon-Quale's conversations with the nonparty declarants were not privileged; (2) Complaint Counsel waived its work product protections; and (3) Respondent has a "substantial need" for the requested material. Respondent seeks an order permitting the reopening of the deposition of Brannon-Quale and prohibiting Complaint Counsel from instructing the witness not to answer questions regarding Brannon-Quale's and the FTC's communications and interactions with the nonparty declarants.

III.

A. Attorney Work Product Doctrine

The well recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Commission's rules, material "prepared in anticipation of litigation" may be obtained through discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 16 C.F.R. § 3.31(c)(5). Work product protection extends to intangible work product and to investigators working under attorney direction and supervision. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975).

The work product doctrine protects "information relevant to the evolution of an affidavit, including but not limited to communications with the counsel relating to the affidavit, prior drafts of the affidavit, and any notes made by counsel while engaging in the process of drafting the affidavit." *Tuttle v. Tyco Electronics Installation Servs., Inc.*, 2007 WL 4561530, at *2 (S.D. Ohio Dec. 21, 2007); *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000) ("Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product entitled to almost absolute immunity."). "[T]here seems to be no question" that "interview reports or attorneys' notes" on meetings with witnesses "are within the class of documents 'prepared in anticipation of litigation' and covered by [Commission Rule 3.31(c)(5)]." *In re General Motors Corp.*, 1982 WL 68290 at *109 (F.T.C. June 25, 1982). Accordingly, Brannon-Quale's communications and interactions with the nonparty declarants are protected by the work product doctrine.

B. Waiver

Respondent asserts that by selectively producing Brannon-Quale’s and Complaint Counsel’s written communications with declarants and by allowing the declarants to testify about their interactions with Brannon-Quale and other FTC staff, Complaint Counsel waived any claim of work product protections of Brannon-Quale’s recollections of those communications. “[D]isclosure to an adversary waives work product protection as to items actually disclosed. . . . But disclosure of some documents does not destroy work product protection for other documents of the same character.” *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) (citing *Wright & Miller*, § 2024 at 209; *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 310-12 (D.D.C.1994) (production of documents protected by attorney work product doctrine resulted in waiver of privilege only as to those documents produced). Furthermore, waiver generally applies only to the specific materials disclosed and not to the broader subject matter of the information. Fed. R. Evid. 502(a) (Advisory Committee Notes). Submission of a declaration about ministerial tasks by a member of a party’s legal team does not open that individual to deposition about protected matters beyond the scope of the tasks described. *In re Traffic Jam Events LLC*, 2021 WL 3465724, at *3-4 (F.T.C. July 23, 2021). Accordingly, Complaint Counsel’s producing written communications with the nonparty declarants and allowing the nonparty declarants to testify about their interactions with Brannon-Quale and other FTC staff does not constitute a waiver of protection for Brannon-Quale’s and the FTC’s communications and interactions with the nonparty declarants.

C. Substantial Need

Respondent asserts that the information being sought is critical to testing the veracity of the statements contained in the nonparty witness declarations, as well as those declarants’ credibility and the integrity of the drafting process. Production of work product may be allowed “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” 16 C.F.R. § 3.31(c)(5). Where respondent was “capable of conducting interviews and taking depositions” of fact witnesses, it did not demonstrate “inability to obtain the substantial equivalent of the materials by other means.” *In the Matter of MSC Software Corp.*, 2002 WL 31433972, at *3 (May 7, 2002) (holding “the work product privilege has not been overcome”).

In this case, Respondent states it has already deposed “many” of the nonparty declarants and “Complaint Counsel permitted each witness to testify about their communications and interactions with Ms. Brannon-Quale.” Motion at 1. The testimony from the nonparty declarants provides Respondent with the information it asserts it needs to test the veracity of the statements contained in their declarations. Further, a “party . . . does not demonstrate substantial need when it merely seeks corroborative evidence,” *Baker*, 209 F.3d at 1054, or to impeach a witness. *Clemmons v. Academy for Educ. Dev.*, 300 F.R.D. 6, 8 (D.D.C. 2013). Accordingly, Respondent has not established a “substantial need” for Brannon-Quale to testify regarding her recollections of witness interactions.

IV.

For the above stated reasons, the Motion is DENIED.

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: August 12, 2022