UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. US AIRWAYS GROUP, INC., et al., Defendants.	No. 1:13-CV-01236-CKK (Before Special Master Levie)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF INTERNAL ANALYSES OF PRIOR AIRLINE MERGERS

Defendants' motion to compel claims to call for "factual materials and information regarding DOJ's approval of four prior airline mergers."[1] But Defendants expressly declined Plaintiffs' offer to produce the basic factual materials collected in earlier investigations and have made clear that they do not seek mere facts—such as the number of overlap routes between merging airlines or numbers of passengers on particular routes. Rather, Defendants explicitly seek Plaintiffs' "own analysis" (Motion at 4) of facts when evaluating the legality of the proposed mergers and determining whether to challenge them in court. Such confidential assessments and internal deliberations are plainly privileged and no court has ever ordered similar disclosures by federal antitrust enforcement officials (or by state officials), as far as we know.

Defendants appear to believe that "factual analyses" leading to enforcement decisions have less protection than "legal analyses." That distinction has no basis in law. Prosecutorial

[1] Defendants requested documents from the United States and directed a related interrogatory to all Plaintiffs, thus all Plaintiffs join in this response.

decisions are a product of analyses of facts and law applicable to specific situations. The D.C. Circuit has explained that information "culled" from a "much larger universe of facts" gathered by an agency reflects "an exercise of judgment as to what issues are most relevant" to an enforcement decision and is privileged under the deliberative process privilege. *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011). Judge Kollar-Kotelly recently reached the same conclusion, holding that an agency's "own analysis" of data provided in investigations "falls squarely within the [deliberative process] privilege." *Am. Petroleum Tankers Parent, LLC v. United States*, __ F. Supp. 2d __, 2013 WL 3462575, at *12 (D.D.C. July 10, 2013). Yet this is precisely the sort of "factual analyses" sought here. Motion at 5, 7.

The requested analyses also are protected work product because they were prepared "in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party," *SafeCard Servs., Inc. v. SEC,* 926 F.2d 1197, 1203 (D.C. Cir. 1991). Many of the requested materials are also protected by the attorney-client privilege and investigative files privilege.

Defendants have no need for these privileged internal analyses, which are irrelevant to the lawfulness of the challenged merger. The compelled disclosure of such analyses would significantly harm the quality of agency decisionmaking by chilling deliberations among government attorneys and economists in future investigations.

I. Government Decisions Not To Challenge Different Airline Mergers Are Irrelevant To Whether This Merger Is Lawful.

Defendants' proposed merger follows four other airline mergers in the last eight years that have significantly reduced the number of major national airlines. Plaintiffs did not sue to enjoin those mergers, but that is not a defense to this lawsuit. Increased concentration through consolidation invariably leads to heightened concerns about subsequent mergers and every

merger must be evaluated on its own terms in light of current industry conditions. How Plaintiffs analyzed other mergers years ago when industry conditions were different has no bearing on legality of this merger.

In claiming relevance, Defendants cite a single case, *United States v. Leggett & Platt, Inc.*, 542 F.2d 655 (6th Cir. 1976). *Leggett*, however, makes clear that whether "the government failed to prosecute civil antitrust actions to divest other industry acquisitions is in and of itself irrelevant," because "'discriminatory enforcement' is, as a matter of law, no defense." *Id.* at 658. While the court also suggested that "factual materials" in files from "other industry acquisitions are relevant, and thereby discoverable unless privileged," *id.*,[2] Defendants declined Plaintiffs' offer to produce the basic factual materials from earlier investigations, making clear that is not what they wanted.

II. Plaintiffs' Internal Analyses Of Prior Airline Mergers Are Privileged.

A. Deliberative Process

The deliberative process privilege "'prevent[s] injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citation omitted). The privilege protects "documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* (citation and internal quotation marks omitted). "[P]redecisional materials, 'even if 'factual' in form' may be covered by the privilege if they 'reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter'

[2] The court did not make any relevance determinations but instead remanded to the district court to consider relevance and privilege under the work-product doctrine and deliberative process privilege. *Id.* at 657, 660.

and thus would 'expose the deliberative process within an agency.'" *In re Apollo Group*, 251 F.R.D. 12, 28 (D.D.C. 2008) (Kollar-Kotelly, J.) (citations omitted).

The deliberative process privilege applies to the requested analyses. They were created for the purpose of evaluating the antitrust merits of the mergers and informing the agency head's decision whether to challenge the merger. The analyses are therefore both "predecisional" and "deliberative." *See In re Sealed Case*, 121 F.3d at 737; *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (documents were privileged because "they were clearly part of the deliberative process leading to [the Antitrust Division's] decision to sue"); *Lone Star Indus. v. F.T.C.*, 1984 WL 21979, at *6 (D.D.C. 1984) (memoranda and analysis of market definition "inform[ing] and contribut[ing] to . . . recommendations" were deliberative). Defendants' effort to distinguish between work performed by government attorneys and government economists is unfounded, as the privilege extends to analyses conducted by antitrust enforcers' in-house economists as well. *E.g.*, *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161-62 (9th Cir. 1984) (Bureau of Economics memoranda recommending merger challenge were deliberative because they would reveal FTC "[a]nalyses").

Defendants argue that the privilege does not apply to "'purely factual reports.'" Motion at 5. But Defendants are not simply seeking facts from the earlier investigations. Instead, they seek "analyses" specifically undertaken to guide government enforcement decisions. Motion at 2-7, 9. Adding the word "factual" to their demands does nothing to undercut the protections of the deliberative process privilege. These analyses reflect Plaintiffs' exercise of judgment in sifting through the relevant universe of information and focusing on what attorneys and economists consider important in a given case and are thus privileged. *See Ancient Coin*, 641 F.3d at 513; *see also Montrose Chem. Corp. of Cal. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974)

("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.").

Just two months ago, a request to obtain a slide "reflect[ing] the Maritime Administration culling and performing its ***own analysis*** of the data provided by the Defendant" was rejected because the material "falls squarely within the [deliberative process] privilege." *Am. Petroleum*, 2013 WL 3462575, at *12 (emphasis added) (Kollar-Kotelly, J.). So too does Defendants' request here for "[a]ll documents that constitute, reflect, or contain the facts or forecasts upon which the DOJ based its clearance of the [four prior mergers]," or, as the Motion to Compel describes it—"DOJ's ***own analysis***," Motion at 4 (emphasis added).

The other cases cited by Defendants (Motion at 5-6) are quite different. They involve retrospective (not pre-decisional) information, *McGrady v. Mabus*, 635 F. Supp. 2d 6 (D.D.C. 2009); no exercise of judgment by the government, *Playboy Enters., Inc. v. DOJ*, 677 F.2d 931 (D.C. Cir. 1982); *see Mapother v. D.O.J.*, 3 F.3d 1533, 1539 (D.C. Cir. 1993); a rulemaking or determination of general agency policy (and not an investigation of a specific event for a legal violation), *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227 (D.C. Cir. 2008); *Public Citizen, Inc. v. O.M.B.*, 598 F.3d 865 (D.C. Cir. 2009), or interpretation of a final, public consent decree, rather than internal analyses, *United States v. Motorola, Inc.*, 1999 WL 552558, at *2 (D.D.C. May 27, 1999). And in *Vento v. IRS*, 714 F. Supp. 2d 137 (D.D.C. 2010), no document production was ordered.

B. Work Product

The work-product doctrine recognizes "that to prepare for litigation, an attorney must '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.'" *United States v. Deloitte LLP*, 610 F.3d 129, 134 (D.C. Cir. 2010) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). "Any part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine." *Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997).

This protection extends to all analyses and related materials that Defendants are seeking here, as they all were prepared as part of Plaintiffs' evaluation of the legality of specific proposed airline mergers (and not some other general purpose). "[W]here an attorney 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,* 926 F.2d at 1203. Materials and recommendations by government economists and other non-testifying experts prepared as part of these investigations are similarly protected. *See* Fed. R. Civ. Proc. 26(b)(3)(B) & (4)(D); *Exxon Corp. v. F.T.C.*, 476 F. Supp. 713, 717-20 (D.D.C. 1979) (economist memoranda, recommendations, and communications with attorneys were work product).

Defendants' suggestion that the work product doctrine does not protect "facts" misses the point. Motion at 7. "'The work-product doctrine simply does not distinguish between factual and deliberative material.'" *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987). As Defendants have narrowed their requests, Defendants want only those facts Plaintiffs deemed significant to prior enforcement decisions. That determination of significance is work product, protecting all the factual material therein. *See Judicial Watch, Inc. v. D.O.J.*, 432 F.3d 366, 371 (D.C. Cir. 2005) ("[F]actual material is itself privileged when it appears within

documents that are attorney work product."); *cf. Hickman*, 329 U.S. at 512-14 (notes of "facts" from witness interviews are work product).

Defendants rely throughout their argument on *United States v. Motorola*. The issue in that case, however, was not the Antitrust Division's internal analyses of an enforcement decision but interpretation of public consent decree terms, i.e., what the parties to the decree intended. Given that dispute (which was essentially a matter of contract interpretation), the court permitted limited discovery to explore the government's "knowledge and expectations when the consent decree was entered." 1999 WL 552558 at *2. Notably, however, the *Motorola* court recognized that both deliberative process and work-product protections might limit the scope of the inquiry. *Id.* at *2. Nor did it compel the production of any internal documents as Defendants seek here.

C. Attorney-Client

The attorney-client privilege applies to government attorneys, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320 (2011), and covers communications between counsel and "employees at varying levels of seniority in [the] agency." *Judicial Watch, Inc. v. Dep't of Treas.*, 802 F.Supp.2d 185, 203 (D.D.C. 2011). It applies here to documents prepared by attorneys to inform their superiors' enforcement decisions.

Defendants' claim that their requests "do not seek confidential attorney advice," Motion at 8, is wrong, as attorneys' internal advice to their superiors on the merits of a merger is confidential attorney advice. Defendants also are wrong that the privilege is completely subsumed by the deliberative process privilege, *id.*, because, unlike that privilege, the attorney-client privilege is absolute. *Blumenthal v. Drudge*, 186 F.R.D. 236, 241 (D.D.C. 1999).

D. Investigatory Files

Plaintiffs' files from civil or criminal investigations and testimony concerning their contents are privileged. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *McPeek v. Ashcroft*, 202 F.R.D. 332, 336 (D.D.C. 2001). This privilege applies to the requested discovery because disclosure would chill future investigations and is not needed by Defendants. *See Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996) (discussing several relevant considerations). Defendants claim that the privilege is inapplicable because disclosure of closed investigations "will not jeopardize any ongoing law enforcement matter." Motion at 8. But if the requested materials are compelled here to allow Defendants to argue inconsistency, nothing would prevent future litigants from raising the same argument. As a consequence, ***all*** Plaintiffs' future merger investigations would be chilled because of the possibility of subsequent disclosure of investigative contents.

III. Defendants Cannot Demonstrate Substantial Need For the Analyses.

The Defendants have targeted their request at Plaintiffs' internal thinking. Thus, the sought materials are "opinion work product," which is "'virtually undiscoverable.'" *Deloitte*, 610 F.3d at 135 (citation omitted); *see also Apollo*, 251 F.R.D. at 23 n.5 (materials revealing attorneys' mental impressions are opinion work product).

Even if the requested materials were considered only fact work product—or were protected solely by the deliberative process privilege—Defendants have not established the "substantial need" required to pierce these protections. As explained above, Plaintiffs' thinking about the earlier mergers is irrelevant to this case. Any legitimate need Defendants have for information from prior mergers could be satisfied by the basic factual materials in those merger investigations or from other sources. Even assuming *arguendo* that Plaintiffs' analyses of that

material has some marginal relevance, it is not enough to justify the consequent "chill" the compelled disclosure would have on future government deliberations. *Warner*, 742 F.2d at 1162.

IV. Plaintiffs Have Not Waived Any Privileges.

Finally, Defendants claim that Plaintiffs—particularly the United States—have waived privileges by "issu[ing] public closing statements about the prior mergers" and by permitting Division economists to publish an article discussing the Delta-Northwest merger. Motion at 9. But the one-page closing statements are non-specific, rely on public information and serve the important purpose of informing the public and the parties of whether a given merger will be the subject of a lawsuit. No court has ever held that such routine announcements give rise to waivers of privilege. Moreover, the announcements do not cite nor otherwise disclose any confidential documents reflecting internal analyses. Thus, there has been no waiver. *See Rockwell Int'l Corp. v. D.O.J.*, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (the Department did not waive work-product protection for documents where "none of [its] actions was inconsistent with keeping the documents secret"). Likewise, the publication of the article does not constitute a waiver, as the Division's economists published the article in their personal capacity and avoided any reference to confidential material. Even if either the closing statements or the article effected a waiver due to voluntary disclosure, the waiver would apply only to the disclosed material, not the entire subject matter. *Cf. Rockwell*, 235 F.3d at 604-07.

CONCLUSION

The motion to compel should be denied.

Respectfully submitted.

FOR THE PLAINTIFFS

/s

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