

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

In the Matter of

**HOMEADVISOR, INC., a corporation,
d/b/a ANGI LEADS,
d/b/a HOMEADVISOR POWERED BY ANGI.**

DOCKET NO. 9407

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT HOMEADVISOR, INC.’S MOTION TO RE-OPEN AND
COMPEL DEPOSITION TESTIMONY OF AMY BRANNON-QUALE**

Respondent’s Motion demands an “*unobstructed deposition*” of a member of Complaint Counsel’s legal team, investigator Amy Brannon-Quale, regarding her recollections and impressions of Complaint Counsel’s communications with third-party declarants. Such an unfettered, extraordinary, and dangerous request runs contrary to decades of work product precedent and seeks to turn the doctrine on its head. To be clear, Respondent seeks protected *core opinion work product*, which is “generally afforded near absolute protection” and is “discoverable only upon a showing of rare and exceptional circumstances.” *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003).

Respondent’s Motion does not dispute that its “unobstructed” request would necessarily invade Complaint Counsel’s work product. Instead, Respondent wrongly posits Complaint Counsel has waived its work product protections, or in the alternative, Respondent has a “substantial need” for it. Neither is true, and Respondent’s Motion should be denied in its entirety.

BACKGROUND

On April 7, 2022, Complaint Counsel filed a summary decision motion attaching voluminous documents, including declarations obtained from eighteen consumers and former employees of HomeAdvisor. *See* RX2. Complaint Counsel produced its written communications with those third parties. Decl. of Sophia Calderón (“Calderón Decl.”) at ¶¶ 4-5.

Complaint Counsel also submitted a declaration from Amy Brannon-Quale, an FTC investigator, authenticating web captures and attaching BBB complaints. *See* RX1. As a member of Complaint Counsel’s legal team, Ms. Brannon-Quale’s investigative activities in this case have been performed at the direction of Complaint Counsel in anticipation of litigation. *See* Calderón Decl. at ¶ 3.

On May 19, 2022, Respondent deposed Ms. Brannon-Quale. RX30. Respondent primarily attempted to examine her on her memory of third-party witnesses with whom she has interacted, the substance of communications with third parties (including non-declarants), and documents she has reviewed or drafted in her investigative work. *See* RX30 at 16:18-32:4. Complaint Counsel asserted work product objections to this line of questioning. *Id.* Respondent’s sole questions relating to Ms. Brannon-Quale’s declaration queried why she included BBB complaints in her declaration, RX30 at 12:3-13:5, and her awareness and review of additional BBB complaints not attached to her declaration, *id.* at 13:21-14:15.

ARGUMENT

1. Ms. Brannon-Quale’s Recollections Are Core Opinion Work Product

The attorney work product doctrine limits discovery of materials prepared in anticipation of litigation. 16 C.F.R. § 3.31(c)(5); *In the Matter of Lab. Corp. of Am. & Lab. Corp. of Am. Holdings*, No. 9345, 2011 WL 822928, at *3 (F.T.C. Feb. 24, 2011). Work product protection extends to intangible work product and beyond attorneys to investigators working under attorney

direction and supervision. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (protection extends to intangible work product, such as attorney’s recollection of what witness told him); *Cendant Corp.*, 343 F.3d at 662.

Federal courts have developed a two-tiered analysis for determining when information is protected by the work product doctrine. *See Cendant Corp.*, 343 F.3d at 663; *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). First, core opinion work product, which encompasses the “mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation, is generally afforded ***near absolute protection*** from discovery” and is “discoverable only upon a showing of ***rare and exceptional circumstances***.” *Cendant Corp.*, 343 F.3d at 663; *see also Baker*, 209 F.3d at 1054. Second, ordinary/factual work product, which is limited to factual information, is discoverable only if the party seeking the information has a substantial need for the information and cannot without undue hardship obtain its substantial equivalent by other means. *Baker*, 209 F.3d at 1054; 16 C.F.R. § 3.31(c)(5).

While ignoring this two-tiered analysis, Respondent briefly claims that it seeks only factual work product, characterizing its request as seeking “the acts taken by FTC staff and third parties’ statements to FTC staff.” Motion at 7. But to the contrary, Respondent seeks to force Complaint Counsel’s investigator to testify (by recollection) regarding the substance of her witness interviews and interactions. Federal courts are clear that such a request ***unavoidably*** invades the ***core opinion work product***, which is entitled to ***near absolute immunity***. *See In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988) (SEC attorneys’ recollections of witness interviews were attorney work product and because the “work product sought here is based on oral statements from witnesses, a far stronger showing is required than the ‘substantial need’”

standard); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1328-29 (8th Cir. 1986) (attorney’s recollection would indicate that “since it was important enough to remember, she must be relying on it in preparing her client’s case”); *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (attorney’s personal recollections pertaining to witness interviews are “absolutely” protected work product). Indeed, an “unobstructed deposition” of Ms. Brannon-Quale’s recollection of her interviews and interactions with third-party witnesses would “inevitably invade” her mental impressions and Complaint Counsel’s core opinion work product. *S.E.C. v. Johnson*, No. CV 05-36 (GK), 2007 WL 9702653, at *2 (D.D.C. Aug. 22, 2007) (testimony regarding an attorney’s role “in shaping and developing the nature of statements and testimony provided by witnesses” would “inevitably invade[]” attorney thoughts, perceptions, strategy and conclusions).

2. Complaint Counsel Has Not Waived Work Product Protection

Respondent argues that, because Complaint Counsel has produced its *written communications* with third-party declarants and did not object when Respondent’s counsel was deposing *those declarants*, Complaint Counsel has waived its work product protections of Ms. Brannon-Quale’s recollections of those communications. This argument fails.

Complaint Counsel’s use of third-party declarants as witnesses—or mere production of written communications with those same witnesses—does not constitute a waiver of Ms. Brannon-Quale’s *mental impressions* regarding those witnesses. Indeed, work product waiver generally applies only to the specific materials disclosed and not to the broader subject matter of the information. 16 C.F.R. § 3.31(g)(2); Fed. R. Evid. 502(a) (Advisory Committee Notes); *see also Trs. Of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 11 (D.D.C. 2010) (Rule 502(a) “abolishe[d] the dreaded subject-matter waiver, i.e., that any disclosure of privileged matter worked a forfeiture of any other privileged

information that pertains to the same subject matter.”). The “subject matter waiver” that Respondent seeks is strictly “limited to situations in which a party intentionally puts protected material information into the litigation in a selective, misleading and unfair manner.” Fed. R. Evid. 502(a) (Advisory Committee Notes). Further, “work-product waiver only extends to ‘factual’ or non-opinion’ work product concerning the same subject matter as the disclosed work product.” *Cave Consulting Group, Inc. v. OptumInsight, Inc.*, No. 15-CV-03424-JCS, 2017 WL 5078436, at *3 (N.D. Cal. Nov. 6, 2017) (quoting *In re EchoStar Commc’ns Corp.*, 448 F.3d 1294, 1302 (Fed. Cir. 2006)).

Respondent’s request is wholly incompatible with this standard. To be clear, Complaint Counsel has not been selective, misleading, or unfair in producing its written communications with third-party declarants—and Respondent knows this.¹ Nor has Complaint Counsel made testimonial use of Ms. Brannon-Quale’s recollections and mental impressions stemming from her interviews and interactions with the third-party declarants, and thus has not waived this work product.² *O’Connor v. Boeing N. Am., Inc.*, 216 F.R.D. 640, 644 (C.D. Cal. 2003); *see also Nobles*, 422 U.S. at 239-40 (finding testimonial use of work product materials occurred when party “sought

¹ Respondent’s accusation that Complaint Counsel selectively withheld third-party communications, Motion at 6, is demonstrably false. Complaint Counsel has produced all written communications with the third-party declarants, withholding only its own internal notes, summaries, drafts, and memoranda regarding its interactions with these witnesses. Calderón Decl., ¶¶ 4-5. Indeed, Complaint Counsel inadvertently produced one internal draft declaration containing attorney notes, and upon discovering the inadvertent production promptly notified Respondent. *Id.* ¶ 7, PX01 (April 25, 2022 notice letter). Respondent never disputed Complaint Counsel’s claim of work product on this document, nor did it “promptly” present it for determination of the work product claim pursuant to Rule 3.31(g)(1)(ii), Calderón Decl., ¶ 8, and therefore cannot dispute the work product claim now. Incredibly, despite its obligation under Rule 3.31(g)(1)(ii) to “promptly return, sequester, or destroy” the document and its prohibition to not “use or disclose” the document, Respondent ***attached the work product document in support of its Motion***. *See* RX12.

² Tellingly, Respondent’s Motion does not cite Ms. Brannon Quale’s declaration to support its waiver arguments. 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*, No. 9395, 2021 WL 3465724, at *3-4 (F.T.C. July 23, 2021).

to adduce the testimony of [his attorney's] investigator and contrast [the investigator's] recollection of the contested statements with that of the prosecution's witnesses").

To manufacture a waiver argument, Respondent attempts to frame the work product at issue broadly as “the FTC’s third-party interactions.” Motion at 6. But Respondent cites no support for its position that Complaint Counsel’s lack of objections to third-party testimony regarding communications with Ms. Brannon-Quale or its production of written communications with third parties³ should result in an unobstructed deposition of Ms. Brannon-Quale’s recollection and mental impressions. It is the questioning of Ms. Brannon-Quale—not of the third-party declarants—that implicates work product here. Indeed, one of Respondent’s cited cases, *S.E.C. v. Gupta*, confirms that Complaint Counsel would have had no basis to object to questioning of third-party declarants about *the witnesses’ own recollections*. 281 F.R.D. 169, 171 (S.D.N.Y. 2012) (holding SEC lawyer could not assert work product protections to block a third-party witness from being questioned about the witness’ own recollections of meeting with SEC counsel). But allowing third parties to testify about conversations with Ms. Brannon-Quale does not subject her to questioning.⁴ No waiver of Ms. Brannon-Quale’s recollections has occurred.

3. Respondent Has Not Shown “Rare And Exceptional Circumstances” or “Substantial Need”

Under Rule 3.31(c)(5), a party may obtain discovery of certain work product only upon a showing of “substantial need.” Respondent mistakenly relies on this provision, but federal courts

³ The communications produced are: (a) emails scheduling telephone conversations; (b) Complaint Counsel’s transmittal of declarations to the third parties for signature; (c) declarants forwarding HomeAdvisor communications to Complaint Counsel; and (d) declarants providing information to Complaint Counsel. See RX3-RX15.

⁴ Respondent’s argument would undermine the purposes of discovery and encourage over-withholding by parties. Cf. *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222 (4th Cir. 1976) (“The net effect of such rule would result in great reluctance to produce any work product documents for fear that it might waive the immunity as to all similar documents.”).

are clear that the “substantial need” standard applies to *ordinary/factual work product*. See *Baker*, 209 F.3d at 1054; *Cendant Corp.*, 343 F.3d at 663. A party’s *core opinion work product*, which is what is at issue here, *see infra*, Section 1, “is discoverable only upon a showing of rare and exceptional circumstances.” *Cendant Corp.*, 343 F.3d at 663; *see also Baker*, 209 F.3d at 1054. Forcing Complaint Counsel’s investigator to testify regarding the substance of her witness interviews *unavoidably* invades Complaint Counsel’s core opinion work product, and Respondent’s desire to hear more about Complaint Counsel’s interactions with third-party witnesses does not amount to “rare and exceptional circumstances.” See *In re Sealed Case*, 856 F.2d at 273; *In re Grand Jury Proceedings*, 473 F.2d at 848-49; *Shelton*, 805 F.2d at 1328-29. Respondent has not even addressed this higher standard for core opinion work product, and for this reason alone its argument fails.

Moreover, even if what Respondent seeks was mere ordinary/fact work product—which it is not—Respondent has not established a “substantial need” for Ms. Brannon-Quale to testify regarding her recollections of witness interactions. Of course, “there is in general no justification for discovery of the statement of a person contained in work product materials when the person is available to be deposed.” *Gay v. P.K. Lindsay Co., Inc.*, 666 F.2d 710, 713 (1st Cir. 1981); *see also Baker*, 209 F.3d at 1054. Here, Respondent has already taken testimony from the vast majority of third-party declarants. And its “examples” of “limited testimony,” with “remarkable lapses in memory,” Motion at 1-3, fail to demonstrate substantial need and grossly misstate testimony:

- That **Kelly Hopkins** could not recall exact names of Complaint Counsel or HomeAdvisor’s sales representative does not illustrate “remarkable lapses in memory,” nor is it inconsistent with his recollection of his interaction with HomeAdvisor in his declaration—details which Respondent has had an opportunity to explore in deposition. See RX2.

- **Richard Prince** testified that, while Ms. Brannon-Quale did the physical act of writing Mr. Prince’s statement into the declaration based on their conferences, “she scripted everything the way I told her . . . , I think she got it exactly like I told her.” RX18 at 179:20-25, 180:6-9 (“She didn’t change nothing. What you’re reading here, or whatever that thing is, is exactly the way I told her it happened”); *compare* Motion at 2.
- **Mark Rothermel**, despite some initial confusion regarding the signing and returning of his declaration, made clear in his deposition that there is no actual dispute that he signed and returned his declaration to Complaint Counsel. RX19 at 93:1-5; 99:5-8; 101:1-10; *compare* Motion at 3.
- **Trenton Grimes’** declaration was signed before Ms. Brannon-Quale even worked on this case, and therefore she could not possibly offer any testimony regarding its drafting. *See* Motion at 3.

These examples only prove that Respondent already had the opportunity to challenge the deponents’ credibility—and they found nothing.

Respondent also argues it learned in some of the declarant’s depositions that some sought to revise statements in their executed declarations. Motion at 8. In one example, in preparation for her deposition, a witness re-reviewed her declaration and asked to delete one word (“exclusively”). RX25 at 18:2-19:21. Another transcript cited does not show any attempt to change the text of a declaration after execution. RX21 at 15:20-20:20. For the three other depositions cited, Respondent’s Motion cites to the entire transcripts without any specific examples. Regardless, Respondent was able to fully examine the declarants about their declarations, and a party normally cannot show a substantial need for information 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); *McPeck v. Ashcroft*, 202 F.R.D. 332, 339 (D.D.C. 2001) (“[I]f the desire to impeach a witness with prior inconsistent statements is a sufficient showing of substantial need, the work product privilege would cease to exist[.]”).

Finally, even if Respondent could establish a basis with respect to one declarant on some limited issue, that should not obviate work product with respect to every witness and with unobstructed scope. Rather than identifying questions it believes were wrongly blocked, HomeAdvisor instead seeks a plainly improper order to completely bar Complaint Counsel from asserting protections explicitly protected by the Rules of Practice, 16 C.F.R. § 3.31(c)(5).

CONCLUSION

For the foregoing reasons, Respondent's Motion should be denied.

Respectfully submitted,

Dated: August 9, 2022

s/ Sophia H. Calderón

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

In the Matter of

**HOMEADVISOR, INC., a corporation,
d/b/a ANGI LEADS,
d/b/a HOMEADVISOR POWERED BY ANGI.**

DOCKET NO. 9407

DECLARATION OF SOPHIA H. CALDERÓN

My name is Sophia H. Calderón, I am over eighteen years of age, and I am a citizen of the United States. I have personal knowledge of the information contained herein. If called as a witness, I could and would testify as follows:

1. I am an attorney licensed to practice law in California, am a full time employee of the Federal Trade Commission, and am Complaint Counsel in the above-captioned matter.
2. Since 2019, I have been the lead attorney assigned to the FTC's investigation of and later complaint against HomeAdvisor, Inc.
3. Amy Brannon-Quale is an investigator in my office and has worked on the investigation and litigation regarding HomeAdvisor, Inc. exclusively at my direction and the direction of other attorneys.
4. On April 6, 2022, Complaint Counsel served Respondent with its initial disclosures, accompanied by copies of then-existing nonprivileged written communications between Complaint Counsel and the third-party declarants in this case.
5. Since then, Complaint Counsel has supplemented its initial disclosures with additional productions of nonprivileged material generated during the litigation.

6. Except as noted in Paragraph 7, below, Complaint Counsel has not produced to Respondent its own notes, summaries, internal draft declarations never sent to third-party declarants, or memoranda regarding its communications with third parties.
7. Complaint Counsel's April 6, 2022 production inadvertently included a draft declaration that contains attorney edits and comments. Promptly after discovering this inadvertent production, on April 25, 2022, I sent a letter to Respondent's Counsel informing them of this inadvertent production of a document containing protected attorney work product and requesting Respondent to "return, sequester, or destroy all copies" of the document. A copy of that letter is attached hereto as PX01.
8. Respondent never contacted me to challenge the instruction in my April 25 letter.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 9, 2022.

s/ Sophia H. Calderón
Sophia H. Calderón

Counsel Supporting the Complaint

PX01

PUBLIC



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UNITED STATES OF AMERICA
Federal Trade Commission
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April 25, 2022

VIA EMAIL

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**Re: In the Matter of HomeAdvisor, Inc., Docket No. 9407
Notice of Inadvertent Disclosure of Protected Information**

Dear Counsel,

Pursuant to 16 C.F.R. § 3.31(g)(1), Complaint Counsel hereby provides notice that its April 6, 2022 document production inadvertently contained a protected document. Specifically, the document beginning with the Bates number FTC_HOMEADVISOR0009539 contains attorney work product and is therefore protected under § 3.31(c)(5).

PUBLIC

As required under § 3.31(g)(1)(ii), please promptly return, sequester, or destroy all copies of the above-referenced document. If you have any questions or concerns, please contact me.

Sincerely,

SOPHIA CALDERON
Digitally signed by SOPHIA CALDERON
Date: 2022.04.25 17:24:23 -07'00'

Sophie Calderon

Cc:

Colin D. A. MacDonald (by email)
Breana M. Roos (by email)
M. Elizabeth Howe (by email)

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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Federal Trade Commission
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I further certify that on August 9, 2022, I caused the foregoing document to be served via email to:

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Dated: August 9, 2022

By: s/ Sophia H. Calderón
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